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1 Moore's AnswerGuide: Fed Pretrial Civil Litigation About the Consulting Editors

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Chapter 1 DETERMINING FORUM
PART A: PROCEDURAL CONTEXT

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.01

§ 1.01 Procedural Context--Determining Forum

Every prospective plaintiff must first decide on the court in which to file suit. Depending on the nature of the claim, the plaintiff may be able to choose either federal or state court. All federal courts (except the U.S. Supreme Court) are courts of limited jurisdiction--creatures of statute, within constitutional guidelines. Therefore, if the grounds for federal jurisdiction exist and suit may also be filed in state court, the plaintiff must decide which is the better forum.

Federal procedures have been more accommodating of large or important cases, with broad discovery the norm. Conversely, emergency litigation requiring expedited discovery and the need for a prompt decision is generally better accommodated in federal courts. Federal courts have magistrate judges and special masters, allowing more efficient case handling through a division of labor.

Determining the ability to proceed in federal court and the proper choice of federal court in which to proceed involves considering several issues, which are the subject of this chapter. These issues, and some related topics, include:

- Subject matter jurisdiction;
- Supplemental jurisdiction;
- Personal jurisdiction;
- Issues of justiciability (*e.g.*, ripeness, standing, etc.);
- Venue;
- Multidistrict litigation;
- Arbitration and alternative dispute resolution (ADR) options; and
- Disqualifying a judge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral Overview



Moore's AnswerGuide: Federal Pretrial Civil Litigation

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Chapter 1 DETERMINING FORUM
PART B: EVALUATING FEDERAL QUESTION JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.02

§ 1.02 Checklist for Evaluating Federal Question Jurisdiction

☐ Determine whether action "arises under" federal law before bringing suit: *See §§ 1.03, 1.06[1] below.*

- ○ Claim created by federal law. *See § 1.06[1][a] below.*
- ○ State-law claim requiring resolution of substantial issue of federal law. *See § 1.06[1][b] below.*

☐ Determine statute, regulation, or constitutional provision under which action arises.

- ○ U.S. Constitution. *See § 1.05[1] below.*
- ○ Federal statute. *See § 1.05[2] below.*
- ○ Administrative act or regulation. *See § 1.05[3] below.*
- ○ Federal common law. *See § 1.05[4] below.*

☐ Determine whether federal jurisdiction is exclusive or concurrent. *See § 1.07 below.*

☐ Include "short and plain statement" of grounds on which court's jurisdiction depends. *See § 1.04 below.*

☐ Amend defective jurisdictional allegations, if necessary. *See § 1.04[2] below.*

☐ Follow well-pleaded complaint rule: *See § 1.06[2] below*.

- ○ Allege federal law under which claim brought. *See § 1.06[2][a] below*.
- ○ State that suit arises under federal law, if declaratory relief sought. *See § 1.06[2][b] below*.
- ○ Determine if exception to well-pleaded complaint rule applies. *See § 1.06[2][b] below*.

☐ Defendant may attempt to challenge federal question jurisdiction. *See § 1.08 below*.

- ○ Motion for Rule 12(b) dismissal. *See § 1.08 below*.
- ○ Answer. *See § 1.08 below*.
- ○ Motion for relief from judgment. *See § 1.08 below*.
- ○ Collateral proceeding, if party did not appear in underlying action and default judgment entered. *See § 1.08 below*.

☐ **Search By Topic:** Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint Rule



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.03

§ 1.03 Defining Federal Question Jurisdiction

District courts have jurisdiction of all civil actions "arising under" the Constitution, laws or treaties of the United States: so called federal question jurisdiction. *See* U.S. Const., art. III, § 2; *28 U.S.C. § 1331*. The federal law under which a claim arises must be a direct and essential element of the plaintiff's claim for relief. *See Herron v. Continental Airlines, 73 F.3d 57, 59 (5th Cir. 1996)* (claim "arises under" federal law when federal law supplies an essential element of the claim).

For purposes of the federal question jurisdiction statute, federal laws include:

1. Federal statutes. *See Murphey v. Lanier, 204 F.3d 911, 912 (9th Cir. 2000)* (because suit generally "arises under" the statute that creates the cause of action, if federal law creates plaintiff's cause of action, federal question jurisdiction will generally be present).

2. Acts and regulations of administrative agencies, unless Congress has expressly exempted them from judicial review. *See Califano v. Sanders, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)* (effect of elimination of jurisdictional amount requirement for federal question jurisdiction is to confer jurisdiction on federal courts to review agency action); and

3. Federal common law. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985)* (federal common law is law of United States for purposes of *28 U.S.C. § 1331*).

In many federal question cases, federal statutes will be the source of the claim for relief. *See § 1.05 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 103.02, 103.31.*
- *Federal Litigation Guide P 1.32.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint Rule



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Chapter 1 DETERMINING FORUM
PART B: EVALUATING FEDERAL QUESTION JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.04

§ 1.04 Establishing Federal Question Jurisdiction

[1] Alleging Sufficient Grounds for Jurisdiction

The plaintiff's complaint must contain "a short and plain statement" of the grounds on which the court's jurisdiction depends. *See Fed. R. Civ. P. 8(a)(1)*; *see also § 4.06 below*. The complaint must make reference to the specific federal law (*e.g.*, constitutional provision or federal statute) under which relief is sought. If the plaintiff fails to plead adequate facts to support subject matter jurisdiction, the complaint is subject to dismissal. *See Fed. R. Civ. P. 12(h)(3)* (if court determines at any time that it lacks subject-matter jurisdiction, court must dismiss the action).

A plaintiff may bring a federal question suit if either the claim for relief is created by federal law or requires the resolution of a substantial question of federal law. *See § 1.06[1] below; see also Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 808, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* (district court's federal question jurisdiction extends over only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law).

The rule requiring that a pleading include "a short and plain statement" of the grounds for the court's jurisdiction applies to an original claim, counterclaim, crossclaim, or third-party claim, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it. *See Fed. R. Civ. P. 7(a)* (allowed pleadings); *Fed. R. Civ. P. 8(a)* (rule applies to any pleading stating a claim for relief).

Warning:

Parties to an action cannot confer jurisdiction on federal courts by stipulation or waiver. If a federal court lacks subject matter jurisdiction, that defect cannot be cured by an agreement between or among the parties that the case may be heard in that court. *See Nugent v. Ashcroft, 367 F.3d 162, 166 (3d Cir. 2004)* (parties cannot confer jurisdiction on a federal court by consent or stipulation). In fact, the absence of subject matter jurisdiction may be raised at any time, even after judgment. *See Fed. R. Civ. P. 12(h)(3)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 8.03.*
- *Federal Litigation Guide P 1.32.*
- *Bender's Federal Practice Forms* Form No. 8:3 et seq.
- *Fed. R. Civ. P. 8* (general rules of pleading).
- *Fed. R. Civ. P. 12* (defenses and objections).
- *Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* (Congress has given the lower federal courts jurisdiction to hear only cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law).

[2] Amending Defective Jurisdictional Allegations

A defective allegation of jurisdiction may generally be amended at any stage of the proceedings unless the jurisdictional facts themselves are defective. *See 28 U.S.C. § 1653*; *see also Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (every court of appeals that has considered the scope of *28 U.S.C. § 1653* has held that it allows appellate courts to remedy inadequate jurisdictional allegations, but not defective jurisdictional facts).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 8.10[2].*
- *Federal Litigation Guide P 3.30[4].*
- *28 U.S.C. § 1653* (amendment of pleadings to show jurisdiction).

[3] Alleging Jurisdiction When Suit Is Commenced

The existence of federal question jurisdiction is determined as of the time the suit is commenced. *See Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 570, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004)* , quoting *Mollan v. Torrance, 22 U.S. 537, 6 L. Ed. 154, 9 Wheat 537, 539 (1824)* (court's jurisdiction depends upon the state of things when action brought).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 8.03.*
- *Federal Litigation Guide P 1.32[1].*
- *Bender's Federal Practice Forms* Form No. 8:3 et seq.

[4] Meeting Burden of Proof to Establish Federal Question Jurisdiction

The party seeking to invoke federal jurisdiction carries the burden of establishing the existence of federal subject matter jurisdiction. *See Gibbs v. Buck, 307 U.S. 66, 72, 59 S. Ct. 725, 83 L. Ed. 1111 (1939)* (burden of showing by admitted facts that federal court has jurisdiction rests on complainants).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.31[4].*
- *Gilman v. BHC Securities, Inc., 104 F.3d 1418, 1421 (2d Cir. 1997)* (party asserting federal jurisdiction bears burden of proving that case is properly in federal court).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint Rule



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.05

§ 1.05 Invoking Federal Question Jurisdiction

[1] Bringing Constitutional Challenges

A party may invoke federal question jurisdiction by:

1. Claiming that a statute is facially inconsistent with the U.S. Constitution. *See Clinton v. Babbitt, 180 F.3d 1081, 1086-1087 (9th Cir. 1999)* (Navajo Nation members living on Hopi lands sufficiently invoked federal question jurisdiction by alleging that proposed leases violated equal protection regardless of whether members stated claim on which relief could be granted); and

2. Claiming that defendant's conduct violated plaintiff's constitutional rights. *See Presbyterian Church v. United States, 870 F.2d 518, 524 (9th Cir. 1989)* (federal jurisdiction over declaratory relief suit alleging violation of the *First* and *Fourth Amendments*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 103.32[1].*
- *Federal Litigation Guide P 1.32[2].*
- *Bender's Federal Practice Forms* Form No. 8:3 et seq.
- *Arbaugh v. Y & H Corp., 546 U.S. 500, 505, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)* (Congress has broadly authorized the federal courts to exercise subject-matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States").
- *Grendell v. Ohio Supreme Court, 252 F.3d 828, 836 (6th Cir. 2001)* (a district court has subject matter jurisdiction to assess a general constitutional challenge to a state court rule).

[2] Bringing Claims Under Federal Statutes

[a] Statutes Expressly Creating Federal Question Causes of Action

Most statutes creating federal question jurisdiction for specific types of actions are located in Title 28 of the United States Code. If the right to the action is limited to a certain class of persons, only those persons may invoke federal question jurisdiction. *See Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 27, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* (ERISA specifies parties entitled to seek declaratory judgment under ERISA provision § 502 and suit brought by any other party for similar relief does not "arise under" that provision).

Some examples of specific federal question statutes include:

1. Actions against foreign states (including political subdivisions and agencies and instrumentalities) pursuant to the Foreign Sovereign Immunities Act. *28 U.S.C. § 1330*.

2. Admiralty cases. *28 U.S.C. § 1333*.

3. Bankruptcy actions. *28 U.S.C. § 1334*.

4. Suits arising under any act of Congress regulating interstate commerce or protecting trade and commerce against restraints and monopolies. *28 U.S.C. § 1337*.

5. Suits arising under patent, copyright, and plant-protection laws. *28 U.S.C. § 1338(a)*.

6. Suits arising under trademark laws. *28 U.S.C. § 1338(b)*.

The Federal Arbitration Act (FAA) alone is not a basis for subject matter jurisdiction when a petition is brought to confirm or vacate an arbitration award. *See Wisconsin v. Ho-Chunk Nation, 463 F.3d 655, 661 (7th Cir. 2006)* , quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 26 n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)* (FAA requires either diversity jurisdiction or some other basis for federal jurisdiction in order for federal court to address the case). *See generally § 1.100 below*. In addition, the Declaratory Judgment Act alone does not confer subject matter jurisdiction, and an independent basis for federal jurisdiction must be pleaded. *See Lawson v. Callahan, 111 F.3d 403, 404 (5th Cir. 1997)* (Declaratory Judgment Act does not confer subject matter jurisdiction on federal court where none otherwise exists).

Some types of actions are defined to "arise under" federal law without regard to the claim that is the subject of the suit, such as suits involving the Federal Deposit Insurance Corporation and the Resolution Trust Corporation. *See*, *e.g.*, *Federal Sav. & Loan Ins. Corp. v. Ticktin, 490 U.S. 82, 87-88, 109 S. Ct. 1626, 104 L. Ed. 2d 73 (1989)* (*12 U.S.C. § 1730(k)(1)* provides federal-question jurisdiction in any case in which the Federal Savings and Loan Insurance Corporation is a party and does not otherwise limit jurisdiction granted in *28 U.S.C. § 1345*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 103.32[2].*
- *Federal Litigation Guide P 1.32[2].*
- *Bender's Federal Practice Forms* Form No. 8:3 et seq.
- *28 U.S.C. § 1330* (actions against foreign states).

- *28 U.S.C. § 1333* (admiralty, maritime and prize cases).
- *28 U.S.C. § 1334* (bankruptcy cases and proceedings).
- *28 U.S.C. § 1337* (commerce and antitrust regulations).
- *28 U.S.C. § 1338* (intellectual property).

[b] Statutes Creating Implied Right of Action

A private right of action may be implied by a federal statute if each of the following conditions are met:

1. The plaintiff is a member of the class for whose benefit the statute was enacted;

2. Congress intended to create a private right of action;

3. A private right of action is consistent with the underlying purpose of the legislative scheme; and

4. The claim for relief is not one traditionally delegated to state law and it would not be inappropriate to infer a claim for relief based solely on federal law.

See Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975) .

Warning:

Absent a clearly expressed Congressional intent to create both a private right of action and a private remedy, no right of action may be implied, even when a statute is phrased in explicit rights-creating terms. *See Gonzaga University v. Doe, 536 U.S. 273, 284, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002)* , quoting *Alexander v. Sandoval, 532 U.S. 275, 286, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)* (when statute does not include explicit "right-or duty-creating language" court rarely imputes to Congress an intent to create private right of action); *Alexander v. Sandoval, 532 U.S. 275, 286-287, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)* (Congress must intend to create both private right and private remedy; without both, no cause of action exists); *see also Karahalios v. National Federation of Federal Employees, 489 U.S. 527, 532-533, 109 S. Ct. 1282, 103 L. Ed. 2d 539 (1989)* (neither language nor structure of Title VII of Civil Service Reform Act of 1978 show any congressional intent to provide federal employees a private right of action against an employee union for breach of duty of fair representation).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 103.32[2].*
- *Federal Litigation Guide P 1.32[2].*
- *Bender's Federal Practice Forms* Form No. 8:3 et seq.
- *Weiss v. Temporary Investment Fund, 692 F.2d 928, 934 (3d Cir. 1982)* (*Cort* provides the generally accepted framework for determining whether a statute creates an implied right of action).

[3] Bringing Claims Under Administrative Acts and Regulations

A plaintiff's claim may invoke federal question jurisdiction if the plaintiff is adversely affected by federal agency action in violation of the law. *See 5 U.S.C. § 702*; *see also Abbott Labs. v. Gardner, 387 U.S. 136, 140, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)* (judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress).

Federal question jurisdiction applies to the acts and regulations of administrative agencies unless Congress has specifically exempted them from judicial review. *See Califano v. Sanders, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)* (the Social Security Act limits judicial review to a particular type of agency action, a "final decision of the Secretary made after a hearing"). When a statute can be enforced through a private claim for relief, the regulations providing authoritative interpretations of that statute can be enforced the same way. *See Alexander v. Sandoval, 532 U.S. 275, 284-289, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)* (if Congress intends a statute to be enforced through a private cause of action, it also intends the authoritative interpretation of the statute to be so enforced as well).

There is a strong presumption that Congress intended judicial review of administrative actions unless a contrary intent is clear from the statute or legislative history. *See Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986)* (judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress). However, if a federal statute does not create a private right of action, a party aggrieved by a federal agency's acts may pursue its remedies under the Administrative Procedure Act, if both federal question jurisdiction and prudential standing exist. *See NCUA v. First National Bank & Trust Co., 522 U.S. 479, 488, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998)* (interpreting § 10(a) of the APA to impose a prudential standing requirement in addition to the requirement that a plaintiff have suffered a sufficient injury-in-fact).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 103.32[3].*
- *Federal Litigation Guide P 1.32[2].*
- *Bender's Federal Practice Forms* Form No. 8:3 et seq.
- *5 U.S.C. § 702* (right of review).

[4] Bringing Claims Under Federal Common Law

Federal question jurisdiction can in unusual circumstances be invoked by alleging violation of federal common law. The instances in which federal jurisdiction may be premised on federal common law fall into essentially two categories:

1. Cases in which a federal rule of decision is necessary to protect uniquely federal interests; and

2. Cases in which Congress has given the courts the power to develop substantive law.

See Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981) ; *see also Frank v. Bear Stearns & Co., 128 F.3d 919, 922 (5th Cir. 1997)* (federal question jurisdiction may exist over claims arising under federal common law).

"Uniquely federal interests" are present if there is an overriding federal interest in the need for a uniform rule of decision, or if the controversy touches basic interests of federalism. *See Illinois v. Milwaukee, 406 U.S. 91, 105-106 n.6, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972)* . However, the mere fact that a lawsuit involves a uniquely federal interest

is insufficient to invoke federal common law jurisdiction; in addition, either a significant conflict must exist between an identifiable federal policy or interest and the operation of state law, or the application of state law must frustrate specific objectives of federal legislation. *See Boyle v. United Technologies Corp., 487 U.S. 500, 507, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988)* (imposition of civil liability on defense contractors for government work involves uniquely federal interest as it directly affects terms of government contracts).

The vesting of jurisdiction does not provide authority to formulate federal common law; federal courts are not free to develop a common law. *See Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)* . However, federal courts may develop substantive rules of decision based on federal common law in the following narrow areas:

1. Cases concerned with the rights and obligations of the United States;

2. Interstate and international disputes implicating the conflicting rights of states or relations with foreign nations;

3. Admiralty cases.

See Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981) .

In addition, Congress has given federal courts the power to develop substantive law in suits under the Labor Management Relations Act and the Sherman Act. *See Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642-643, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)* .

When federal common law governs a case, that case necessarily presents a federal question within the subject matter jurisdiction of the federal court system just as if the case were controlled by federal statute. *See Battle v. Seibels Bruce Insurance Co., 288 F.3d 596, 606 (4th Cir. 2002)* (federal question jurisdiction over flood insurance claims as policy was issued under national program and claims necessarily required resolution of substantial question of federal common law).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 103.32[4].*
- *Federal Litigation Guide P 1.32[2].*
- *Bender's Federal Practice Forms* Form No. 8:3 et seq.
- *Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68, 86 S. Ct. 1301, 16 L. Ed. 2d 369 (1966)* (when the court finds no significant threat to any identifiable federal policy or interest, it does not press on to consider other questions relevant to invoking federal common law).
- *United Automobile, Aerospace & Agricultural Implement Workers, Local 33 v. R.E. Dietz Co., 996 F.2d 592, 597 (2d Cir. 1993)* (courts resort to federal common law as an independent jurisdictional basis under *28 U.S.C. § 1331* under limited circumstances, namely when a claim presents an issue requiring an Act of Congress be construed or a distinctive policy of an Act of Congress requires that federal principles control the claim's disposition).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral OverviewGovernmentsLegislationStatutory Remedies & Rights



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Chapter 1 DETERMINING FORUM
PART B: EVALUATING FEDERAL QUESTION JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.06

§ 1.06 Determining Federal Question Jurisdiction

[1] Applying "Arising Under" Test

[a] Federal Law Creates Cause of Action

If the claim for relief is created by federal law, the "arising under" test is satisfied. *See Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 808, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986)* (vast majority of cases brought under general federal question jurisdiction of federal courts are those in which federal law creates cause of action).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 103.31.*
- *Federal Litigation Guide P 1.32[2].*

[b] Resolution of State-Law Claim Requires Resolution of Substantial Issue of Federal Law

If a state law creates the cause of action, the "arising under" test asks whether that cause of action poses a substantial federal question. *See Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 201, 41 S. Ct. 243, 65 L. Ed. 577 (1921)* (mere adoption by state law of a United States law as a criterion or test, when law of the United States has no force *proprio vigore*, does not cause a case under state law to be also a case under law of the United States).

To determine when the federal element is deemed sufficiently substantial, federal courts must:

1. Examine congressional intent and the nature of the federal interest at stake. *See Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 810, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986)* .

2. Be able to address the question without disrupting "any congressionally approved balance of federal and state judicial responsibilities." *See Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 314, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)* .

Dismissal for lack of substantiality is a dismissal for lack of subject matter jurisdiction. Because the inquiry goes to the merits of the allegations in the pleadings, the dismissal is equivalent to a dismissal for failure to state a claim on which relief may be granted. However, it is not a dismissal on the merits and therefore res judicata does not apply. Further, when a claim is dismissed for lack of subject matter jurisdiction, all supplemental claims must be dismissed because the court never had proper jurisdiction over the case. *See Fed. R. Civ. P. 12(b)(1)*; *see also Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946)* (distinguishing between judgment on the merits for failure to state a claim and dismissal for lack of jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 103.31, 103.33.*
- *Federal Litigation Guide P 1.32[2].*
- *Fed. R. Civ. P. 12* (defenses and objections).

[2] Applying Well-Pleaded Complaint Rule

[a] Plaintiff Must Allege Violation of Federal Law

The plaintiff must allege federal question jurisdiction and the specific federal law under which the claim arises must appear 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)* (usually, determining whether particular case arises under federal law turns on "well-pleaded complaint" rule).

A plaintiff may not rely on federal issues anticipated or raised in the defendant's answer to establish federal question jurisdiction. *See Oklahoma Tax Commission v. Graham, 489 U.S. 838, 840-841, 109 S. Ct. 1519, 103 L. Ed. 2d 924 (1989)* (whether a case is one arising under federal law must be determined from what necessarily appears in plaintiff's statement of his or her own claim in the bill or declaration, unaided by anything alleged in anticipation of defenses the defendant may raise). A defendant also cannot create federal jurisdiction by inserting a federal question into the plaintiff's case. *See Caterpillar, Inc. v. Williams, 482 U.S. 386, 399, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* (defendant cannot, merely by injecting a federal question into action that asserts what is plainly a state-law claim, transform action into one arising under federal law). A federal counterclaim is insufficient to establish federal question jurisdiction. *See Holmes Group v. Vornado Air Circulation Systems, Inc., 535 U.S. 826, 831, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002)* (a counterclaim cannot serve as the basis for "arising under" jurisdiction).

[b] Complaint for Declaratory Relief Must State That Suit Arises Under Federal Law

The plaintiff in a declaratory relief action must state in his or her well-pleaded complaint that the underlying suit anticipated from the defendant is one that arises under federal law. *See Fed. R. Civ. P. 57*; *see also Loftis v. United Parcel Service, Inc., 342 F.3d 509, 514 (6th Cir. 2003)* (federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint); *Northeast Illinois Regional Commuter Railroad Corp. v. Hoey Farina & Downes, 212 F.3d 1010, 1014 (7th Cir. 2000)* (in declaratory judgment cases, the well-pleaded complaint rule dictates that jurisdiction is determined by whether federal jurisdiction would exist over the presumed suit by the declaratory judgment defendant).

[c] Artful Pleading Doctrine as Exception to Well-Pleaded Complaint Rule

The artful pleading doctrine is a corollary or exception to the well-pleaded complaint rule. A plaintiff is free to forgo

federal causes of action and only plead state--law claims. *See Caterpillar, Inc. v. Williams, 482 U.S. 386, 398-399, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* (plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court). However, under the artful pleading doctrine, a plaintiff cannot avoid federal court by simply omitting to plead a necessary federal question in the complaint; in such a case the necessary federal question will be deemed to be alleged in the complaint. *See Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 22, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* (plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint).

[d] Preemption as Exception to Well-Pleaded Complaint Rule

A second corollary to the well-pleaded complaint rule is that a federal question will be found when Congress has so completely preempted an area of law that any claims asserted in this area are necessarily federal in nature. *See Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 24, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* (if a federal cause of action completely preempts state cause of action, any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law).

Although preemption is usually raised as a defense, not grounds for federal jurisdiction, in the few areas in which Congress has completely preempted state law, federal question jurisdiction exists even when the text of the complaint asserts only state-law claims. *See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)* (Congress may so completely preempt a particular area that any civil complaint raising those claims is necessarily federal in character). Complete preemption arises only in extraordinary situations.

Warning:

Implied preemption is not the same thing as an implied federal claim. Implied preemption occurs when Congress has not expressly stated an intent to preempt state law in a statutory scheme, but its intent to have federal authority occupy the field can be implied from the extent of regulation. *See, e.g., Wuebker v. Wilbur-Ellis Co., 418 F.3d 883, 886 (8th Cir. 2005)* (implied preemption occurs when Congress creates scheme of federal regulation so pervasive that only reasonable inference is that it meant to displace the states). An implied federal claim may be inferred from Congressional action, largely from the language of a statute, the statutory structure, or legislative history. *See Karahalios v. National Federation of Federal Employees, 489 U.S. 527, 532-533, 109 S. Ct. 1282, 103 L. Ed. 2d 539 (1989)* (unless Congressional intent to create a private right of action can be inferred from language of statute, statutory structure, or other source, essential predicate for implication of a private remedy does not exist).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 103.40 -103.47.*
- *Federal Litigation Guide P 1.32[2].*
- *Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 65, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)* (when plaintiff raises completely preempted state-law claim in complaint, court is obligated to construe complaint as raising federal claim and therefore "arising under" federal law).
- *Caterpillar, Inc. v. Williams, 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* (complete preemption transforms a state-law claim into one arising under federal law, so well pleaded complaint rule is satisfied even though complainant never intended to raise issue of federal law).
- *Nordan v. Blackwater Security Consulting, LLC, 460 F.3d 576, 584 (4th Cir. 2006)* (one corollary to

well-pleaded complaint rule recognizes that some federal laws evince such a strong federal interest that, when they apply to facts underpinning plaintiff's state-law claim, they convert that claim into one arising under federal law).

- *Sullivan v. American Airlines, Inc., 424 F.3d 267, 272 (2d Cir. 2005)* (under complete-preemption doctrine, certain federal statutes are construed to have such "extraordinary" preemptive force that state-law claims coming within the scope of the federal statute are transformed, for jurisdictional purposes, into federal claims, *i.e.*, completely preempted).

- *City of Rome v. Verizon Communications, Inc., 362 F.3d 168, 182 (2d Cir. 2004)* (in declaratory judgment action, federal jurisdiction does not lie if, but for availability of declaratory judgment procedure, federal claim would arise only as defense to state created action).

- *Household Bank v. JFS Group, 320 F.3d 1249, 1259 (11th Cir. 2003)* (a federal district court has subject matter jurisdiction over declaratory judgment action if plaintiff's well-pleaded complaint alleges facts showing defendant could file coercive action arising under federal law).

- *Fax Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 486 (2d Cir. 1998)* (removal to federal court is proper only if federal question appears plainly on face of "well-pleaded complaint").

- *First National Bank v. Aberdeen National Bank, 627 F.2d 843, 849 (8th Cir. 1980)* (right created by federal law must be essential element of plaintiff's cause of action, and that centrality of federal claim must appear on face of the well-pleaded complaint, unaided by answer or petition for removal).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsSubstantial QuestionsCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint Rule



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Chapter 1 DETERMINING FORUM
PART B: EVALUATING FEDERAL QUESTION JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.07

§ 1.07 Distinguishing Concurrent and Exclusive Federal Jurisdiction

[1] Establishing Concurrent Jurisdiction With State Courts

In many cases, a federal court exercises jurisdiction concurrently with state courts and the plaintiff may choose to proceed in either state or federal court. *See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981)* (mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over a cause of action). If the plaintiff chooses state court, the defendant may try to remove the case to federal court. *See 28 U.S.C. § 1441*; *see also* Ch. 2 *below*.

[2] Determining When Federal Forum Is Exclusive

Examples of exclusive federal jurisdiction include:

1. Admiralty and maritime. *28 U.S.C. § 1333*;

2. Bankruptcy. *28 U.S.C. § 1334*;

3. Patents and copyrights. *28 U.S.C. § 1338*; and

4. Actions against foreign states pursuant to the Foreign Sovereign Immunities Act. *28 U.S.C. § 1330*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 103.04*.
- *Federal Litigation Guide P 1.10 et seq*.
- *28 U.S.C. § 1330* (actions against foreign states).
- *28 U.S.C. § 1333* (admiralty, maritime and prize cases).

- *28 U.S.C. § 1334* (bankruptcy cases and proceedings).
- *28 U.S.C. § 1338* (intellectual property).
- *28 U.S.C. § 1441* (actions removable generally).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive Jurisdiction



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.08

§ 1.08 Challenging Federal Question Jurisdiction

Federal question jurisdiction may be challenged by any of the following:

1. Motion for Rule 12(b) dismissal. *Fed. R. Civ. P. 12(b)(1)*; *see § 4.32 below*;

2. Answer. *Fed. R. Civ. P. 12(a), (h)(3)*; *see § 4.31 below*;

3. Motion for relief from judgment. *Fed. R. Civ. P. 60(b)(6)*; *see, e.g., Bank of Montreal v. Olafsson, 648 F.2d 1078, 1079 (6th Cir. 1981)* (affirmed the judgment of the district court granting defendant's request to set aside a default judgment under Rule 60(b)(6) and dismissing plaintiff's case for lack of subject matter jurisdiction); and

4. In a collateral proceeding, but only if the party did not appear in the underlying action and a default judgment was entered. *Cf. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 376, 60 S. Ct. 317, 84 L. Ed. 329 (1940)* (when parties are brought before court in accordance with requirements of due process, to determine whether it has jurisdiction to hear cause, its decision, while open to direct review, may not be assailed collaterally).



Warning:

The court may dismiss the action for lack of subject matter jurisdiction sua sponte. *See Fed. R. Civ. P. 12(h)(3)*; *see also Digitel, Inc. v. MCI Worldcom, Inc., 239 F.3d 187, 188 (2d Cir. 2001)* (noting that district court, relying on a ground not raised by motion, dismissed *sua sponte* Digitel's complaint for lack of subject matter jurisdiction).



Strategic Point:

Any party, including the party that invoked federal question jurisdiction, may bring a motion to dismiss for lack of subject matter jurisdiction at any time during the proceedings (including appellate proceedings). *See Fed. R. Civ. P. 12(h)(3)*; *see also American Fire & Casualty Co. v. Finn, 341 U.S. 6,*

17-18, 71 S. Ct. 534, 95 L. Ed. 702 (1951) (to permit federal trial court to enter judgment in case in which it could not have original jurisdiction of suit would by work wrongful extension of federal jurisdiction) (superseded by statute on different grounds).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.30.*
- *Federal Litigation Guide PP 3.01, 3.03, 3.05, 3.20 et seq., 3.200[6].*
- *Bender's Federal Practice Forms* Form No. 12:10.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Chs. 2, 3, 12.
- *Fed. R. Civ. P. 12* (defenses and objections).
- *Fed. R. Civ. P. 60* (relief from judgment or order).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.09

§ 1.09 Checklist for Evaluating Diversity Jurisdiction

☐ Determine statutory requirements for diversity jurisdiction. *See § 1.10 below*.

☐ Determine each party's citizenship and domicile at the time of the suit. *See §§ 1.11[2], 1.12 below*.

- ○ Individual. *See § 1.16 below*.
- ○ Corporation. *See § 1.17 below*.
- ○ Noncorporate entity. *See § 1.18 below*.
- ○ Insurer when insured not joined as defendant. *See § 1.19 below*.
- ○ Aliens. *See § 1.20 below*.

☐ Determine whether citizenship of all plaintiffs diverse from that of any defendant. *See § 1.11[1] below*.

☐ Consider whether diversity affected by joinder. *See § 1.15 below*.

☐ Allege grounds sufficient and meet burden of proof to establish diversity jurisdiction. *See §§ 1.13, 1.14 below*.

☐ Determine whether amount in controversy exceeds $75,000. *See § 1.21 below*.

- ○ Excluding costs or interest. *See § 1.21 below*.
- ○ Including punitive damages. *See § 1.21[3] below*.
- ○ Including attorney's fees, if appropriate. *See § 1.21[4] below*.
- ○ Determining amount in controversy if equitable relief sought. *See § 1.21[5] below*.
- ○ Applying legal certainty test. *See § 1.21[6] below*.
- ○ Excluding affect of valid defense or counterclaim. *See § 1.21[7] below*.

☐ Meet burden of proof that amount in controversy exceeds $75,000. *See § 1.21[8] below*.

☐ Aggregate claims to satisfy jurisdictional amount. *See § 1.22 below*.

- ○ Single plaintiff against single defendant. *See § 1.22[1] below*.
- ○ Single plaintiff against multiple defendants. *See § 1.22[2] below*.
- ○ Multiple plaintiffs against single defendant. *See § 1.22[3] below*.
- ○ Class actions. *See § 1.22[4] below*.

☐ Meet minimal diversity requirements of Multiparty, Multiforum Trial Jurisdiction Act of 2002. *See § 1.23[1] below*.

☐ Meet minimal diversity requirements of Class Action Fairness Act of 2005. *See § 1.23[2] below*.

☐ Challenge diversity jurisdiction. *See § 1.24 below*.

☐ **Search By Topic:** Civil Procedure > Jurisdiction > Diversity Jurisdiction

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionJurisdictional RequirementsCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.10

§ 1.10 Determining Statutory Requirements for Diversity Jurisdiction

A suit may be brought in federal court invoking diversity jurisdiction if the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between the following parties:

1. Citizens of different states. *See 28 U.S.C. § 1332(a)(1)*;

2. Citizens of a state and citizens or subjects of a foreign state. *See 28 U.S.C. § 1332(a)(2)*;

3. Citizens of different states with citizens or subjects of a foreign state as additional parties. *See 28 U.S.C. § 1332(a)(3)*; and

4. A foreign state as plaintiff and citizens of a state or different states. *See 28 U.S.C. § 1332(a)(4)*.

The term "states" for diversity purposes includes the United States territories, the District of Columbia, and the Commonwealth of Puerto Rico. *See 28 U.S.C. § 1332(e)*.

Exception:
Special jurisdictional requirements apply to multistate class actions and mass actions. *See § 1.23[2] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.13*.
- *Federal Litigation Guide P 1.05[2] [2.-1]*.
- *28 U.S.C. § 1332* (diversity jurisdiction).
- *Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707, 711 (9th Cir. 1992)* (diversity jurisdiction exists between citizens of a State and citizens or subjects of a foreign state when amount in controversy

exceeds minimum required amount).

- *Crowley v. Glaze, 710 F.2d 676, 678 (10th Cir. 1983)* (statutes conferring diversity jurisdiction are to be strictly construed).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionJurisdictional RequirementsCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.11

§ 1.11 Establishing Diverse Citizenship

[1] Establishing Complete Diversity in Most Cases

Diversity jurisdiction generally requires that no defendant be from the same state as any plaintiff. *See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267, 2 L. Ed. 435 (1806)* (diversity jurisdiction exists where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state); *see also State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-531, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* (diversity jurisdiction requires parties have "complete diversity"); *Capitol Indemnity Corp. v. Russellville Steel Co., 367 F.3d 831, 835 (8th Cir. 2004)* (complete diversity of citizenship exists where no defendants hold citizenship in a state where any plaintiff holds citizenship).

Warning:

The Multiparty, Multiforum Trial Jurisdiction Act of 2002 and the Class Action Fairness Act of 2005 both have special jurisdictional and procedural provisions, including modified requirements for diversity jurisdiction, in certain types of cases. *See § 1.23 below.*

Changes in citizenship after a case is filed do not ordinarily affect jurisdiction. *See Faysound, Ltd. v. United Coconut Chemicals, Inc., 878 F.2d 290, 296 (9th Cir. 1989)* (jurisdiction is to be determined as it exists at the time it was invoked and later events do not confer jurisdiction). However, if an amendment joins new parties, diversity is determined as of the time of amendment. *See Aetna Casualty & Surety Co. v. Hillman, 796 F.2d 770, 775 (5th Cir. 1986)* (*28 U.S.C. § 1653* is "not to be used to create jurisdiction retroactively where it did not previously exist").

A federal court has discretion to drop a nondiverse party who is found not to be indispensable to the action under Rule 19. *See Fed. R. Civ. P. 19, 21*; *see also § 1.15 below.*

Exceptions:

Federal courts have excepted domestic relations cases from diversity jurisdiction. Thus, federal courts lack jurisdiction over actions for the traditional family law remedies of divorce, support, and custody. *See Ankenbrandt v. Richards, 504 U.S. 689, 703-704, 112 S. Ct. 2206, 119 L. Ed. 2d 468 (1992)* (domestic relations exception divests federal courts of power to issue divorce, alimony, and child custody

decrees); *see also Peterson v. Babbitt, 708 F.2d 465, 466 (9th Cir. 1983)* (jurisdiction should be declined when primary issue concerns status of parent and child or spouses). Federal courts also may not exercise diversity jurisdiction to probate a will, administer an estate, or entertain an action that would interfere with pending probate proceedings in a state court or with the state court's control of property in its custody. *See Markham v. Allen, 326 U.S. 490, 494, 66 S. Ct. 296, 90 L. Ed. 256 (1946)* (federal courts may adjudicate property rights in estate property if final judgment would not interfere with state court's possession, except to extent that state court is bound by judgment to recognize right adjudicated by the federal court). This exception is narrow and only applies if a matter is purely probate in nature, *e.g.*, that the federal court is being asked directly to probate or annul a will or administer an estate, or is being asked to adjudicate the right to property that is in the custody of a state probate court. *See Marshall v. Marshall, 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480, 498 (2006)* (when a matter is otherwise within federal jurisdiction, federal courts are not barred from adjudicating that matter by the probate exception). The domestic relations exception to federal subject matter jurisdiction applies only to cases in which jurisdiction is based on diversity. *See Atwood v. Fort Peck Tribal Court Assiniboine & Souix Tribes, 513 F.3d 943, 947 (9th Cir. 2008)* (domestic relations exception inapplicable to federal question jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.12.*
- *Federal Litigation Guide P 1.32[3].*
- *Fed. R. Civ. P. 19* (joinder of persons needed for just adjudication).
- *Fed. R. Civ. P. 21* (misjoinder and non-joinder of parties).

[2] Determining Diversity Jurisdiction When Suit Is Commenced

Generally, diversity jurisdiction is determined as of the time the complaint is filed. *See Grand Union Supermarkets of the Virgin Islands, Inc. v. H.E. Lockhart Management, Inc., 316 F.3d 408, 410 (3d Cir. 2003)* (for diversity purposes, citizenship of parties is determined as of the time complaint was filed); *see also Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 573-577, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004)* (rejecting exception for cases that have already been tried); *Co-Efficient Energy Systems v. CSL Industries, Inc., 812 F.2d 556, 557 (9th Cir. 1987)* (diversity of citizenship is determined as of the time of the filing of the complaint).

Warning:

If the court realigns the parties, the court must reassess diversity jurisdiction at that time. If there is no complete diversity after realignment, diversity jurisdiction is lost. *See City of Indianapolis v. Chase National Bank, 314 U.S. 63, 68, 62 S. Ct. 15, 86 L. Ed. 47 (1941)* (to sustain diversity jurisdiction there must exist an actual, substantial controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side). However, subsequent events do not deprive a court of jurisdiction over parties who were properly aligned initially. *See Freeport-McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426, 428, 111 S. Ct. 858, 112 L. Ed. 2d 951 (1991)* (diversity jurisdiction is determined at time action is commenced and may not be divested by subsequent events).

Exceptions:

In class actions subject to the modified diversity requirements of the Class Action Fairness Act of 2005,

citizenship of the proposed plaintiff class members is determined as of the date of filing of the complaint or amended complaint. However, if the initial pleading was not subject to federal jurisdiction, citizenship of the proposed plaintiff class members is determined as of the date the plaintiffs serve the amended pleading or other paper indicating the existence of federal jurisdiction. *See 28 U.S.C. § 1332(d)(7)*. The time-of-filing rule also has no application to a case in which an amended complaint, filed as of right, changes the basis for federal subject matter jurisdiction from diversity to the existence of a federal question. *See ConnectU LLC v. Zuckerberg, 522 F.3d 82, 92-94 (1st Cir. 2008)* (although time-of-filing rule applies to diversity cases, courts look to amended complaint to determine jurisdiction in federal question cases).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.16*.
- *Federal Litigation Guide P 1.32[3]*.
- *28 U.S.C. § 1332* (diversity jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness EntitiesCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividuals



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.12

§ 1.12 Determining Diversity Jurisdiction Based on Citizenship of Named Parties

The citizenship of all named parties is considered in determining the existence of diversity jurisdiction. *See Pecherski v. General Motors Corp., 636 F.2d 1156, 1160 (8th Cir. 1981)* (whenever federal jurisdiction depends on complete diversity, existence of diversity is determined from fact of citizenship of parties named and not from the fact of service).

The citizenship of defendants sued under fictitious names, such as "Doe" defendants is disregarded for diversity jurisdiction purposes. *See Howell by Goerdt v. Tribune Entertainment Co., 106 F.3d 215, 218 (7th Cir. 1997)* (because existence of diversity jurisdiction cannot be determined without knowledge of every defendant's place of citizenship, "John Doe" defendants are not permitted in federal diversity suits). However, this rule applies only to John Does as such, and not to subsequently named parties identifying one of those fictitious defendants. *See Doleac v. Michalson, 264 F.3d 470, 475-477 (5th Cir. 2001)* (Section 1441(a) applies only to John Doe defendants as such, not to subsequently named parties identifying one of those fictitious defendants). Further, the citizenship of nominal and formal parties who have no interest in the suit is disregarded for purposes of determining diversity. *See Navarro Savings Association v. Lee, 446 U.S. 458, 460-461, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980)* (federal court must disregard nominal or formal parties and rest jurisdiction only on the citizenship of real parties to the controversy); *see also United States Fire Insurance Co. v. Charter Financial Group, Inc., 851 F.2d 957, 959 (7th Cir. 1988)* (plaintiff generally must prove diverse citizenship of John Doe defendants in federal diversity actions; however, because court found claimants to be nominal parties, court disregarded them for purposes of federal diversity jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.15.*
- *Federal Litigation Guide P 1.32[3].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness EntitiesCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividuals



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.13

§ 1.13 Alleging Grounds for Diversity Jurisdiction

A plaintiff invoking diversity jurisdiction must plead specifically the following:

1. The citizenship of each of the parties to the action;

2. The state of the principal place of business of any corporate parties; and

3. The requisite amount in controversy.

See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182, 56 S. Ct. 780, 80 L. Ed. 1135 (1936) (plaintiff must properly allege jurisdictional facts, according to nature of case); *see also Sikirica v. Nationwide Insurance Co., 416 F.3d 214, 219 (3d Cir. 2005)* (initial pleading must give notice of the grounds for federal diversity jurisdiction).



Strategic Point:

A plaintiff may amend the complaint to correct any defects or omissions in the allegations of jurisdiction. *See 28 U.S.C. § 1653*; *see also McCready v. eBay, Inc., 453 F.3d 882, 891 (7th Cir. 2006)* (when diversity jurisdiction is not properly alleged, typically court would allow plaintiff to amend complaint to cure deficiency or to supplement brief to provide clarification). However, a plaintiff may not amend the complaint when the defects are in the jurisdictional facts themselves. *See Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830-832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (*28 U.S.C. § 1653* allows appellate courts to remedy inadequate jurisdictional allegations, but not defective jurisdictional facts).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 102.14, 102.17.*
- *Federal Litigation Guide P 1.32[3].*

- *Bender's Federal Practice Forms* Form Nos. 8:1, 8:2.
- *28 U.S.C. § 1653* (amending pleadings to show jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness EntitiesCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividuals



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.14

§ 1.14 Meeting Burden of Proof to Establish Diversity Jurisdiction

The party seeking to invoke diversity jurisdiction bears the burden of proving that complete diversity existed when the action was filed. *See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)* (court may demand that party alleging jurisdiction justify allegations by preponderance of evidence).



Warning:

Parties cannot establish jurisdiction by waiver, estoppel, or agreement. *See Creaciones Con Idea, S.A. de C.V. v. Mashreqbank PSC, 232 F.3d 79, 82 (2d Cir. 2000)* (principles of estoppel do not apply to questions of subject matter jurisdiction); *see also Wight v. BankAmerica Corp., 219 F.3d 79, 90 (2d Cir. 2000)* (regardless of how parties conduct their case, courts have an independent obligation to ensure that federal jurisdiction is not extended beyond its proper limits).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.14.*
- *Federal Litigation Guide P 1.32[3].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.15

§ 1.15 Affecting Diversity Jurisdiction by Joinder

[1] Joining Nondiverse Required Party Requires Dismissal

If a required party is joined pursuant to Rule 19, the compulsory joinder rule, and joinder destroys diversity, the court must dismiss the case. *See Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 439 (4th Cir. 1999)* (district court concluded that non-diverse, plaintiffs were necessary parties under *Fed. R. Civ. P. 19* and, because their joinder would destroy diversity, case should be dismissed for want of jurisdiction); *see also §§ 3.14 -3.21 below* (application of compulsory joinder rule).

To preserve diversity, a federal court has discretion to drop a nondiverse party who is found to be dispensable under Rule 19, on motion by any party or sua sponte, at any stage in the proceedings on just terms. *See Fed. R. Civ. P. 19*, *21*; *United Republic Insurance Co. v. Chase Manhattan Bank, 315 F.3d 168, 170 (2d Cir. 2003)* (if district court determines that party is nondiverse and dispensable, court may sever that party and still preserve its judgment over claims of remaining parties).

Appellate courts may dismiss a dispensable, nondiverse party to preserve federal jurisdiction, although this power is to be used sparingly, based on the court's assessment of possible prejudice to the parties. If the presence of the nondiverse party gives any party a tactical advantage and a factual dispute arises, the court of appeals should remand the case to the district court, which is better suited to determine the existence of prejudice under the facts of the individual case. There is no per se rule, however, that the district court must make the initial determination in every case. *See Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 833, 837-838, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (court should carefully consider whether dismissal of nondiverse party will prejudice parties in the litigation).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.18.*
- *Federal Litigation Guide P 1.32[3].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.

- *Fed. R. Civ. P. 19* (joinder of persons needed for just adjudication).
- *Fed. R. Civ. P. 21* (misjoinder and nonjoinder of parties).

[2] Barring Improper or Collusive Joinder

Federal district courts lack jurisdiction over a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined in order to invoke the court's diversity jurisdiction. *See 28 U.S.C. § 1359*; *see also McCulloch v. Velez, 364 F.3d 1, 5 (1st Cir. 2004)* (statute is anti-collusion measure, enacted to prevent parties from manufacturing diversity jurisdiction in order to channel garden-variety litigation from local courts into federal forum).

To establish diversity, a plaintiff-assignee must show both of the following:

1. A real and substantial interest in the outcome of the litigation. *See Krier-Hawthorne v. Beam, 728 F.2d 658, 664 n.8 (4th Cir. 1984)* (Murnaghan, J., dissenting) (a "real party in interest" for the purpose of determining diversity of citizenship is a person who has a "substantial stake" in the outcome of the case).

2. That the transaction was made for a bona fide business purpose and not to obtain federal diversity jurisdiction. *See Belcher v. Birmingham Trust National Bank, 395 F.2d 685, 686 (5th Cir. 1968)* (on record before it, court found there was great likelihood that, as between plaintiff and Birmingham Trust, there were bona fide, hostile and adverse interests on which diversity jurisdiction might have been properly founded).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.19[1].*
- *Federal Litigation Guide P 1.35[5].*
- *28 U.S.C. § 1359* (parties collusively joined or made).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderFraudulent JoinderCivil ProcedurePartiesJoinderNecessary Parties



Moore's AnswerGuide: Federal Pretrial Civil Litigation

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Chapter 1 DETERMINING FORUM
PART C: EVALUATING DIVERSITY JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.16

§ 1.16 Determining Citizenship of Individuals to Establish Diversity Jurisdiction

[1] Determining United States Citizenship

Persons deemed to be citizens of the United States include, among others:

1. A person born in the United States and subject to its jurisdiction;

2. A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe;

3. A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, before the birth of that person; and

4. A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year before the birth of that person, and the other of whom is a national, but not a citizen of the United States.

8 U.S.C. § 1401.

[2] Determining Whether Person is Citizen of Specific State

A natural person is a citizen of a state within the meaning of the diversity statute, if that person is both a citizen of the United States and domiciled within that state. *See Toms v. Country Quality Meats, Inc., 610 F.2d 313, 316 (5th Cir. 1980)* (when jurisdiction depends on citizenship, citizenship should be distinctly and affirmatively alleged); *see also Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828-829, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (U.S. citizen with no domicile in the United States was "stateless" for purposes of § 1332(a)(3) and ineligible for diversity jurisdiction under § 1332(a)(2)); *Matchett v. Camargo, 2006 U.S. Dist. LEXIS 89400, at *2-*3 (M.D. Ga. 2006)* (two necessary inquiries regarding citizenship for diversity jurisdiction: (1) whether the person is a United States citizen, and (2) whether the person is domiciled in a particular state). A citizen of a foreign state always has access to federal court

in an action against an American citizen under *28 U.S.C. § 1332*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 102.30, 102.33.*
- *Federal Litigation Guide P 1.32[3].*
- *8 U.S.C. § 1401* (persons deemed to be citizens of the United States).

[3] Determining Domicile

[a] Federal Law Determines Domicile

In general, federal common law governs the domiciles of the parties for purposes of diversity jurisdiction. *See Acridge v. Evangelical Lutheran Good Samaritan Society, 334 F.3d 444, 448 (5th Cir. 2003)* (amount-in-controversy requirement may be satisfied either from view of aggregate value to class members or defendants). However, federal courts may look to state law for guidance. *See Rishell v. Jane Phillips Episcopal Memorial Medical Center, 12 F.3d 171, 172 (10th Cir. 1993)* (even though federal principles will dictate diversity jurisdiction questions, court can utilize state law as an aid to reaching proper decision). The determination of a person's domicile is a mixed question of law and fact; if the application of the rule of law to the facts requires essentially a factual inquiry, the conclusion may not be set aside by an appellate court unless clearly erroneous. *See Coury v. Prot, 85 F.3d 244, 251 (5th Cir. 1996)* (most courts regard domicile as presenting mixed question of law and fact, but in practice, district court's determination of domicile is reviewed on appeal as a question of fact; it will be upheld unless "clearly erroneous").

[b] State Citizenship Is Equivalent to State Domicile

For purposes of diversity jurisdiction, citizenship of a state is the equivalent of domicile in that state. *See Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954)* (in determining diversity jurisdiction, the state where someone establishes domicile serves a dual function as state of citizenship). Domicile means actual physical presence in a state with the intent to remain in the state indefinitely and make it home. *See McCormick v. Aderholt, 293 F.3d 1254, 1257-1258 (11th Cir. 2002)* ; *see also Preston v. Tenet Healthsystem Memorial Medical Center, 485 F.3d 793, 797-798 (5th Cir. 2007)* (in determining diversity jurisdiction, state where someone establishes domicile is also one's state of citizenship, and domicile requires demonstration of two factors: residence and intention to remain).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.34[1], [3].*
- *Federal Litigation Guide P 1.32[3].*
- *28 U.S.C. § 1359* (parties collusively joined or made).

[c] Residence Alone Is Insufficient

Domicile and residence are not necessarily synonymous for purposes of diversity. A citizen may have multiple residences but only one domicile. In determining which of a person's residences is his or her domicile, the court must focus on the intent of the party, which requires an examination of the entire course of a person's conduct. *See Freeman v. Northwest Acceptance Corp., 754 F.2d 553, 555 (5th Cir. 1985)* , quoting *Stine v. Moore, 213 F.2d 446, 448 (5th*

Cir. 1954) (residence in fact and the intention of making the place of residence one's home are essential elements of domicile).

Federal courts examine the totality of the circumstances to determine domicile; no one factor controls. *See Juvelis v. Snider, 68 F.3d 648, 654 (3d Cir. 1995)* (although motive is not determinative, it may tend to show whether there was an intention to make a home). Some factors evidencing an intent to remain in a new domicile include:

1. Voting registration and voting practices;

2. Place of employment or business;

3. Current residence;

4. Location of real property; and

5. Location of spouse and family.



Warning:

If a defendant asserts a change in domicile after the plaintiff has met the burden of showing the defendant's initial domicile, the burden shifts to the defendant to establish that the domicile had changed when the suit was filed. *See Gutierrez v. Fox, 141 F.3d 425, 427 (2d Cir. 1998)* (person alleging change of domicile has burden of proving it).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.34.*
- *Federal Litigation Guide P 1.32[3].*

[4] Determining Citizenship of Particular Individuals

Estate Representatives. The legal representative of the estate of a decedent, an infant, or an incompetent is deemed to be a citizen of the state of citizenship of the principal. *See 28 U.S.C. § 1332(c)(2).*

Receivers. If a party is represented by a court-appointed receiver, the citizenship of the receiver controls. *See Federal Deposit Insurance Corp. v. Sumner Financial Corp., 602 F.2d 670, 677 (5th Cir. 1979)* (citizenship of receiver, not that of party represented, governs for diversity purposes).

Fiduciaries. The citizenship of a fiduciary, rather than the beneficiary, generally controls. *See O'Brien v. Avco Corp., 425 F.2d 1030, 1032 (2d Cir. 1969)* (for purposes of diversity jurisdiction, the citizenship of the fiduciary, and not the beneficiary, controls).

Native Americans. Native Americans are citizens of the state in which they reside. *See Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 17-18 n.10, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987)* (Native Americans are citizens of the States in which they reside).

Students. Students attending school in another state are generally regarded as only temporary residents of the state in which they are attending school; it is presumed that they retain their domicile at their former abode. *See Garcia Perez v. Santaella, 364 F.3d 348, 354 (1st Cir. 2004)* (with regard to diversity jurisdiction, out-of-state college students are

not domiciliaries of state in which they go to school).

Prison Inmates. A person incarcerated in prison in another state does not change domicile. *See Sullivan v. Freeman, 944 F.2d 334, 337 (7th Cir. 1991)* (domicile of prisoner before he or she was imprisoned is presumed to remain his or her domicile while he or she is in prison).

Minors. Except in the case of an emancipated minor (which is determined by state law), domicile is first acquired at birth and is determined by the domicile of the parent or guardian on whom the child is dependent. *See Corabi v. Auto Racing, Inc., 264 F.2d 784, 786 (3d Cir. 1959)* (citizenship of general guardian governs right of mentally incompetent individual to bring and maintain a diversity suit); *Safeco Insurance Co. of America v. Mirczak, 662 F. Supp. 1155, 1157 (D. Nev. 1987)* (minor's domicile is determined by reference to that of some other person; in most cases, the minor's father's domicile controls).

United States Citizens Domiciled Abroad. When a citizen is traveling or temporarily residing abroad with no intention to permanently change his or her existing domicile, the citizen's domicile is unchanged for purposes of diversity jurisdiction. *See, e.g., Anderson v. Watt, 138 U.S. 694, 706, 11 S. Ct. 449, 34 L. Ed. 1078 (1891)* (place where a person lives is taken to be his domicile until facts adduced establish contrary, and a domicile when acquired is presumed to continue until it is shown to have been changed). If an American citizen is domiciled abroad, he or she is not a citizen of any state and cannot sue or be sued in federal court based on diversity jurisdiction. *See Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830-832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* ; *see also Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 68 (2d Cir. 1990)* (United States citizens who are domiciled abroad are neither citizens of any state of the United States nor citizens or subjects of a foreign state, and *28 U.S.C. § 1332(a)* does not provide that the courts have jurisdiction over a suit to which such persons are parties).

Foreign States. A foreign state always has access to federal court in an action against an American citizen. *See 28 U.S.C. § 1332(a)(4).*

Permanent Residents. Aliens admitted to the United States for permanent residence are citizens of the state in which they are domiciled. *See 28 U.S.C. § 1332(a).*

Persons With Dual Citizenship. A person who holds dual citizenship is considered a citizen of a state for diversity purposes.

Naturalized Citizens. A naturalized citizen cannot assert his or her foreign citizenship for purposes of alienage jurisdiction.

Military Personnel. Military personnel are presumed to retain their prior domicile unless they manifest their intent to change domicile.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.37.*
- *Federal Litigation Guide P 1.32[3].*
- *28 U.S.C. § 1332* (diversity jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividuals



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Chapter 1 DETERMINING FORUM
PART C: EVALUATING DIVERSITY JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.17

§ 1.17 Determining Citizenship of Corporations to Establish Diversity Jurisdiction

[1] Determining Citizenship Based on State of Incorporation and Principal Place of Business

Corporations are deemed citizens of both their state of incorporation and the state where their principal place of business is located. *See 28 U.S.C. § 1332(c)*; *Athena Automotive, Inc. v. Digregorio, 166 F.3d 288, 289 (4th Cir. 1999)* (for purposes of determining a federal court's subject matter jurisdiction based on diversity of citizenship, a corporation is considered to be a citizen of (1) the state of its incorporation and (2) the state where it has its principal place of business); *see also Midlantic National Bank v. Hansen, 48 F.3d 693, 696 (3d Cir. 1995)* ("inactive" corporation, e.g., a corporation conducting no business activities, has no principal place of business, and is instead a citizen of its state of incorporation only).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.50.*
- *Federal Litigation Guide P 1.32[3].*
- *28 U.S.C. § 1332* (diversity jurisdiction).

[2] Determining State of Incorporation

A corporation is deemed a citizen of every state in which it is incorporated. *See Capitol Indemnity Corp. v. Russellville Steel Co., 367 F.3d 831, 835 (8th Cir. 2004)* (corporation is a citizen of the state in which it is incorporated).

Warning:

If a state requires that a corporation incorporate in that state to do business there, the corporation will not be considered a citizen of that state for purposes of diversity jurisdiction, as involuntary incorporation is disregarded. *See Rudisill v. Southern Railway, 424 F. Supp. 1102, 1104 (W.D.N.C. 1976)* , *aff'd*, *548 F.2d 488 (4th Cir. 1977)* (corporation should not be deemed a citizen of a state in which it has been

compelled to incorporate).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.53[1].*
- *Federal Litigation Guide P 1.32[3].*
- *28 U.S.C. § 1332* (diversity jurisdiction).

[3] Determining Principal Place of Business

Resolving a conflict among the circuit courts of appeal, the Supreme Court adopted the "nerve center" test for determining a corporation's principle place of business. The "nerve center" is the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is normally the place where the corporation maintains its headquarters, provided that the headquarters is the actual center of direction, control and coordination, and not simply an office where the corporation holds its board meetings. *See Hertz Corp. v. Friend, -- U.S. --, 130 S. Ct. 1181, 175 L. Ed. 2d 1029, 1041-1042 (2010)* . In adopting the nerve center approach, the court specifically rejected the "business activities" or "substantial predominance" of corporate activities approach, which had been applied by numerous federal courts. *See, e.g., MacGinnitie v. Hobbs Group, LLC, 420 F.3d 1234, 1239 (11th Cir. 2005)* ("total activities" test used to determine corporation's principle place of business). The Supreme Court opined that a "business activities" approach can lead to strange results because nearly every national retailer would be deemed a citizen of a state with a large population, such as California, where a "substantial predominance" of corporate activities might take place simply because that state would have a large number of customers. *See Hertz Corp. v. Friend, -- U.S. --, 130 S. Ct. 1181, 175 L. Ed. 2d 1029, 1042 (2010)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.54.*
- *Federal Litigation Guide P 1.32[3].*

[4] Determining Citizenship of Alien Corporations

An alien corporation is a citizen of the country where it was incorporated and the location of its principal place of business. *See Panalpina Welttransport GmBh v. Geosource, Inc., 764 F.2d 352, 354 (5th Cir. 1985)* (a corporation incorporated in a foreign country is a citizen of that country for purposes of diversity jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.55.*
- *Federal Litigation Guide P 1.32[3].*
- *Bailey v. Grand Trunk Lines New England, 805 F.2d 1097, 1101 (2d Cir. 1986)* (alien corporation's worldwide principal place of business, and not its principal place of business within the United States is controlling).

[5] Determining Citizenship of Particular Corporate Entities

Nonprofit Corporations. A nonprofit corporation is considered a corporation for diversity purposes. The citizenship of the nonprofit corporation is determined by the citizenship of the corporation if the corporation is the real party in interest. *See Kuntz v. Lamar Corp., 385 F.3d 1177, 1182-1183 (9th Cir. 2004)* (nonprofit cooperative incorporated under state law treated as corporation for purposes of diversity jurisdiction). However, if members have been wronged directly, an argument can be made that the members are considered the real parties in interest and their citizenship should be deemed relevant for diversity purposes. *See CCC Information Services, Inc. v. American Salvage Pool Association, 230 F.3d 342, 345-347 (7th Cir. 2000)* (when members seek to enforce their rights as third-party beneficiaries of corporation, members' citizenship controls).

Defunct or Inactive Corporations. One way to determine the citizenship of an inactive corporation is the facts and circumstances test. Under this test, if the corporation has been inactive for a substantial period of time, it is a citizen only in the state of incorporation. If the corporation has not been inactive for a substantial period of time, the place of its last business activity would be relevant to, but not dispositive of, the determination of the principal place of business. *See Harris v. Black Clawson Co., 961 F.2d 547, 551 (5th Cir. 1992)* (when corporation has been inactive in a state for a substantial period of time, court looks to its state of incorporation for determining diversity). Some circuits hold that an inactive corporation's citizenship is determined by both its state of incorporation and the place of its last business activity. *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 141 (2d Cir. 1991)* (when a corporation has ceased business activity, diversity jurisdiction under *28 U.S.C. § 1332(c)* is determined not only by its state of incorporation, but also by the place it last transacted business).

Federally Chartered Corporations. A federally chartered corporation in which the United States owns half or more of the stock may sue or be sued in federal court under federal question jurisdiction. *See 28 U.S.C. § 1349*. A federally chartered corporation in which the United States owns less than half the stock and is organized to conduct business or activities in more than one state generally is not a citizen of a state unless the activities of the corporation are confined to one particular state or if Congress has expressly provided for state citizenship. *See Burton v. United States Olympic Committee, 574 F. Supp. 517, 519 (C.D. Cal. 1983)* (court held that both diversity and federal question jurisdiction were lacking over USOC under either *28 U.S.C. § 1332* or *§ 1349*).

Incorporated Native American Tribes. A Native American corporation is a citizen of the state in which the reservation is located. *See Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1226 (9th Cir. 1989)* (for purposes of diversity jurisdiction, an Indian corporation is a citizen of the state in whose borders reservation is located).

National Banking Associations. By statute, national banking associations are deemed citizens of states in which they are located. *See 28 U.S.C. § 1348*. Location refers to the state in which it has its main office, as set forth in its articles of incorporation, and not every state in which it has branch operations. *See Wachovia Bank v. Schmidt, 546 U.S. 303, 318-319, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006)* (national bank is citizen only of the state in which it has its main office).

Parent and Subsidiary Corporations. The subsidiary corporation has a separate corporate character and does not adopt the citizenship of its parent corporation unless the subsidiary is deemed to be the alter ego of the parent corporation. *See U.S.I. Properties Corp. v. M.D. Construction Co., 860 F.2d 1, 7 (1st Cir. 1988)* (subsidiary and parent corporations are generally considered to be separate entities for diversity jurisdiction purposes). Therefore, courts look to the state of incorporation and the principal place of business of the subsidiary itself. *See Danjaq, S.A. v. Pathe Communications Corp., 979 F.2d 772, 776 (9th Cir. 1992)* (in suit involving subsidiary corporation, court looks to state of incorporation and principal place of business of subsidiary, and not its parent).

Merged Corporations. The citizenship of the surviving corporation ordinarily determines diversity. *See Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp., 523 F.2d 543, 548 (7th Cir. 1975)* (after a foreign corporation merges into a

Delaware corporation, the surviving corporation for diversity jurisdiction is a citizen of Delaware).

Corporations Not in Good Standing. A corporation that has not remained in good standing in the state of its incorporation remains a citizen of that state as long as the state has not revoked its corporate charter. If the charter has been revoked, the corporation may nevertheless remain a citizen of the state of incorporation if it retains the capacity to sue and be sued under state law. *See Wild v. Subscription Plus, Inc., 292 F.3d 526, 528-529 (7th Cir. 2002)* (courts look to law of state that granted corporate charter for purposes of determining state of citizenship when corporate charter has been revoked and most states permit corporation whose charter has been revoked to continue nevertheless to operate as a corporation, specifically for purposes of suing and being sued, until it is actually dissolved).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.56.*
- *Federal Litigation Guide P 1.32[3].*
- *28 U.S.C. § 1348* (banking association as party).
- *28 U.S.C. § 1349* (corporation organized under federal law as party).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness Entities



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Chapter 1 DETERMINING FORUM
PART C: EVALUATING DIVERSITY JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.18

§ 1.18 Determining Citizenship of Noncorporate Entities

[1] Determining Citizenship of Partnerships

A general or limited partnership is deemed to have the citizenship of each of its general partners and limited partners. *See Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998)* (citizenship of partnership is citizenship of partners, even if they are limited partners).



Warning:

A partnership cannot invoke diversity jurisdiction if any partner who is a United States citizen is domiciled abroad, because that partner is not a citizen of any state. *See Coudert Brothers v. Easyfind International, Inc., 601 F. Supp. 525, 526-527 (S.D.N.Y. 1985)* , citing *Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L. Ed. 435 (1806)* (for sake of applying U.S. diversity jurisdiction statute, partnership must be considered to be a citizen of any and all states and foreign countries of which its partners are citizens). Diversity jurisdiction is lacking if a partner sues the partnership, because the partner's citizenship is counted on both sides of the case. *See Buckley v. Control Data Corp., 923 F.2d 96, 97 (8th Cir. 1991)* (when limited partners sue limited partnership, there is not diversity of citizenship in claim).

[2] Determining Citizenship of Other Noncorporate Entities

Limited Liability Companies. The citizenship of a limited liability company is determined by the citizenship of its members; therefore, the company is a citizen of every state of which its owners or members are citizens. *See Johnson v. Columbia Properties Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006)* (limited liability company has the citizenship of all its members).

Joint Ventures. The citizenship of a joint venture is the citizenship of each member, regardless of whether the member has an interest in the suit. *See Schiavone Construction Co. v. New York, 99 F.3d 546, 548 (2d Cir. 1996)* (for diversity purposes, citizenship of a joint venture is the citizenship of each of its members).

Unincorporated Associations. An unincorporated association is deemed to have the citizenship of each of its members. *See United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc., 382 U.S. 145, 146-150, 86 S. Ct. 272,*

15 L. Ed. 2d 217 (1965) (an unincorporated labor union's citizenship, for the purposes of federal diversity jurisdiction, is that of each of its members); *see also Carden v. Arkoma Associates, 494 U.S. 185, 196, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990)* (diversity jurisdiction in suit by or against an artificial entity depends on citizenship of all members).

Exception:

For purposes of the minimal diversity requirements of the Class Action Fairness Act of 2005, an unincorporated association is deemed to be a citizen of the state where it has its principal place of business and the state under whose laws it is organized. *See 28 U.S.C. § 1332(d)(10).*

Trusts. A trust is a citizen of the state where the trustee is a citizen. *See May Department Stores Co. v. Federal Insurance Co., 305 F.3d 597, 599 (7th Cir. 2002)* (for diversity purposes a trust is a citizen of whatever state of which the trustee is a citizen).

Unincorporated Native American Tribes. Unincorporated Native American tribes are not citizens of any state, and are not unincorporated associations for purposes of diversity jurisdiction. *See American Vantage v. Table Mountain Rancheria, 292 F.3d 1091, 1094-1098, 1100 (9th Cir. 2002)* (neither unincorporated Indian tribe operating a casino that was an unincorporated arm of the tribe nor casino itself are citizens of state for purposes of diversity jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.57.*
- *Federal Litigation Guide P 1.32[3].*
- *28 U.S.C. § 1332* (diversity jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness Entities



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Chapter 1 DETERMINING FORUM
PART C: EVALUATING DIVERSITY JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.19

§ 1.19 Determining Citizenship of Insurer When Insured Not Joined As Defendant

In any direct action against an insurer in which the insured is not joined as a party-defendant (but could be), the insurer is deemed to be a citizen of the following states:

1. The state of which the insured is a citizen;

2. Any state in which the insurer is incorporated; and

3. The state where the insurer has its principal place of business.

See 28 U.S.C. § 1332(c)(1); *see also Hernandez v. Travelers Insurance Co., 489 F.2d 721, 723 (5th Cir. 1974)* (insurer deemed citizen of state of which insured is citizen as well as of any state by which insurer has been incorporated and of state where it has its principal place of business, for purposes of determining whether diversity jurisdiction exists).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.58.*
- *28 U.S.C. § 1332* (diversity jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.20

§ 1.20 Establishing Diversity Jurisdiction in Suits Involving Aliens

[1] Establishing Diversity Jurisdiction When Parties Are Citizens and Aliens

Diversity jurisdiction exists for actions between citizens of a state and citizens or subjects of a foreign state (alienage jurisdiction). *See 28 U.S.C. § 1332(a)(2)*. Diversity jurisdiction also exists for actions between citizens of different states and in which citizens or subjects of a foreign state are additional parties on both sides of the dispute. *See 28 U.S.C. § 1332(a)(3)*; *see also Transure, Inc. v. Marsh & McLennan, Inc., 766 F.2d 1297, 1299 (9th Cir. 1985)* (federal diversity jurisdiction is not defeated when there is legitimate controversy between diverse citizens and aliens are additional parties; and there is complete diversity as to citizens). However, no diversity jurisdiction exists when an alien sues an alien and a citizen of another state; if the alien defendant is an indispensable party, the case must be dismissed. *See Cheng v. Boeing Co., 708 F.2d 1406, 1412 (9th Cir. 1983)* (diversity jurisdiction does not encompass foreign plaintiffs suing foreign defendants); *see also Allendale Mutual Insurance v. Bull Data Systems, Inc., 10 F.3d 425, 427-428 (7th Cir. 1993)* (no jurisdiction when one side has only foreign parties and other is mixture of foreign and domestic parties).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.70.*
- *Federal Litigation Guide P 1.32[3].*
- *28 U.S.C. § 1332* (diversity jurisdiction).

[2] Establishing Diversity Jurisdiction in Actions by or Against Foreign States

Diversity jurisdiction exists for actions between a foreign state, as plaintiff, and citizens of a state or different states. *See 28 U.S.C. § 1332(a)(4)*; *28 U.S.C. § 1603*. Federal jurisdiction in actions brought against foreign states is governed exclusively by the Foreign Sovereign Immunities Act. *See 28 U.S.C. § 1330*; *see also Republic of Austria v. Altmann, 541 U.S. 677, 691, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004)* (federal jurisdiction in actions brought against foreign states is governed by the Foreign Sovereign Immunities Act); *Moore v. United Kingdom, 384 F.3d 1079, 1082 (2004)*

(district courts have original jurisdiction of any nonjury civil action against a foreign state under the Foreign Sovereign Immunities Act).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 102.71, 102.72.*
- *Federal Litigation Guide P 1.32[3].*
- *28 U.S.C. § 1330* (actions against foreign states).
- *28 U.S.C. § 1332* (diversity jurisdiction).
- *28 U.S.C. § 1603* (definitions).

[3] Establishing Diversity Jurisdiction in Actions Between Aliens

The presence of aliens on both sides of a litigation destroys diversity if there is not a citizen of the United States on each side of the litigation. *See Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 790 (2d Cir. 1980)* (presence of aliens on two sides of a case destroys diversity jurisdiction); *but see Tango Music L.L.C. v. Deadquick Music Inc., 348 F.3d 244, 245-246 (7th Cir. 2003)* (presence of U.K. citizens on both sides of case did not destroy diversity when there were also diverse U.S. parties on both sides of case).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.77.*
- *Federal Litigation Guide P 1.32[3].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionCitizenshipCivil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionJurisdictional Requirements



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Chapter 1 DETERMINING FORUM
PART C: EVALUATING DIVERSITY JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.21

§ 1.21 Establishing Amount in Controversy Meets Minimum Requirements

[1] Determining Amount in Controversy When Complaint Is Filed

The amount in controversy is determined as of the time the complaint is filed. *See Freeport-McMoRan, Inc. v. K N Energy, 498 U.S. 426, 428, 111 S. Ct. 858, 112 L. Ed. 2d 951 (1991)* (if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events); *but see Spectacor Management Group v. Brown, 131 F.3d 120, 125 (3d Cir. 1997)* (when defendant elects not to file a motion to dismiss for lack of jurisdiction, but answers complaint by asserting compulsory counterclaim, amount of counterclaim may be considered by court in determining if amount in controversy exceeds statutory requirement for diversity jurisdiction).

[2] Establishing Amount Is More Than $75,000

Diversity jurisdiction generally requires that the amount in controversy exceed $75,000, exclusive of interest and costs. *See 28 U.S.C. § 1332(b)*; *see Smoot v. Mazda Motors of America, Inc., 469 F.3d 675, 676 (7th Cir. 2006)* (diversity jurisdiction depends on the jurisdictional amount's exceeding $ 75,000, exclusive of interest and costs); *see also Valdez v. Allstate Insurance Co., 372 F.3d 1115, 1116-1118 (9th Cir. 2004)* (in order to remove plaintiff's Arizona state-law civil action, defendant must show that matter in controversy exceeds sum or value of $ 75,000, exclusive of interest and costs).

Warning:

The amount in controversy is a jurisdictional requirement and is not waivable by the parties. *See 28 U.S.C. § 1332(b).*

Although the jurisdictional amount must be met exclusive of costs and interest (*see 28 U.S.C. § 1332(b)*), the following costs may be included:

1. Costs associated with the defendant's allegedly wrongful conduct. *See Griffin v. Holmes, 843 F. Supp. 81, 84-85 (E.D.N.C. 1993)* (costs incurred as a result of defendant's allegedly wrongful conduct, are an element of the damage claim, they are not the type of costs the jurisdictional statutes exempt from inclusion in determining the amount in controversy).

2. Interest that is an underlying obligation and not solely attributable to a delay in payment or wrongful deprivation of funds. *See, e.g., State Farm Mutual Automobile Insurance v. Narvaez, 149 F.3d 1269, 1271 (10th Cir. 1998)* (interest is not counted to determine the amount in controversy if it is an incident arising solely by virtue of a delay in payment of the underlying amount in controversy).

Interest is includible if it is an integral part of the aggregate amount of damages claimed, or is itself a principal obligation, as opposed to being incidental or accessory to the principal amount demanded. *See Edwards v. Bates County, 163 U.S. 269, 272, 16 S. Ct. 967, 41 L. Ed. 155 (1896)* (claim made by plaintiff on interest coupons was in no just sense accessory to any other demand, but was in itself principal and primary); *see also Brown v. Webster, 156 U.S. 328, 330, 15 S. Ct. 377, 39 L. Ed. 440 (1895)* (sum of the principal demand determines the question of jurisdiction, and accessory of interest demand cannot be computed for jurisdictional purposes).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 102.100, 102.104, 102.106[5].*
- *Federal Litigation Guide PP 1.05[2] [2.-1], 1.32[3].*
- *Bender's Federal Practice Forms* Form Nos. 8:1, 8:2.
- *28 U.S.C. § 1332* (diversity jurisdiction).

[3] Including Punitive Damages in Jurisdictional Amount

Punitive damages are properly aggregated as part of the amount in controversy. *See Allison v. Security Benefit Life Insurance Co., 980 F.2d 1213, 1215 (8th Cir. 1992)* (punitive damages are included in determining the amount in controversy).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.106[4].*

[4] Including Attorney's Fees in Jurisdictional Amount, Only if Provided for in Contract or by Statute

Attorney's fees do not constitute part of the matter in controversy unless the fees are provided for by contract or statute. If recoverable by statute or contract, attorney's fees are included in determining the amount in controversy regardless of whether the award is mandatory or discretionary. *See Galt G/S v. JSS Scandinavia, 142 F.3d 1150, 1155-1156 (9th Cir. 1998)* (mandatory and discretionary attorneys' fees can be taken into account in determining the amount in controversy if a statute authorizes fees to a successful litigant).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.106[6].*

[5] Determining Amount in Controversy in Suits Involving Equitable Relief

In suits involving equitable relief, the jurisdictional amount is determined by the value of the thing to be accomplished.

See Uhl v. Thoroughbred Technology & Telecommunications, Inc., 309 F.3d 978, 983 (7th Cir. 2002) (jurisdictional amount in action for equitable relief should be assessed by looking at either the benefit to the plaintiff or the cost to the defendant of the requested relief).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.106.*

[6] Determining Amount in Controversy Under Legal Certainty Test

Under the legal certainty rule, a strong, rebuttable presumption exists that the face of the complaint is a good-faith representation of the actual amount in controversy. The plaintiff need establish only that it does *not* appear to a legal certainty that the claim is below the jurisdictional minimum. Thus, courts must be very confident that a party cannot recover the jurisdictional amount before dismissing the case for want of jurisdiction. *See Scherer v. Equitable Life Assurance Society of the United States, 347 F.3d 394, 397 (2d Cir. 2003)* (to overcome face-of-the-complaint presumption that jurisdictional amount is present for purposes of diversity jurisdiction, party opposing jurisdiction must show "to a legal certainty" that amount recoverable does not meet jurisdictional threshold).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.106[1].*
- *Federal Litigation Guide P 3.200[5].*

[7] Providing Evidence of Valid Defense or Counterclaim Does Not Defeat Diversity

The amount in controversy is determined without regard to any valid defense, counterclaim or offset, even if revealed in plaintiff's complaint. *See St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-289, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* (fact that complaint discloses existence of valid defense to claim does not negate jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.106[3].*

[8] Meeting Burden of Proof to Establish Jurisdiction

If the existence of the minimum jurisdictional amount is disputed, the burden of proof falls on the party seeking relief in the federal forum. *See American Bankers Life Assurance Co. v. Evans, 319 F.3d 907, 909 (7th Cir. 2003)* (party seeking to invoke federal jurisdiction bears ultimate burden of proof as to jurisdictional amount). The burden of proof is by a preponderance of the evidence. *See Sierminski v. Transouth Finance Corp., 216 F.3d 945, 947-948 (11th Cir. 2000)* (burden of proof as to jurisdictional amount is by preponderance of the evidence). Conclusory allegations as to the amount in controversy are insufficient to meet this burden. *See Williams v. Best Buy Co., 269 F.3d 1316, 1319-1320 (11th Cir. 2001)* (conclusory allegation in notice of removal that jurisdictional amount is satisfied, without setting forth underlying facts supporting such assertion, is insufficient to meet defendant's burden).



Strategic Point:

The proponent of jurisdiction may introduce summary--judgment--type evidence concerning the amount in controversy if the face of the complaint does not support jurisdiction. *See Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1336 (5th Cir. 1995)* (when facially apparent test is not met, district court can require parties to submit summary-judgment-type evidence, as to amount in controversy at time of removal).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.107.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyChallengesCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminations



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.22

§ 1.22 Aggregating Claims to Satisfy Jurisdictional Amount

[1] Aggregating Claims of Single Plaintiff Against Single Defendant

A single plaintiff may aggregate all claims, related or unrelated, that he or she has against a single defendant in calculating the amount in controversy, even if the claims were assigned to the plaintiff by a third party, unless the assignment was made collusively for the purpose of creating federal jurisdiction. *See Fed. R. Civ. P. 18(a)*; *see also Budget Rent-A-Car, Inc. v. Higashiguchi, 109 F.3d 1471, 1473-1474 (9th Cir. 1997)* (declaratory judgment plaintiff may reach jurisdictional requirement of *28 U.S.C. § 1332* by aggregating its multiple claims against a single defendant).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.108[1].*
- *Fed. R. Civ. P. 18* (joinder of claims and remedies).
- *Wolde-Meskel v. Vocational Instruction Project Community Services, Inc., 166 F.3d 59, 62 (2d Cir. 1999)* (when single plaintiff joins several claims against defendant, general rule is that value of all claims can be added together or aggregated in determining whether requisite jurisdictional amount in controversy has been satisfied).

[2] Aggregating Claims of Single Plaintiff Against Multiple Defendants

A plaintiff may not aggregate his or her claims against multiple defendants unless the claims against the defendants are common and undivided, such that the defendants' liability is properly characterized as joint and not several. *See Siegerist v. Blaw-Knox Co., 414 F.2d 375, 381 (8th Cir. 1969)* (when trademark infringement claim and unfair competition claim are pressed against defendants jointly, aggregate value of claims is proper measure for determining jurisdiction under *28 U.S.C. § 1332*); *see also Libby, McNeill & Libby v. City National Bank, 592 F.2d 504, 509-510 (9th Cir. 1978)* (tests for aggregating claims of one plaintiff against multiple defendants and of multiple plaintiffs against one defendant are essentially the same: plaintiff's claims against the defendants must be common and undivided so that defendants' liability is joint and not several).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.108[2].*

[3] Aggregating Claims of Multiple Plaintiffs Against Single Defendant

Plaintiffs may join together to sue a common defendant but each plaintiff must establish that his or her claim against that defendant meets the jurisdictional minimum unless:

1. They are enforcing a single title or right in which they have a common and undivided interest. *See Pearson v. National Society of Public Accountants, 200 F.2d 897, 898 (5th Cir. 1953)* (two plaintiffs' claims may be joined under *Fed. R. Civ. P. 18(a)*, so they may also be aggregated to make up the jurisdictional amount); *see also Libby, McNeill, & Libby v. City National Bank, 592 F.2d 504, 509-510 (9th Cir. 1978)* (tests for aggregating claims of one plaintiff against multiple defendants and of multiple plaintiffs against one defendant are essentially same: plaintiff's claims against defendants must be common and undivided so that defendants' liability is joint and not several); or

2. At least one named plaintiff satisfies the amount in controversy requirement and supplemental jurisdiction may be exercised over the claims of other plaintiffs. *See Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 549, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* (when other elements of jurisdiction are present and at least one named plaintiff in the action satisfies amount-in-controversy requirement, *28 U.S.C. § 1367* does authorize supplemental jurisdiction over claims of other plaintiffs in same case, even if those claims are for less than jurisdictional amount specified in statute setting forth requirements for diversity jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.108[3].*

[4] Aggregating Claims in Class Actions

In class actions subject to the minimal diversity requirements of the Class Action Fairness Act of 2005, the claims of individual class members are aggregated to determine whether the matter in controversy exceeds the threshold sum or value of $5 million, exclusive of interest and costs. *See 28 U.S.C. § 1332(d)(6)*; *see also Frazier v. Pioneer Americas LLC, 455 F.3d 542, 545 (5th Cir. 2006)* (Class Action Fairness Act explicitly allows aggregation of each class member's claim). The amount in controversy may be satisfied either from the view of the aggregate value to the class members or to the defendants. *See Berry v. American Express Publishing Corp., 381 F. Supp. 2d 1118, 1123 (C.D. Cal. 2005)* .

However, in other class actions, class members may not aggregate their claims. *See Kessler v. National Enters., Inc., 347 F.3d 1076, 1078 (8th Cir. 2003)* (general rule is that individual class members' distinct claims for actual damages may not be aggregated to satisfy the amount-in-controversy requirement for diversity jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.108[4].*
- *Federal Litigation Guide P 42.25.*

- *28 U.S.C. § 1332* (diversity jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminations



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.23

§ 1.23 Establishing Minimal Diversity

[1] Minimal Diversity Required by Multiparty, Multiforum Trial Jurisdiction Act of 2002

The Multiparty, Multiforum Trial Jurisdiction Act of 2002 provides special jurisdictional and procedural provisions for civil cases arising from accidents that result in at least 75 deaths. *See 28 U.S.C. §§ 1369*, *1391(g)*, *1441(e)*, *1441(f)*, *1697*, *1785*. When at least 75 natural persons have died in a single accident at a discrete location, district courts have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from the accident if any of the following are true:

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

2. Any two defendants reside in different states, regardless of whether those defendants are also residents of the same state or states; or

3. Substantial parts of the accident took place in different states.

See 28 U.S.C. § 1369(a).

However, district courts must abstain from hearing any of the above-described civil actions when (1) the substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens, and (2) the claims asserted will be governed primarily by the laws of that state. *See 28 U.S.C. § 1369(b).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 102.25.*
- *Federal Litigation Guide P 1.32[4].*

- *28 U.S.C. § 1369* (multiparty, multiforum jurisdiction).
- *28 U.S.C. § 1391* (venue generally).
- *28 U.S.C. § 1441* (actions removable).
- *28 U.S.C. § 1697* (service in multiparty, multiforum actions).
- *28 U.S.C. § 1785* (subpoenas in multiparty, multiforum actions).

[2] Minimal Diversity Required by Class Action Fairness Act of 2005

Under the Class Action Fairness Act of 2005 (CAFA), a district court has original jurisdiction of certain class actions in which the matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs, and diversity of citizenship exists between any member of a class of plaintiffs and any defendant. *See 28 U.S.C. § 1332(d)(2)*; *see also Berry v. American Express Publishing, 381 F. Supp. 2d 1118, 1123 (C.D. Cal. 2005)* (amount-in-controversy requirement may be satisfied either from view of aggregate value to class members or defendants). For this purpose, 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)*.

Exceptions:

Various exceptions to the minimal diversity requirements of CAFA are enumerated in *28 U.S.C. § 1332(d)*. Among them are the following situations:

1. The amount in controversy is less than $5 million. *See 28 U.S.C. § 1332(d)(2)*;

2. The primary defendants are states, state officials, or other governmental entities against whom relief is foreclosed. *See 28 U.S.C. § 1332(d)(5)(A)*;

3. The number of members in all proposed plaintiff classes is less than 100. *See 28 U.S.C. § 1332(d)(5)(B)*; and

4. The action solely relates to the internal affairs or governance of a corporation or other business entity and arises under the laws of the state of incorporation or organization. *See 28 U.S.C. § 1332(d)(9)(B)*;

5. Two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state in which the action was originally filed. *See 28 U.S.C. § 1332(d)(4)(B)*.

The minimal diversity provisions of CAFA generally extend to "mass actions." *See 28 U.S.C. § 1332(b)*. A "mass action" is a civil action (other than a class action) in which the monetary relief claims of 100 or more persons will be jointly tried on the ground that their claims involve common questions of law or fact. *See 28 U.S.C. § 1332(d)(11)(B)(i)*. However, in a mass action, unlike in a class action under CAFA, jurisdiction exists only over those plaintiffs whose claims satisfy the traditional jurisdictional amount requirements, *i.e.*, $75,000 for each plaintiff. *See 28 U.S.C. § 1332(a), (d)(11)(B)(i)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 102.26, 102.108[4], 102.109[6].*
- *Federal Litigation Guide P 1.32[5].*
- *Bender's Federal Practice Forms* Form No. 23:1.
- *28 U.S.C. § 1332* (diversity jurisdiction).
- *Grimsdale v. Kash N' Karry Food Stores, Inc. (In re Hannaford Bros. Customer Data Sec. Breach Litig.), 564 F.3d 75, 79 (1st Cir. 2009)* (plaintiffs are entitled to structure their class action to include only class members residing in a particular state, so as to avoid removal under the Class Action Fairness Act).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureVenueMultidistrict LitigationCivil ProcedureVenueMultiparty Litigation



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.24

§ 1.24 Challenging Diversity Jurisdiction

Diversity jurisdiction may be challenged by any of the following:

1. Motion for Rule 12(b) dismissal. *See Fed. R. Civ. P. 12(b)(1)*;

2. Answer. *See Fed. R. Civ. P. 12(h)(3)*;

3. Motion for relief from judgment. *See Fed. R. Civ. P. 60(b)(6)*; *see*, *e.g.*, *Bank of Montreal v. Olafsson, 648 F.2d 1078, 1079 (6th Cir. 1981)* (affirmed grant of 60(b) motion to set aside default judgment due to court's lack of subject matter jurisdiction);

4. In a collateral proceeding, if the party did not appear in the underlying action and a default judgment was entered. *See Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 377-378, 60 S. Ct. 317, 84 L. Ed. 329 (1940)* (res judicata may be pleaded as a bar to a collateral attack on subject matter jurisdiction, not only as to matters actually presented to sustain or defeat right asserted in earlier proceeding, but also as to any other available matter which might have been presented to that end).



Strategic Point:

Any party, including the party that invoked diversity jurisdiction, may bring a motion to dismiss for lack of subject matter jurisdiction at any time during the proceedings, including on appeal. *See Fed. R. Civ. P. 12(h)(3)*; *see also American Fire & Casualty Co. v. Finn, 341 U.S. 6, 16-18, 71 S. Ct. 534, 95 L. Ed. 702 (1951)* (superseded by statute on different grounds) (court held that an insurer who removed case to federal court was not estopped from protesting the removal action because a lack of party diversity deprived the district court of original jurisdiction over the action).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.30.*

- *Federal Litigation Guide P 3.200[5].*
- *Bender's Federal Practice Forms* Form No. 12:11.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Chs. 3, 12.
- *28 U.S.C. § 1332(d)* (diversity jurisdiction).
- *Fed. R. Civ. P. 12* (defense and objections).
- *Fed. R. Civ. P. 60* (relief from judgment or order).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyChallengesCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview



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Chapter 1 DETERMINING FORUM
PART D: EVALUATING SUPPLEMENTAL JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.25

§ 1.25 Checklist for Evaluating Supplemental Jurisdiction

☐ Determine whether court must take supplemental jurisdiction over claims. *See § 1.26 below*.

☐ Determine whether taking supplemental jurisdiction would defeat diversity jurisdiction. *See § 1.27 below*.

☐ Determine whether court may decline supplemental jurisdiction over claims. *See § 1.28 below*.

- ○ Novel or complex issue of state law. *See § 1.28[1] below*.
- ○ Supplemental claim substantially predominates. *See § 1.28[2] below*.
- ○ Federal claim is dismissed. *See § 1.28[3] below*.
- ○ Exceptional circumstances exist. *See § 1.28[4] below*.

☐ Determine whether claims subject to supplemental jurisdiction as part of same case or controversy. *See § 1.29 below*.

- ○ Apply "common nucleus" standard. *See § 1.29[1] below*.
- ○ Joined or aggregated claims. *See § 1.29[2] below*.
- ○ Counterclaims. *See § 1.29[3] below*.

- Crossclaims. *See § 1.29[4] below*.
- Determine if federal question substantial. *See § 1.29[5] below*.
- Determine if claims arose from same act or omission. *See § 1.29[6] below*.

☐ Determine whether supplemental jurisdiction exists over parties.

- Joined parties. *See § 1.30 below*.
- Impleaded parties. *See § 1.31 below*.
- Class actions. *See § 1.32 below*.
- Intervening parties. *See § 1.33 below*.

☐ **Search By Topic:** Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionAncillary JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent ClaimsCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent PartiesCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & Controversy



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.26

§ 1.26 Determining Whether Court Must Take Supplemental Jurisdiction Over Claim

Once it is determined that a supplemental claim is related to the claim within the court's original jurisdiction, so that they form the same case or controversy, supplemental jurisdiction over the related claim is mandatory. Nonfederal claims are part of the "same case or controversy" as federal claims when they derive from a common nucleus of operative fact and are such that a plaintiff would ordinarily be expected to try them in the same proceeding. *See Finley v. United States, 490 U.S. 545, 549, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989)* , *superseded by statute on other grounds*, quoting *United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

Exception:

The court has discretion to elect not to hear a claim over which supplemental jurisdiction exists if the claim falls within one of the circumstances enumerated in *28 U.S.C. § 1367(c)*; *see Executive Software North America, Inc. v. United States District Court, 24 F.3d 1545, 1557 (9th Cir. 1994)* (*28 U.S.C. § 1367(c)(4)* permits a discretionary remand of pendent claims when in exceptional circumstances, there are other compelling reasons for declining jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 106.05.*
- *Federal Litigation Guide PP 1.05[2.-2], 1.32[6].*
- *28 U.S.C. § 1367* (supplemental jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & Controversy



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.27

§ 1.27 Determining Whether Court Lacks Supplemental Jurisdiction in Diversity Action

In any diversity action, a federal court lacks supplemental jurisdiction over claims made under the following joinder devices if exercising supplemental jurisdiction over the claim would defeat diversity:

1. Claims by plaintiffs against persons made parties by impleading third parties, required joinder, permissive joinder, and intervention;

2. Claims by persons to be joined under Rule 19;

3. Claims by persons seeking to intervene under Rule 24. *See Beckman Indus. v. International Ins. Co., 966 F.2d 470, 471 (9th Cir. 1992)* (permissive intervention requires proposed intervenor to show independent basis for jurisdiction).

See 28 U.S.C. § 1367(b); *see also Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 373-377, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978)* (neither convenience of litigants nor considerations of judicial economy can suffice to justify extension of doctrine of ancillary jurisdiction to plaintiff's cause of action against citizen of same state in diversity case).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 106.05[3].*
- *Federal Litigation Guide PP 1.05[4], 1.32[6].*
- *28 U.S.C. § 1367* (supplemental jurisdiction).
- *Fed. R. Civ. P. 19* (required joinder of parties).
- *Fed. R. Civ. P. 20* (permissive joinder of parties).

- *Fed. R. Civ. P. 24* (intervention).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesJoinderGeneral Overview



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Chapter 1 DETERMINING FORUM
PART D: EVALUATING SUPPLEMENTAL JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.28

§ 1.28 Determining Whether Court May Decline Supplemental Jurisdiction

[1] Declining Jurisdiction When Novel or Complex Issue of State Law Exists

A district court has discretion to decline to exercise supplemental jurisdiction over a claim if the claim raises a novel or complex issue of state law. *See 28 U.S.C. § 1367(c)(1)*; *see also Dream Palace v. County of Maricopa, 384 F.3d 990, 1022 (9th Cir. 2004)* (no abuse of discretion in declining to exercise jurisdiction over delicate issues of state law involving balance of power between state and local authorities). However, the fact that an issue is one of first impression regarding the interpretation of a state statute does not require a court to decline to exercise supplemental jurisdiction if the issue is not "complex." *See Schwarm v. Craighead, 233 F.R.D. 655, 659 (E.D. Cal. 2006)* (court found that interpretation of California law was not complex and that economy, convenience, fairness, and comity favored retention of supplemental jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 106.05[4], 106.64.*
- *Federal Litigation Guide PP 1.05[4], 4.39[1].*
- *28 U.S.C. § 1367* (supplemental jurisdiction).

[2] Declining Jurisdiction When Supplemental Claim Substantially Predominates

A district court has discretion to decline to exercise supplemental jurisdiction over a claim that substantially predominates over the original claim. *See 28 U.S.C. § 1367(c)(2).*

A supplemental state claim predominates if:

1. The supplemental claim is more complex than the federal claim;

2. The supplemental claim requires more judicial resources to adjudicate than the federal claim;

3. The supplemental claim is more salient in the case as a whole than the federal claim; or

4. A substantial quantity of evidence supports the supplemental claim that would not be relevant to the federal claim. *See De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 309 (3d Cir. 2003)* (when state issues substantially predominate, whether in terms of proof, of scope of issues raised, or of comprehensiveness of the remedy sought, state claims may be dismissed without prejudice and left for resolution to state tribunals); *see also Picard v. Bay Area Regional Transit District, 823 F. Supp. 1519, 1527 (N.D. Cal. 1993)* (although based on different legal theories, federal and state claims required virtually same evidentiary presentation at trial).

See Acri v. Varian Assocs., 114 F.3d 999, 1000 (9th Cir. 1997) (federal district court with power to hear state-law claims has discretion to keep, or decline to keep, them under the conditions set out in *28 U.S.C. § 1367(c)*); *see also Diven v. Amalgamated Transit Union International, 38 F.3d 598, 602 (D.C. Cir. 1994)* (because non-federal claims predominated over plaintiffs' federal claims, district court did not abuse its discretion by refusing to exercise supplemental jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 106.05[4], 106.65.*
- *Federal Litigation Guide PP 1.05[4], 4.39[1].*
- *28 U.S.C. § 1367* (supplemental jurisdiction).

[3] Declining Jurisdiction When Federal Claim Is Dismissed

If all federal claims against all defendants are dismissed on the merits before trial, the district court has the discretion to retain or dismiss any remaining supplemental claims. *See 28 U.S.C. § 1367(c)(3).* After dismissing the jurisdiction-conferring claim(s), the district court retains authority to hear supplemental claims (including state-law claims), considering the factors set out in *28 U.S.C. § 1367(c)*, only if it had original federal subject matter jurisdiction in the case.

Warning:

If the federal claim is dismissed for lack of subject matter jurisdiction, a district court has no discretion to retain the supplemental claims for adjudication and must dismiss the state-law claims without prejudice. *See Herman Family Revocable Trust v. Teddy Bear, 254 F.3d 802, 805 (9th Cir. 2001)* (if federal claim is dismissed for lack of subject matter jurisdiction, district court has no discretion to retain supplemental claims for adjudication).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 106.05[4], 106.66.*
- *Federal Litigation Guide PP 3.98[2], 4.39[1].*
- *28 U.S.C. § 1367* (supplemental jurisdiction).

[4] Declining Jurisdiction Under Exceptional Circumstances

A district court may decline to exercise supplemental jurisdiction in exceptional circumstances when there are other compelling reasons to do so. *See 28 U.S.C. § 1367(c)(4)*; *Executive Software North America, Inc. v. United States District Court, 24 F.3d 1545, 1555-1560 (9th Cir. 1994)* (*28 U.S.C. § 1367(c)(4)* permits a discretionary remand of pendent claims when in exceptional circumstances, there are other compelling reasons for declining jurisdiction). The court should set forth specific reasons explaining its decision. *See Bahrampour v. Lampert, 356 F.3d 969, 979 (9th Cir. 2004)* (matter remanded because district court did not set forth reasons for failing to exercise its jurisdiction over supplemental state-law claim).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 106.05[4], 106.67.*
- *Federal Litigation Guide P 4.39[1].*
- *28 U.S.C. § 1367* (supplemental jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral Overview



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.29

§ 1.29 Determining Whether Additional Claims Are Subject to Supplemental Jurisdiction as Part of Same Case or Controversy

[1] Applying "Common Nucleus" Standard

An additional claim is part of the original case or controversy if both of the following requirements are met:

1. The additional claim and the federal claims derive from a common nucleus of operative fact; and

2. The nonfederal claims are such that the plaintiff would ordinarily be expected to try them with the federal claims in one proceeding.

See United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966) (for court to have pendent jurisdiction, state and federal claims must derive from common nucleus of operative fact); *see also Trs. of the Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maintenance, Inc., 333 F.3d 923, 925 (9th Cir. 2003)* (nonfederal claims are part of same "case" as federal claims when they derive from a common nucleus of operative fact and are such that a plaintiff would ordinarily be expected to try them in one judicial proceeding).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 106.21.*
- *Federal Litigation Guide P 1.32[6] et seq.*
- *Lindsay v. Gov't Emples. Ins. Co., 448 F.3d 416, 424 (D.C. Cir. 2006)* (federal claim and state-law claim form part of same case or controversy if two claims derive from common nucleus of operative fact such that relationship between federal claim and state claim permits conclusion that entire action before court comprises but one constitutional case).

[2] Joining or Aggregating Claims

A single plaintiff may join all claims against a single defendant in an action, whether or not those claims arise from a common nucleus of operative fact. *See Fed. R. Civ. P. 18(a)*. The plaintiff may aggregate these claims to reach the required amount in controversy. *See Budget Rent-A-Car, Inc. v. Higashiguchi, 109 F.3d 1471, 1473-1474 (9th Cir. 1997)* (declaratory judgment plaintiff may reach the jurisdictional requirement of *28 U.S.C. § 1332* by aggregating its multiple claims against a single defendant).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed) § 106.40*.
- *Bender's Federal Practice Forms* Form No. 18:1 et seq.
- *Fed. R. Civ. P. 18(a)* (joinder of claims).

[3] Bringing Counterclaims

Defendants may use supplemental jurisdiction to bring a counterclaim within a federal court's jurisdiction in either federal question or diversity actions. If the main claim is federal and the counterclaim arises under state law between nondiverse parties, the court nonetheless has supplemental jurisdiction over the defendant's counterclaim. If the main claim is a diversity action and defendant's counterclaim fails to meet the jurisdictional minimum for diversity jurisdiction, the court still has supplemental jurisdiction over the counterclaim. *See 28 U.S.C. § 1367(a), (b)*; *see also Fed. R. Civ. P. 13(a), (b)*.

If a defendant's counterclaims are compulsory (*see § 4.45[2] below*), supplemental jurisdiction exists and no further analysis is necessary. If, however, a defendant's counterclaims are permissive, the court must analyze whether supplemental jurisdiction exists over those claims under the "case or controversy" test and whether to exercise its discretion to exercise that jurisdiction. *See Spectacor Management Group v. Brown, 131 F.3d 120, 121 (3d Cir. 1997)* (federal courts have a virtually unflagging obligation to exercise their jurisdiction over compulsory counterclaim except in those extraordinary circumstances where the order to the parties to repair to the state court would clearly serve important countervailing interest); *see also Oak Park Trust & Savings Bank v. Therkildsen, 209 F.3d 648, 651 (7th Cir. 2000)* (permissive counterclaim is outside federal court's supplemental jurisdiction and requires independent basis of federal jurisdiction); *but see Global NAPs, Inc. v. Verizon New England, Inc., 603 F.3d 71, 87 (1st Cir. 2010)* (by its plain text, § 1367 governs supplemental jurisdiction over all counterclaims, superseding pre-§ 1367 case law distinguishing between compulsory and permissive counterclaims).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 106.41*.
- *Federal Litigation Guide P 1.90[13.-1]*.
- *Bender's Federal Practice Forms* Form Nos. 13:1-13:15.
- *28 U.S.C. § 1367* (supplemental jurisdiction).
- *Fed. R. Civ. P. 13* (counterclaim and crossclaims).

[4] Bringing Crossclaims

Crossclaims against coparties asserted under Rule 13(g) (*see § 4.46 below*) may be asserted in either federal question or diversity actions. Crossclaims against coparties asserted in diversity actions are supported by supplemental jurisdiction regardless of whether the parties on the crossclaim are diverse. *See 28 U.S.C. § 1367(a)*; *see also Fed R. Civ. P. 13(g)*; *Travelers Insurance Co. v. First National Bank, 675 F.2d 633, 638 (5th Cir. 1982)* (it is well-established that supplemental jurisdiction extends to crossclaims properly asserted under Rule 13(g)).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 106.41.*
- *Federal Litigation Guide P 1.91[3.-3].*
- *Bender's Federal Practice Forms* Form Nos. 13:50-13:53.
- *28 U.S.C. § 1367* (supplemental jurisdiction).
- *Fed. R. Civ. P. 13* (counterclaim and crossclaims).

[5] Determining Whether Federal Question Is Substantial

In federal question cases, a court may exercise supplemental jurisdiction only if a sufficiently substantial federal claim supports the underlying jurisdiction. *See United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* (assuming substantiality of the federal issues, there is power in federal courts to hear both federal and state claims).

Whenever a separate and independent claim or cause of action arising under federal question jurisdiction is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed. The district court may determine all issues, or in its discretion, remand all matters in which state law predominates. *See 28 U.S.C. § 1441(c)*; *see also* Ch. 2 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 106.02.*
- *28 U.S.C. § 1441* (actions removable generally).
- *Purgess v. Sharrock, 33 F.3d 134, 139 (2d Cir. 1994)* (if federal claims are dismissed before trial, state claims should be dismissed as well; however, if there has been substantial expenditure in time, effort, and money in preparing dependent claims before federal claim is dismissed, knocking them down with belated rejection of supplemental jurisdiction may not be fair).

[6] Determining Whether Claims Arose from Same Act or Omission

If the same act or omission violates parallel federal and state laws, the common nucleus of operative facts is obvious and federal courts routinely exercise supplemental jurisdiction over the state-law claims. *See, e.g., De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 308 (3d Cir. 2003)* (district court may exercise supplemental jurisdiction when state-law claims share common nucleus of operative fact with claims that supported district court's original jurisdiction).

Claims for relief by different persons arising from a single act or omission by the defendant together constitute a single

case or controversy. *See Arnold v. Kimberly Quality Care Nursing Service, 762 F. Supp. 1182, 1186 (M.D. Pa. 1991)* (claim for relief for personal injury by one plaintiff and claim for relief for loss of consortium by another stemming from the same act or omission by the defendant is the same case or controversy); *see also Brown v. Grabowski, 922 F.2d 1097, 1121 n.17 (3d Cir. 1990)* (allowing supplemental jurisdiction over claims arising from same case or controversy and that involve joinder or intervention of additional parties).

A single injury with multiple causation is generally not the same case or controversy. *See Galt G/S v. Hapag-Lloyd AG, 60 F.3d 1370, 1374-1375 (9th Cir. 1995)* .

Circuit Split:

Federal courts disagree as to whether one injury creates a single case or controversy regardless of how many parties are alleged to have contributed to the injury and how unrelated to or remote from each other in time and place is their conduct. *See Sinclair v. Soniform, Inc., 935 F.2d 599, 603 (3d Cir. 1991)* (claims against crew and manufacturers were part of same case or controversy because both sets of claims were based on same purported injuries stemming from same scuba diving incident); *but see Galt G/S v. Hapag-Lloyd AG, 60 F.3d 1370, 1374-1375 (9th Cir. 1995)* (claim against transporters for damaging cargo in transit was not same case or controversy as transporters' indemnity claim against retailer for improper storage, which was alleged to have actually caused damage to cargo).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 106.24.*
- *Federal Litigation Guide P 1.32[6].*

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.30

§ 1.30 Determining Whether Supplemental Jurisdiction Exists Over Joined Parties

Supplemental jurisdiction may apply to claims that involve the joinder or intervention of additional parties through the Federal Rules of Civil Procedure. *See 28 U.S.C. § 1367(a)*. A defendant counterclaiming against the plaintiff may join additional parties to the counterclaim pursuant to Rule 13(h). *See Fed. R. Civ. P. 13(h)*; *see also § 4.45[9][c] below*. These claims are supported by supplemental jurisdiction even if complete diversity would be destroyed, assuming they are part of the same case or controversy. *See FDIC v. Bathgate, 27 F.3d 850, 874 n.14 (3d Cir. 1994)* (at time that pleading against bank directors was filed, defendants' counterclaims against FDIC remained before district court; thus, defendants properly joined bank directors as additional parties to counterclaim).

Warning:

Parties joined under Rule 19, the compulsory joinder rule, may not assert claims that would defeat diversity. *See 28 U.S.C. § 1367(b)*; *see Fed. R. Civ. P. 19*; *see also Krueger v. Cartwright, 996 F.2d 928, 933 n.6 (7th Cir. 1993)* ; *§ 3.18 below* .

If the basis for original jurisdiction is a federal question, supplemental jurisdiction exists for all claims against parties joined under *Fed. R. Civ. P. 20*, the permissive joinder provision. *See 28 U.S.C. § 1367(a)*; *see also Palmer v. Hospital Authority of Randolph County, 22 F.3d 1559, 1566-1569 (11th Cir. 1994)* (if one plaintiff asserts federal claim against defendant, joined plaintiff's state-law claim against that defendant is supported by supplemental jurisdiction without regard to diversity of parties provided claim arises out of common nucleus of operative fact). However, no supplemental jurisdiction exists in diversity cases over claims by plaintiffs against persons permissively joined under *Fed. R. Civ. P. 20* if the joinder destroys diversity. *See 28 U.S.C. § 1367(b)*; *see Casas Office Machines v. Mita Copystar America, Inc., 42 F.3d 668, 674 (1st Cir. 1994)* (joinder of additional parties is not allowed if to do so would defeat the rule of complete diversity).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 106.43, 106.45, 106.47.*
- *28 U.S.C. § 1367* (supplemental jurisdiction).

- *Fed. R. Civ. P. 13* (counterclaim and crossclaim).

- *Fed. R. Civ. P. 19* (required joinder of parties).

- *Fed. R. Civ. P. 20* (permissive joinder of parties).

- *United Capitol Insurance Co. v. Kapiloff, 155 F.3d 488, 492-493 (4th Cir. 1998)* (despite requirement of complete diversity for jurisdiction under *28 U.S.C. § 1332*, *28 U.S.C. § 1367(a)* confers supplemental jurisdiction over all other claims that are so related to claims in action within original jurisdiction that they form part of same case or controversy).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesJoinderGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.31

§ 1.31 Determining Whether Supplemental Jurisdiction Exists Over Impleaded Parties

Claims by defendants against impleaded third-party defendants are supported by supplemental jurisdiction without regard to whether an independent basis of jurisdiction exists, provided that the court has jurisdiction over the main claim between the original parties. *See 28 U.S.C. § 1367(a)*; *see also Estate of Bruce v. Middletown, 781 F. Supp. 1013, 1015 (S.D.N.Y. 1992)* .



Warning:

State-law claims by plaintiffs against third parties impleaded by defendants are not supported by supplemental jurisdiction unless there is complete diversity between plaintiffs and the impleaded third parties. *See 28 U.S.C. § 1367(b)*.

Supplemental jurisdiction does not exist over a plaintiff's *Fed. R. Civ. P. 14* impleader claim for indemnity or contribution growing out of a counterclaim against the plaintiff unless complete diversity exists between the plaintiff and the impleaded third parties. *See 28 U.S.C. § 1367(b)*; *Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 373-377, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 106.42*.
- *28 U.S.C. § 1367* (supplemental jurisdiction).
- *Fed. R. Civ. P. 14* (third-party practice).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.32

§ 1.32 Determining Whether Supplemental Jurisdiction Exists in Class Actions

The supplemental jurisdiction statute, *28 U.S.C. § 1367*, displaces the traditional rule requiring each member of a class action invoking diversity jurisdiction to meet the jurisdictional minimum amount in controversy requirement. Nevertheless, at least one claim must satisfy the amount in controversy in diversity class actions to establish a cognizable claim to which the other claims are supplemental. *See Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 549, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* (when other elements of jurisdiction are present and at least one named plaintiff in the action satisfies amount-in-controversy requirement, *28 U.S.C. § 1367* does authorize supplemental jurisdiction over the claims of other plaintiffs in same case, even if those claims are for less than the jurisdictional amount specified in statute setting forth the requirements for diversity jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 106.44.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.33

§ 1.33 Determining Whether Supplemental Jurisdiction Exists Over Claims of Intervening Parties

Claims against nondiverse parties asserted by persons seeking to intervene as plaintiffs are not supported by supplemental jurisdiction in a diversity action, even if intervention is by right under *Fed. R. Civ. P. 24(a). See 28 U.S.C. § 1367(b)*; *Fed. R. Civ. P. 24*; *see also Development Financial Corp. v. Alpha Housing & Health Care, Inc., 54 F.3d 156, 159 (3d Cir. 1995)* (in a diversity action, *28 U.S.C. § 1367(b)* eliminates supplemental jurisdiction over the claims of a plaintiff-intervenor that shares citizenship with a defendant).

One may intervene as a defendant and then assert a counterclaim against a nondiverse plaintiff or a crossclaim against a nondiverse party. *See 28 U.S.C. § 1367*. However, a party may not intervene as a defendant solely for the purpose of asserting a claim against a nondiverse plaintiff; the intervenor must be potentially liable to the plaintiff on the primary claim to be treated as a defendant to whom supplemental jurisdiction may apply under *28 U.S.C. § 1367(b). See United States v. Union Electric Co., 64 F.3d 1152, 1170 (8th Cir. 1995)* (court may grant permissive intervention where (1) the movant shows independent ground for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense and the main action have a question of law or fact in common).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 106.46*.
- *Federal Litigation Guide P 4.35*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *28 U.S.C. § 1367(b)* (supplemental jurisdiction).
- *Fed. R. Civ. P. 24* (intervention).

Legal Topics:

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

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PART E: EVALUATING PERSONAL JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.34

§ 1.34 Checklist for Evaluating Personal Jurisdiction

☐ Determine whether court has personal jurisdiction over defendant. *See § 1.35 below*.

- ○ Determine whether parties have established jurisdiction by waiver. *See § 1.36 below*.
- ○ Determine whether parties have established jurisdiction by presence in forum. *See § 1.37 below*.
- ○ Determine whether parties have established jurisdiction by consent. *See § 1.38 below*.
- ○ Determine whether parties have established jurisdiction by domicile. *See § 1.39 below*.

☐ Determine whether due process requirements for jurisdiction are satisfied. *See § 1.40 below*.

- ○ Minimum contacts with forum. *See § 1.40[1] below*.
- ○ Fundamental fairness of litigating in that forum. *See § 1.40[2] below*.

☐ Determine whether court has general jurisdiction over defendant. *See § 1.41 below*.

- ○ Court can assert jurisdiction over claims unrelated to forum. *See § 1.41[1] below*.

- ○ Non-resident defendant has enough contacts with forum for court to assert general jurisdiction. *See § 1.41[2] below*.

☐ Determine whether court has specific jurisdiction over defendant. *See § 1.42 below*.

- ○ Claims arise from defendant's contacts with forum. *See § 1.42[1] below*.
- ○ Jurisdiction based on "stream of commerce" with forum. *See § 1.42[2] below*.
- ○ Defendant "purposefully availed" him or herself of forum in through Web site, along with other pertinent factors. *See § 1.42[3] below*.

☐ Determine whether court has pendent personal jurisdiction over claims lacking independent basis. *See § 1.43 below*.

☐ Determine whether court can assert personal jurisdiction under long-arm statute. *See § 1.44 below*.

- ○ Apply due process test. *See § 1.44[1] below*.
- ○ Determine whether "doing business" statute confers jurisdiction over corporation. *See § 1.44[2] below*.

☐ Determine whether court can assert jurisdiction over property. *See § 1.45 below*.

- ○ In rem jurisdiction. *See § 1.45[1] below*.
- ○ Quasi in rem jurisdiction. *See § 1.45[2] below*.
- ○ Enforcing another state's judgment against property. *See § 1.45[3] below*.

☐ Determine whether court can assert jurisdiction through service of process. *See § 1.46 below*.

- ○ Meet notice and hearing requirements. *See § 1.46[1] below*.
- ○ Meet statutory requirements. *See § 1.46[2] below*.
- ○ Meet service of process requirements. *See § 1.46[3] below*.
- ○ Request waiver of service of process. *See § 1.46[4] below*.

☐ Challenge court's personal jurisdiction. *See § 1.47[1] below*.

- ○ File motion to dismiss for lack of jurisdiction.
- ○ Raise jurisdictional defense in the answer.
- ○ Allow plaintiff to obtain a default judgment by not appearing in the action, and then collaterally attack the default judgment for lack of jurisdiction.

☐ Oppose challenge to court's personal jurisdiction. *See § 1.47[2] below*.

☐ **Search By Topic:** Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.35

§ 1.35 Determining Court's Authority Over Parties

Personal jurisdiction refers to the court's authority over the parties to an action and is required to render a judgment in personam. *See Burnham v. Superior Court, 495 U.S. 604, 608, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* (judgment of a court lacking jurisdiction is void). If the court proceeds to hear an action over which it has no personal jurisdiction, its judgment is invalid and voidable. *See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)* (no personal jurisdiction as defendant had no "contacts, ties, or relations" with the state).

The plaintiff bears the burden of establishing that the court has personal jurisdiction over the defendant. Until the court conducts an evidentiary hearing, the plaintiff need only make a prima facie showing of the court's jurisdiction. Unless contravened, the plaintiff's version of facts is taken as true, and conflicts between the facts stated in opposing affidavits must be resolved in the plaintiff's favor to determine whether a prima facie case exists for personal jurisdiction. *See Harris Rutsky & Co. Insurance Services v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003)* ; *see also Wilson v. Belin, 20 F.3d 644, 648 (5th Cir. 1994)* (when personal jurisdiction is at issue, plaintiff may bear his or her burden by presenting prima facie case, and plaintiff's uncontroverted allegations must be taken as true with any conflicts between parties' affidavits resolved in plaintiff's favor).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.20.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallenges



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PART E: EVALUATING PERSONAL JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.36

§ 1.36 Establishing Personal Jurisdiction by Waiver

A defendant may waive a defective exercise of personal jurisdiction either expressly (*e.g.*, by consenting to jurisdiction), or impliedly (*e.g.*, by failing to object in a timely manner). *See Fed. R. Civ. P. 12(h)(1), (3)*; *see also Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* (requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising issue). A party waives any defense of lack of personal jurisdiction by failing to raise the defense in its first motion under Rule 12(b). *See English v. Dyke, 23 F.3d 1086, 1090-1091 (6th Cir. 1994)* (defense of lack of jurisdiction over the person is waived if omitted from a Rule 12 motion); *see also § 4.32 below* (preparing Rule 12(b) motions).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.53[2].*
- *Fed. R. Civ. P. 12* (defenses and objections).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsent



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.37

§ 1.37 Establishing Personal Jurisdiction Based on Presence

Courts can exercise personal jurisdiction over a nonresident defendant when the defendant is personally served with process while present in the forum state. *See Burnham v. Superior Court, 495 U.S. 604, 610-611, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* (courts have power to hale before them any individual who could be found within their borders, and that once having acquired jurisdiction over such a person by properly serving him with process, can retain jurisdiction to enter judgment against him or her).

A challenge to jurisdiction based on due process grounds by a defendant who was personally served while physically present in the state will rarely, if ever, be successful. *See Northern Light Technology, Inc. v. Northern Lights Club, 236 F.3d 57, 63 (1st Cir. 2001)* (generally no immunity from service of process when suit in which immunity is sought is part of, or a continuation of, suit for which person claiming immunity is in the jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.51.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.38

§ 1.38 Establishing Personal Jurisdiction Based on Consent

A nonresident defendant who appears in an action without raising lack of personal jurisdiction is deemed to have consented to the court's jurisdiction. *See General Trading Inc. v. Yale Materials Handling Corp., 119 F.3d 1485, 1496 (11th Cir. 1997)* (a party that fails to raise a defense of lack of personal jurisdiction at the appropriate time is deemed to have conferred personal jurisdiction on the court by consent).

The defendant's filing of a counterclaim constitutes consent to personal jurisdiction where the action is pending, and waives any objection to lack of service. *See Schnabel v. Lui, 302 F.3d 1023, 1037 (9th Cir. 2002)* (parties who file a counterclaim avail themselves of the district court and consent to personal jurisdiction).



Warning:

In general, a defendant may consent by contract to the court's jurisdiction. A contractual forum selection clause requires parties to submit to jurisdiction in a designated court or in a court chosen by one of the parties for any action arising out of the contract. *See National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-316, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964)* (parties to contract may agree in advance to submit to jurisdiction of given court). A forum selection clause is enforceable unless it is shown that to enforce it would be unreasonable or unjust or that some invalidity such as fraud or overreaching is attached to it. *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 the circumstances). This is so even if the clause is part of boilerplate language in a form contract. *See Carnival Cruise Lines v. Shute, 499 U.S. 585, 593, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)* (reasonable forum clause in form contract may be permissible).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.53.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsent



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.39

§ 1.39 Establishing Personal Jurisdiction Based on Domicile

A court has jurisdiction over persons domiciled within the forum state at the time the action is filed, even if the defendant is absent from the state. *See Milliken v. Meyer, 311 U.S. 457, 464, 61 S. Ct. 339, 85 L. Ed. 278 (1940)* (domicile in state is sufficient to bring absent defendant within reach of state's jurisdiction for purposes of personal judgment by means of appropriate substituted service). A person's domicile is the state where the person has a permanent home, to which he or she has the intention of returning whenever absent. *See Lew v. Moss, 797 F.2d 747, 750-751 (9th Cir. 1986)* (domicile is a location where a person has established a fixed habitation or abode in a particular place and intends to remain there permanently or indefinitely).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.52.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsDomicile



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.40

§ 1.40 Satisfying Due Process Requirements for Personal Jurisdiction

[1] Establishing Defendant Has Minimum Contacts with Forum

Federal courts assess the following factors in determining whether a defendant has sufficient contacts with the forum for personal jurisdiction to be exercised over that defendant consistent with the Constitution:

1. Whether the defendant purposefully availed itself of the privileges and benefits of conducting activities within the forum. *See Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995)* (purposeful availment rule met if defendant took deliberate action within forum state or created continuing obligations to forum residents); *see also Bridgeport Music, Inc. v. Still N the Water Publishing, 327 F.3d 472, 478 (6th Cir. 2003)* (if plaintiff can demonstrate purposeful availment, absence of physical contacts with the forum state will not defeat personal jurisdiction over a non-resident defendant);

2. Whether the defendant's contacts in the forum are such that the defendant reasonably should anticipate being sued in the forum; and

3. Whether the defendant's business contacts with the forum are continuous and systematic.

See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473-474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (forum can assert specific jurisdiction over out-of-state defendant who has not consented to suit there, if defendant has purposefully directed his activities at residents of forum, and litigation results from alleged injuries that arise out of or relate to those activities); *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296-297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)* (defendant's conduct and connection with the forum state should be such that defendant should reasonably anticipate being haled into court there); *Hanson v. Denckla, 357 U.S. 235, 251, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)* (however minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he or she has had the "minimal contacts" with that state that are a prerequisite to its exercise of power over him or her).

[2] Establishing Fundamental Fairness of Subjecting Defendant to Litigation in Forum

If it can be established that the defendant had minimum contacts with the forum, the court must then decide whether it is

fair to subject the defendant to litigation in the forum. *See Harris Rutsky & Co. Insurance Services v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003)* (in addition to minimum contacts, the exercise of jurisdiction over a defendant must comport with fair play and substantial justice); *see also Phillips Exeter Academy v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999)* (court must analyze overall reasonableness of exercise of jurisdiction in light of a variety of pertinent factors that touch on fundamental fairness of an exercise of jurisdiction).



Strategic Point:

Once it is decided that the defendant purposefully established minimum contacts within a forum, the defendant must present a compelling case that the presence of other considerations makes the forum court's exercise of jurisdiction unreasonable. *See Metropolitan Life Insurance Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996)* .

Circuit Split:

Circuits are divided over which party must prove that an adequate alternative forum exists. *Compare Harris Rutsky & Co. Insurance Services v. Bell & Clements Ltd., 328 F.3d 1122, 1133-1134 (9th Cir. 2003)* (plaintiff bears burden of proving unavailability of an alternative forum); *Gschwind v. Cessna Aircraft Co., 161 F.3d 602, 606 (10th Cir. 1998)* (defendant bears burden of proving that an adequate alternative forum exists).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.30.*
- *Federal Litigation Guide P 1.50.*
- *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996)* (reasonableness analysis should take into account: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) interests of forum state in adjudicating case; (3) plaintiff's interest in obtaining convenient and effective relief; (4) interstate judicial system's interest in obtaining most efficient resolution of controversy; and (5) shared interest of states in furthering substantive social policies).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsPurposeful AvailmentCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsSubstantial Contacts



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.41

§ 1.41 Invoking General Jurisdiction

[1] Allowing Court Jurisdiction Over Claims Unrelated to Defendant's Contacts with Forum

General jurisdiction allows a court to exercise jurisdiction over a defendant based on any claim, including claims unrelated to the defendant's contacts with the state. *See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.15, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (general jurisdiction allows state to exercise personal jurisdiction over defendant in a suit not arising out of or related to the defendant's contacts with the forum); *see also 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 state exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, State has been said to be exercising general jurisdiction over the defendant).

[2] Establishing Sufficient Contacts to Exercise Jurisdiction Over Non-Resident Defendant

A forum court may assert general jurisdiction over a nonresident defendant only when the defendant's connections with the forum are continuous, systematic, and substantial. *See Lake v. Lake, 817 F.2d 1416, 1420 (9th Cir. 1987)* (if defendant's activities within the forum state are continuous and systematic or substantial, the state has a sufficient relationship with the defendant to assert general jurisdiction).

Warning:

Courts have been reluctant to assert general jurisdiction over nonresident defendants even when the defendant's contacts with the forum state are quite extensive. *See Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445-446, 72 S. Ct. 413, 96 L. Ed. 485, 47 Ohio Op. 216 (1952)* (amount and kind of activities that must be carried on by foreign corporation in state of forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417-419, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)* . Mere purchasing and incidental contacts with the forum are not enough, even if the purchasing is systematic and continuous. The general--jurisdiction threshold of "continuous and systematic" contacts typically requires a business defendant to have an office in the forum state, although lesser involvement with the forum state has been found sufficient. *See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)* (mere

purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over nonresident corporation in a cause of action not related to those purchase transactions).

Exception:

Proper service within the forum may be an adequate basis for general jurisdiction, even if the defendant has no other forum state contacts. *See Burnham v. Superior Court, 495 U.S. 604, 610-611, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* (courts have power to hale before them any individual who could be found within their borders, and that once having acquired jurisdiction over such a person by properly serving him with process, can retain jurisdiction to enter judgment against him or her).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 108.40, 108.41.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.42

§ 1.42 Invoking Specific Jurisdiction

[1] Establishing Claim Arises Directly from Defendant's Contacts with Forum

A court may exercise specific jurisdiction when the defendant has few contacts, or even a single contact with the forum state, if the claim arises directly from the defendant's contacts within that state. *See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-473, 479, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (when forum seeks to assert specific jurisdiction over out-of-state defendant who has not consented to suit there, fair warning requirement is satisfied if defendant has purposefully directed his activities at residents of forum, and litigation results from alleged injuries that arise out of or relate to those activities).

Physical contact with the forum state is not required. Personal jurisdiction may be exercised over a defendant whose only "contact" with the forum state is the "purposeful direction" of a foreign act having an effect in the forum state. *See Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 213 (5th Cir. 1999)* (actual content of communications with a forum that gave rise to intentional tort causes of action alone constituted purposeful availment sufficient to establish specific jurisdiction). If the defendant's intentional act is not expressly aimed at the forum state, there is no jurisdiction even if harm is ultimately caused in the forum state. *See United States v. Swiss American Bank, Ltd., 274 F.3d 610, 625 (1st Cir. 2001)* (when government has failed to satisfy the first prong of purposeful availment of the forum, its argument for specific jurisdiction must fail).

In the case of intentional torts, the "effects" test requires that:

1. The defendant allegedly committed an intentional act expressly aimed at the forum state that causes harm; and

2. The defendant knows that harm is likely to be suffered in the forum state.

See Bancroft & Masters, Inc. v. Augusta National, Inc., 223 F.3d 1082, 1087 (9th Cir. 2000) ("express aiming" test met when defendant allegedly engaged in conduct targeted at a plaintiff whom defendant knew resided in forum state).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 108.40, 108.42.*

- *Tamburo v. Dworkin, 601 F.3d 693, 706 (7th Cir. 2010)* (district court could exercise specific personal jurisdiction over out-of-state defendants based on allegedly defamatory and harassing e-mails and messages posted on their public websites when this activity was expressly aimed at plaintiff in forum state).

- *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc., 334 F.3d 390, 402 (4th Cir. 2003)* (it is unreasonable to expect that, merely by utilizing servers owned by a Maryland-based company, CPC should have foreseen that it could be haled into a Maryland court and held to account for the contents of its website).

- *Allred v. Moore & Peterson, 117 F.3d 278, 286 (5th Cir. 1997)* ("effects" test is not a substitute for a nonresident's minimum contacts that demonstrate purposeful availment of the benefits of the forum state).

- *Hicklin Engineering, Inc. v. Aidco, Inc., 959 F.2d 738, 739 (8th Cir. 1992)* (although promotion and solicitation may have an effect on a competitor, absent additional contacts, this effect alone will not be sufficient to bestow personal jurisdiction).

[2] Establishing Specific Jurisdiction in "Stream of Commerce" Cases

A plurality of the Supreme Court has determined that the purposeful availment threshold is met when a manufacturer places a product into the stream of commerce with awareness of its ultimate sale in the forum state, even though the product reached the state through the independent, but foreseeable, conduct of others. *See Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 116-117, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987))* (it may suffice if manufacturer is aware that its products are regularly sold for use in forum state, even if particular defective product was not sold there).

A second plurality of the Supreme Court has determined that additional conduct must be "purposefully directed" at the forum state. This additional conduct could include designing a product for the forum state market, advertising in the forum, providing consumer advice in the forum, or marketing a product through a distributor or sales-agent in the forum state. *See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)* (substantial connection between defendant and forum state necessary for finding of minimum contacts must come about by an action of defendant purposefully directed toward forum state and placement of a product into stream of commerce).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 108.40, 108.42.*

[3] Establishing Specific Jurisdiction in Web Site Cases

The operation of a strictly passive website, in which the only contacts with the forum state consist of mere viewings of the website's content by those surfing the Internet, by itself, does not give rise to specific jurisdiction when the website is not directed at the forum state. *See ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002)* (passive Internet activity does not generally include directing electronic activity into state with manifested intent of engaging business or other interactions in state); *see also Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1157 (9th Cir. 2006)* (when website advertiser does nothing other than register domain name and post essentially passive website and

nothing else is done to encourage residents of a forum state, there is no personal jurisdiction). However, jurisdiction may be appropriate when the Internet conduct includes "something more" to show the party directed substantial activity toward the forum. *See Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997)* (jurisdiction is more likely the greater the level of interactivity and commercial nature of the exchange of information that occurs with the forum state).

The scope and nature of the related contacts are key to this analysis. Factors for consideration include:

1. Whether the defendant encouraged residents of the forum state to engage in relevant contacts with the defendant;

2. Whether there is evidence that the contacts constitute a continuous and substantial part of the defendant's business;

3. Whether the defendant exchanged messages with forum residents or gained subscribers through its contacts; and

4. Whether the defendant otherwise purposefully availed itself of the privilege of doing business in the forum.

See Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997) .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 108.40, 108.42.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 1.43 Invoking Pendent Personal Jurisdiction Over Claims Lacking an Independent Basis for Jurisdiction

Once a basis for exercising personal jurisdiction over a defendant has been established, the doctrine of pendent personal jurisdiction may require the defendant to defend another claim for which there is no independent basis of jurisdiction. The pendent claim must arise out of the same set of operative facts as the claim over which the court does have personal jurisdiction. Whether to exercise pendent personal jurisdiction is within the discretion of the district court. *CE Distribution, LLC v. New Sensor Corp., 380 F.3d 1107, 1113-1114 (9th Cir. 2004)* (if court determines that there has been a sufficient showing of personal jurisdiction to reach trial with regard to one claim, but not other, it may or may not be appropriate to assume jurisdiction over other claim under principles analogous to the doctrine of pendent jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.123.*

- *ESAB Group v. Centricut, Inc., 126 F.3d 617, 628 (4th Cir. 1997)* (district court may have pendent personal jurisdiction to adjudicate state claims properly within the court's subject matter jurisdiction when it has obtained personal jurisdiction over defendant by reason of federal claim, even though that state's long-arm statute could not authorize service over defendants with respect to the state claims).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent Claims



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§ 1.44 Determining Personal Jurisdiction Under Long-Arm Statutes

[1] Applying Due Process Test

A long-arm statute may be used to exercise jurisdiction over a defendant to the extent due process allows. *See Harris Rutsky & Co. Insurance Services v. Bell & Clements Ltd., 328 F.3d 1122, 1134-1136 (9th Cir. 2003)* (in addition to minimum contacts, the exercise of jurisdiction over a defendant must comport with fair play and substantial justice); *see also Bullion v. Gillespie, 895 F.2d 213, 215-216 (5th Cir. 1990)* (district court's personal jurisdiction turned on reach of Texas long-arm statute, which had been interpreted by Texas courts as extending to the limits of due process).

[2] Determining Whether "Doing Business" Statute Confers Court Jurisdiction Over Corporation

Out-of-state corporations often must consent to state court jurisdiction pursuant to "doing business statutes" in order to qualify to do business in a state not of their incorporation. Doing business statutes may be used as an alternative to long-arm statutes for asserting jurisdiction over foreign corporations. *See Lorelei Corp. v. County of Guadalupe, 940 F.2d 717, 720 (1st Cir. 1991)* (court first determines whether the state's "long arm" or "doing business" statute authorizes it to exercise personal jurisdiction over the foreign defendant; if it does, court then determines whether exercise of personal jurisdiction under circumstances is consistent with due process under the *Fourteenth Amendment*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.60.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsDoing BusinessCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum Contacts



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.45

§ 1.45 Establishing Jurisdiction Over Property

[1] Overview of Property-Based Jurisdiction

Property located within a state can be a basis for jurisdiction for in rem or quasi in rem actions to determine interests in that property, or in actions in which the property is the source of the underlying controversy between the plaintiff and the defendant. This type of judgment does not impose any personal obligation on the defendant. *See Shaffer v. Heitner, 433 U.S. 186, 207-208, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

Property-based jurisdiction is subject to the same constitutional due process standards that govern personal jurisdiction. The test is whether there is a constitutionally sufficient "relationship among the defendant, the forum, and the litigation." *See Shaffer v. Heitner, 433 U.S. 186, 201, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

[2] Asserting in Rem Jurisdiction

A judgment in rem affects the interests of all persons with respect to a designated property. *See Hanson v. Denckla, 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)* .

[3] Asserting Quasi in Rem Jurisdiction

There are two types of quasi in rem jurisdiction: a claim to the actual property or a claim (*e.g.*, in contract or tort) against the property seeking to establish an interest in the defendant's property. *See Hanson v. Denckla, 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)* .

A minimum--contacts connection between the property and the subject matter of the action is required. *See Shaffer v. Heitner, 433 U.S. 186, 212, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

[4] Enforcing Another State's Judgment Against Property

Presence of property in the forum state is a sufficient basis for jurisdiction in an action to enforce another state's judgment against the property, even if the defendant does not have other contacts with the forum state. *See Shaffer v. Heitner, 433 U.S. 186, 210 n.36, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.80.*

- *Shaffer v. Heitner, 433 U.S. 186, 207-208, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* (effect of judgment in case where jurisdiction is in rem is limited to property that supports jurisdiction and does not impose personal liability on property owner, because owner is not before court).

- *Hanson v. Denckla, 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)* (quasi in rem jurisdiction refers to actions in which the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons, as well as to actions in which the plaintiff seeks to apply what plaintiff concedes to be the property of the defendant to the satisfaction of a claim against him or her).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 1.46 Invoking Personal Jurisdiction Through Service of Process

[1] Meeting Due Process Requirements: Adequate Notice of Action and Opportunity to be Heard

Due process requires adequate notice to the defendant of the action and an opportunity for the defendant to be heard. *See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)* ; *Pennoyer v. Neff, 95 U.S. 714, 722-723, 24 L. Ed. 565 (1878)* .

The method of notice must be reasonably certain to inform the defendant that he or she is being sued. If it is not possible to provide such notice, the chosen form of notice must be as likely as other feasible and customary forms of notice to notify the defendant. *See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)* .

Due process also requires that the defendant be afforded an opportunity to be heard. Therefore, notice must be given sufficiently in advance to enable the defendant to properly prepare a defensive pleading. *See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)* .

[2] Meeting Statutory Requirements

Due process requires compliance with the method of service prescribed by statute. *See Wuchter v. Pizzutti, 276 U.S. 13, 19, 24, 48 S. Ct. 259, 72 L. Ed. 446 (1928)* (if nonresident's appearance is not directed by statute despite actual notice of the cause by serving notice outside of the state, not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it).

[3] Publication May Be Sufficient

Publication may be sufficient if the defendant cannot be found and the plaintiff exercised due diligence in searching for the defendant. *See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316, 70 S. Ct. 652, 94 L. Ed. 865 (1950)* .

However, notice by publication (or publication and posting) is inadequate in state condemnation proceedings when the property owner's name and address are known. *See Schroeder v. New York, 371 U.S. 208, 213, 83 S. Ct. 279, 9 L. Ed.*

2d 255 (1962) (notice by publication is not enough to constitute due process with respect to person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by proceedings in question); *Walker v. Hutchinson, 352 U.S. 112, 116, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956)* (court held newspaper publication alone was not adequate notice as required by due process, where, as in the instant case, the owner's name was known to the condemning city and was on the official records).

Publication and posting of property is insufficient notice to the mortgagee in a tax foreclosure sale. *See Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799-800, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983)* (when mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service).

[4] Methods of Service Within United States

Service of process may be accomplished in suits within the United States by any of the following means:

1. Personal service on the defendant or authorized agent in the forum state;

2. Leaving the process at the dwelling house of an individual defendant, with a person of suitable age and discretion residing there;

3. Personal service outside the state on a domiciliary of the state. *See Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)* (personal service outside the state on one domiciled within the state, meets all the requirements of due process);

4. Service pursuant to the law of the state in which the district court sits; or

5. Service pursuant to the law of the state where service is effected.

See Fed. R. Civ. P. 4.

[5] Methods of Service In Foreign Country

Service of process may be accomplished on a foreign defendant by any of the following means:

1. Service by internationally agreed--on methods, such as those prescribed by the Hague Convention;

2. If the foreign country has not agreed on a method of service, then service may be made by personal delivery or any form of mail requiring a signed receipt, unless the foreign country bars those methods;

3. If personal delivery or mail is prohibited by the foreign country's law, by any manner prescribed by the foreign country's law or directed by the foreign authority in response to a letter of request; or

4. Service directed by the court by any means not prohibited by international agreement.

See Fed. R. Civ. P. 4(f).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.51.*

- *Fed. R. Civ. P. 4* (summons).
- *Federal Litigation Guide P 1.51 et seq.*

[6] Service On Impleaded or Joined Parties

Service on persons impleaded under *Fed. R. Civ. P. 14* or joined under *Fed. R. Civ. P. 19* is permitted at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues. *See Fed. R. Civ. P. 4(k)(1)(B).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.123[2][a].*
- *Fed. R. Civ. P. 4* (summons).
- *Fed. R. Civ. P. 14* (third-party practice).
- *Fed. R. Civ. P. 19* (joinder of persons needed for just adjudication).

[7] Nationwide Service of Process for Certain Claims

Congress has authorized nationwide service of process in a variety of actions, including the following:

1. The Securities Exchange Act of 1934, *see 15 U.S.C. § 78aa*;

2. The Employee Retirement Income Security Act (ERISA), *see 29 U.S.C. § 1132(e)*;

3. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), *see 42 U.S.C. § 9613(e)*;

4. The Racketeer Influenced and Corrupt Organizations Act (RICO), *see 18 U.S.C. § 1965*; and

5. The Clayton Act, *see 28 U.S.C. § 1391.*

See Fed. R. Civ. P. 4(k)(1)(C).

Even absent a federal statute specifically authorizing nationwide service, defendants who are not subject to personal jurisdiction in any state court, but who have contacts with the United States as a whole, may be subject to personal jurisdiction in federal question cases. *See Fed. R. Civ. P. 4(k)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.123[2][b].*
- *15 U.S.C. § 78aa* (Securities Exchange Act of 1934).
- *18 U.S.C. § 1965* (RICO).

- *28 U.S.C. § 1391* (Clayton Act).
- *29 U.S.C. § 1132(e)* (ERISA).
- *42 U.S.C. § 9613(e)* (CERCLA).
- *Fed. R. Civ. P. 4* (summons).

[8] Requesting Waiver of Service of Process

[a] Limitations on Who Can Waive Service of Process

The waiver of service provisions of *Fed. R. Civ. P. 4(d)* apply only to individuals, corporations, and associations that are subject to service under *Fed. R. Civ. P. 4(e)*, *(f)*, or *(h)*, including the following:

1. Individuals within a judicial district of the United States, *see Fed. R. Civ. P. 4(e)*;
2. Individuals in a foreign country, *see Fed. R. Civ. P. 4(f)*;
3. Domestic and foreign corporations, *see Fed. R. Civ. P. 4(h)*; and
4. Partnerships and unincorporated associations, *see Fed. R. Civ. P. 4(h)*.

See Fed. R. Civ. P. 4(d)(1).

The waiver option does not apply to service on the following, *see Fed. R. Civ. P. 4(d)(2)*:

1. Infants or incompetent persons, *see Fed. R. Civ. P. 4(g)*;
2. The United States, its agencies, corporations, or officers, *see Fed. R. Civ. P. 4(i)*; and
3. Foreign, state, or local governments, *see Fed. R. Civ. P. 4(j)*.

See Fed. R. Civ. P. 4(d)(1).

[b] Requesting Waiver of Service

To initiate the waiver of service option, a plaintiff must notify the defendant that an action has been commenced, and request the defendant to waive service of process. The notice and request for waiver must be delivered in writing, by first-class mail or "other reliable means," such as overnight or express mail, fax, or messenger. *See Fed. R. Civ. P. 4(d)(1)(G)*. It must also be accompanied by a copy of the complaint identifying the court where the action has been commenced, but need not be accompanied by a summons. *See Fed. R. Civ. P. 4(d)(1)(C)*.

If the defendant is an individual, the notice of action and request for waiver must be addressed directly to the defendant. If the defendant is a corporation, partnership, or other unincorporated association, the notice and request for waiver must be addressed directly to an officer or agent. *See Fed. R. Civ. P. 4(d)(1)(A)*.

The plaintiff must mail to the defendant a copy of the complaint, as well as two copies of a waiver form, together with a prepaid means of compliance in writing. *See Fed. R. Civ. P. 4(d)(1)(C)*. Failure to include all necessary documents may

invalidate the waiver of service of process. *See Fed. R. Civ. P. 4(d)(2).*

[c] Responding After Request for Waiver

If the defendant signs the waiver of service, the defendant will have 60 days from the date of the request (90 days if outside the United States) within which to answer the complaint. *See Fed. R. Civ. P. 4(d)(3).*

Consequences of failing to sign the waiver of service are that (1) the defendant must respond to the complaint within 21 days after service of the summons and complaint, and (2) the court will impose the costs subsequently incurred in effecting service on the defendant, unless the defendant shows good cause for its failure. *See Fed. R. Civ. P. 4(d)(2), 12(a)(1)(A).*

[d] Filing Waiver with Court

After the plaintiff files a waiver of service with the court, the court treats the action as if the defendant had been served formally and proof of service had been filed with the court. *See Fed. R. Civ. P. 4(d)(4).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 108.122[1].*
- *Federal Litigation Guide P 1.54.*
- *Fed. R. Civ. P. 4* (summons).

Legal Topics:

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

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Chapter 1 DETERMINING FORUM
PART E: EVALUATING PERSONAL JURISDICTION

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.47

§ 1.47 Challenging Personal Jurisdiction

[1] Raising Challenge Without Waiving Objection to Personal Jurisdiction

Personal jurisdiction may be challenged as follows:

1. Defendant may attack jurisdiction by filing a motion to dismiss for lack of jurisdiction over the person at beginning of action. *See Fed. R. Civ. P. 12(b)*;

2. Defendant may raise a jurisdictional defense in the answer. *See Fed. R. Civ. P. 12(b)*; or

3. Defendant may allow plaintiff to obtain a default judgment by not appearing in the action, and then collaterally attack the default judgment for lack of jurisdiction. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* (defendant is always free to ignore judicial proceedings, risk default judgment, and then challenge that judgment on jurisdictional grounds in collateral proceeding).

A defendant must raise an objection to personal jurisdiction, either by proper pre-pleading motion or in the initial responsive pleading, to avoid waiving the right to object. The jurisdiction objection is waived if either:

1. Defendant makes a *Fed. R. Civ. P. 12* motion but does not include an objection to personal jurisdiction; or

2. Defendant does not make a *Fed. R. Civ. P. 12* motion and fails to include the objection in the answer.

See Fed. R. Civ. P. 12(b), (g), (h)(1); *see also Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* (requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue).



Strategic Point:

If the defendant makes a timely and successful objection to personal jurisdiction, it does not necessarily mean the action will be dismissed. A federal court lacking both personal jurisdiction and venue may transfer the case to a federal court where venue and personal jurisdiction would be proper. *See 28 U.S.C. § 1406(a)*; *see also 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, however wrong plaintiff may have been in filing his case as to venue, whether court in which it was filed had personal jurisdiction over the defendants or not). Thus, a motion to dismiss under *Fed. R. Civ. P. 12* 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 this power to transfer venue even if it lacks personal jurisdiction over the defendants).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 12.31*, *108.03[2]*, *108.143*.
- *Federal Litigation Guide P 3.60 et seq*.
- *Bender's Federal Practice Forms* Form Nos. 12:40, 12:41, 12:44, 12:45.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *28 U.S.C. § 1404* (change of venue).
- *28 U.S.C. § 1406* (cure or waiver of defects).
- *Fed. R. Civ. P. 12* (defenses and objections).

[2] Opposing Challenge to Personal Jurisdiction

In response to a defendant's motion to dismiss for lack of personal jurisdiction under *Fed. R. Civ. P. 12(b)*, the plaintiff must make a prima facie showing of proper jurisdiction by alleging facts that, if true, would support the court's exercise of personal jurisdiction over the defendant. *See Thomas v. Ashcroft, 470 F.3d 491, 495 (2d Cir. 2006)* (in order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists); *Mattel, Inc. v. Greiner & Hausser GmbH, 354 F.3d 857, 862 (9th Cir. 2003)* (plaintiff need make only a prima facie showing of jurisdiction to survive the motion to dismiss).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 12.31*, *108.143*.
- *Federal Litigation Guide P 3.63 et seq*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Chs. 2, 3, 12.
- *Fed. R. Civ. P. 12* (defenses and objections).
- *Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004)* (conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments



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Chapter 1 DETERMINING FORUM
PART F: DETERMINING WHETHER ACTION IS JUSTICIABLE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.48

§ 1.48 Checklist for Analyzing Issues of Justiciability

☐ Ascertain whether there is a case and controversy. *See § 1.49 below*.

☐ Ascertain whether plaintiff has standing to bring the action. *See § 1.50 below*.

- ○ Determine whether plaintiff meets constitutional requirements for standing. *See § 1.50 below*.
- ○ Determine whether plaintiff meets prudential requirements for standing. *See § 1.51 below*.

☐ Raise standing issue, if appropriate. *See § 1.52 below*.

☐ Ascertain whether the case is ripe for adjudication. *See § 1.53 below*.

- ○ Determine fitness for judicial review. *See § 1.53[1] below*.
- ○ Determine whether withholding judicial review will impose hardship. *See § 1.53[2] below*.
- ○ Determine whether substantial or real threat of immediate harm makes matter ripe for declaratory judgment. *See § 1.53[3] below*.

☐ Raise ripeness issue, if appropriate. *See § 1.54 below*.

☐ Ascertain whether the case has become moot. *See § 1.55 below*.

○ Determine whether case or controversy will remain live while litigation pending. *See § 1.55[1] below*.

○ If not, determine whether case meets exception to mootness doctrine. *See § 1.55[2] below*.

☐ Raise mootness issue, if appropriate. *See § 1.56 below*.

☐ Ascertain whether the court should decline jurisdiction because a political question is at issue. *See § 1.57 below*.

☐ Ascertain whether the court should abstain from exercising its jurisdiction. *See § 1.58 below*.

○ Determine whether *Pullman* abstention applies. *See § 1.58[1] below*.

○ Determine whether *Thibodaux* abstention applies. *See § 1.58[2] below*.

○ Determine whether *Burford* abstention applies. *See § 1.58[3] below*.

○ Determine whether *Colorado River* abstention applies. *See § 1.58[4] below*.

○ Determine whether first-to-file rule applies. *See § 1.58[5] below*.

☐ **Search By Topic:** Civil Procedure > Justiciability

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityGeneral OverviewCivil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedureJusticiabilityRipenessGeneral OverviewCivil ProcedureJusticiabilityStandingGeneral Overview



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Chapter 1 DETERMINING FORUM
PART F: DETERMINING WHETHER ACTION IS JUSTICIABLE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.49

§ 1.49 Determining Whether Plaintiff Meets General Requirements for Standing

Standing addresses who may bring a suit, or whether the plaintiff is a proper party to request an adjudication of a particular issue. *See Flast v. Cohen, 392 U.S. 83, 99, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)* (litigant will ordinarily not be permitted to assert the rights of absent third parties).

To qualify as a plaintiff with standing to litigate, a person must show an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent." *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (plaintiff must have suffered an "injury in fact," an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not "conjectural" or "hypothetical").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 12.31, 101.20* et seq.

- *Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* (an interest shared generally with public at large in proper application of the Constitution and laws will not confer standing).

- *United States v. Hacker, 565 F.3d 522, 526 (8th Cir. 2009)* (Eighth Circuit joined the majority of other circuits in holding that, in the absence of state involvement, a private party does not have standing to assert that the federal government is encroaching on state sovereign immunity in violation of the *Tenth Amendment*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureJusticiabilityStandingBurdens of ProofCivil ProcedureJusticiabilityStandingInjury in FactCivil ProcedureJusticiabilityStandingPersonal StakeCivil ProcedureJusticiabilityStandingThird Party Standing



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Chapter 1 DETERMINING FORUM
PART F: DETERMINING WHETHER ACTION IS JUSTICIABLE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.50

§ 1.50 Meeting Constitutional Requirements for Standing

[1] Showing Plaintiff Suffers "Injury in Fact"

The alleged injury must affect the plaintiff in a personal and individual way. *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (plaintiff must have suffered an "injury in fact," an invasion of a legally protected interest that is concrete and particularized). This injury must be "distinct and palpable." *See Whitmore v. Arkansas, 495 U.S. 149, 155-156, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)* (complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract, that can be traced to challenged action and is likely to be redressed by favorable decision); *see also Idaho Conservation League v. Mumma, 956 F.2d 1508, 1514 (9th Cir. 1992)* (personal--injury requirement of a plaintiff's standing will be met only if alleged harm is distinct and palpable and not abstract, conjectural, or hypothetical).

The alleged injury must be real and immediate, not conjectural or hypothetical. *See Gratz v. Bollinger, 539 U.S. 244, 284, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)* (an injury claim must be real and immediate); *O'Shea v. Littleton, 414 U.S. 488, 494, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)* (plaintiff's alleged injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical").

Warning:

A purely ideological interest is insufficient to confer standing. *See Diamond v. Charles, 476 U.S. 54, 67, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986)* (claim of conscientious objection does not provide judicially cognizable interest); *United States v. SCRAP, 412 U.S. 669, 687, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)* (person must be "adversely affected" or "aggrieved" to have standing, as opposed to having a mere interest in the problem). A plaintiff who alleges only a violation of others' rights does not have standing. *See Loritz v. United States Court of Appeals for the Ninth Circuit, 382 F.3d 990, 992 (9th Cir. 2004)* (plaintiff does not have standing when he did not allege a violation of a right personal to himself but, rather, a violation of others' rights).

[2] Showing Injury Traceable to Defendant

Standing requires that there be a direct causal connection between plaintiff's asserted injury and defendant's challenged

action. *See Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)* (standing requires that there be a direct causal connection between plaintiff's asserted injury and defendant's challenged action); *see also Whitmore v. Arkansas, 495 U.S. 149, 155-156, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)* (complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract, that can be traced to challenged action and is likely to be redressed by favorable decision); *Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1113 (9th Cir. 2002)* (in addition to injury in fact, to establish standing intervenors must show a causal connection between the injury and the conduct complained of and that the injury will likely be redressed by the relief requested).

[3] Showing Injury Is Redressable

Plaintiff must demonstrate that its injury is likely to be redressed by a favorable decision. *See Whitmore v. Arkansas, 495 U.S. 149, 155-156, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)* (complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract, that can be traced to challenged action and is likely to be redressed by favorable decision); *see also Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1113 (9th Cir. 2002)* (in addition to injury in fact, to establish standing intervenors must show a causal connection between the injury and the conduct complained of and that the injury will likely be redressed by the relief requested); *Adams v. Resolution Trust Corp., 927 F.2d 348, 354 (8th Cir. 1991)* (to satisfy case or controversy requirement of Article III of the Constitution, plaintiff's claimed injury must be redressable by a favorable judicial decision).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 101.22 et seq., 101.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureJusticiabilityStandingInjury in FactCivil ProcedureJusticiabilityStandingPersonal Stake



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.51

§ 1.51 Meeting Prudential Requirements for Standing

[1] Court Considers Prudential Concerns

In deciding whether standing exists, a court must consider prudential concerns in addition to the constitutional aspects of standing. *See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)* (federal judiciary adheres to set of prudential principles that bear on question of standing).

[2] Showing Alleged Injury Falls Within Protected "Zone of Interests"

In demonstrating that the prudential requirements for standing are met, the plaintiff must show the alleged injury falls within the "zone of interests" protected by the statute or constitutional provision at issue. *See Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517, 521, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991)* ; *see also Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1179 (9th Cir. 2000)* (prudential standing rule requires that plaintiff's alleged injuries must fall within the "zone of interests" protected by statute at issue). This prudential "zone of interests" test is relatively easy to satisfy, unless the party's interests are so marginally related to the statute or inconsistent with its purposes that it is unreasonable to assume that Congress intended standing. *See Clarke v. Securities Industry Association, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987)* ("zone of interests" denies right of review if plaintiff's interests are so marginally related to or inconsistent with purposes implicit in statute that it cannot reasonably be assumed that Congress intended to permit suit).

[3] Showing Complaint Raises More Than Abstract Questions

The plaintiff also must show the complaint raises more than abstract questions, amounting to generalized grievances that more appropriately would be resolved by the legislative and executive branches. *See Crist v. Commission on Presidential Debates, 262 F.3d 193, 195 (2d Cir. 2001)* ; *see also National Wildlife Federation v. Burford, 871 F.2d 849, 852 (9th Cir. 1989)* (injury cannot be general or amorphous harm but must be particular, distinct and concrete).

[4] Showing Plaintiff Asserting His or Her Own Legal Rights

The plaintiff must assert his or her own legal rights and interests, rather than those of third parties. *See Elk Grove*

Unified School District v. Newdow, 542 U.S. 1, 13-18, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) (it was improper for federal courts to entertain claim of the father whose standing to sue was founded on disputed family law rights); *Wasson v. Sonoma County Junior College, 203 F.3d 659, 663-664 (9th Cir. 2000)* (parties ordinarily are not permitted to assert constitutional rights other than their own).

An association has standing to sue on behalf of its members when:

1. Its members otherwise would have standing to sue in their own right;

2. The interests the association seeks to protect are germane to the organization's purpose; and

3. Neither the claim asserted nor the relief requested requires the participation of individual members.

See Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1119 (9th Cir. 2005) ; *Fraternal Order of Police v. United States, 152 F.3d 998, 1001 (D.C. Cir. 1998)* .

Prudential standing requirements are relaxed in *First Amendment* cases. *See Berner v. Delahanty, 129 F.3d 20, 24 (1st Cir. 1997)* (when *First Amendment* is in play, the Court will relax prudential limitations on standing to ameliorate the risk of washing away free speech protections).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 101.22 et seq., 101.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureJusticiabilityStandingPersonal StakeCivil ProcedureJusticiabilityStandingThird Party Standing



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Chapter 1 DETERMINING FORUM
PART F: DETERMINING WHETHER ACTION IS JUSTICIABLE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.52

§ 1.52 Raising Standing Issue

[1] Filing Motion to Dismiss

As an element of subject matter jurisdiction, the issue of standing may be raised by a motion to dismiss for lack of jurisdiction over the subject matter. *See Fed. R. Civ. P. 12(b)(1)*; *see also § 4.32 below* (bringing Rule 12(b) motions).

[2] Filing Motion for Summary Judgment

Standing may also be raised by a summary judgment motion. *See Fed. R. Civ. P. 56*; *Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)* (held motion for summary judgment based on lack of standing should have been granted); *see also §§ 9.21 -9.26 below* (summary judgment motions).

[3] Issue May Be Raised at Any Point in Proceedings

Because standing is part of the case or controversy requirement, it cannot be waived. Thus, the standing issue may be raised at any point in the proceedings. *See Fed. R. Civ. P. 12(h)(3)*; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)* (a plaintiff's standing is a jurisdictional matter and can be raised at any point); *Alexander v. Anheuser-Busch Cos., 990 F.2d 536, 538 (10th Cir. 1993)* (issue of standing is jurisdictional in nature; whether or not raised by the parties, the court is obligated to satisfy itself as to the court's own jurisdiction at every stage of the proceeding); *see also Friery v. Los Angeles Unified School District, 448 F.3d 1146, 1148-1149 (9th Cir. 2006)* (despite advanced stage of litigation, a party questioned plaintiff's standing, and as standing implicates Article III limitations on judicial power to decide a case, court had to address it before proceeding to merits).

[4] Meeting Burden of Proof on Standing Issue

The party invoking federal jurisdiction has the burden of establishing the elements of standing. *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (party invoking federal jurisdiction bears burden of establishing standing elements); *see also DH2, Inc. v. United States SEC, 422 F.3d 591, 596 (7th Cir. 2005)* (burden to establish standing is on party invoking federal jurisdiction); *Los Angeles County Bar Association v. Eu, 979 F.2d 697, 701 (9th Cir. 1992)* (party seeking to invoke the court's powers must carry the burden of showing that more

than "speculative inferences" connect the injury to the challenged action). To meet its burden, the litigant must clearly and specifically set forth facts sufficient to satisfy the Article III standing requirements. *See Whitmore v. Arkansas, 495 U.S. 149, 155-156, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)* ; *see also United States v. SCRAP, 412 U.S. 669, 688, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)* (plaintiff challenging agency action must allege that he or she has been or will in fact be perceptibly harmed by the challenged agency action, not that plaintiff can imagine circumstances in which plaintiff could be affected the agency's action).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 101.30 et seq.*
- *Bender's Federal Practice Forms* Form No. 12:12.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Chs. 3, 9.
- *Fed. R. Civ. P. 12* (defenses and objections).
- *Fed. R. Civ. P. 56* (summary judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureJusticiabilityStandingBurdens of ProofCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss



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Chapter 1 DETERMINING FORUM
PART F: DETERMINING WHETHER ACTION IS JUSTICIABLE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.53

§ 1.53 Determining Whether Matter Ripe for Adjudication

[1] Determining Fitness for Judicial Review

Unless a case is ripe, a court cannot be assured that the facts have been sufficiently developed and the matter is sufficiently concrete for the court to render a decision that will resolve the dispute and affect the parties' conduct. The ripeness doctrine therefore prevents courts from becoming entangled in purely abstract or theoretical disagreements. *See Abbott Labs. v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)* ; *see, e.g., NRDC v. Abraham, 388 F.3d 701, 704-707 (9th Cir. 2004)* (basic rationale of ripeness doctrine is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements); *see also Digital Props., Inc. v. Plantation, 121 F.3d 586, 589 (11th Cir. 1997)* (ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through review of potential or abstract disputes).

To constitute an actual case or controversy the issue involved must be "fit" for review. *See Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)* . Determining fitness for review entails considering whether the claim involves uncertain and contingent events that may not occur as anticipated or that may never occur at all. The court must also consider the finality of the issue presented for review, the definiteness of the threat of harm, and the extent to which resolution of the matter depends on facts not yet developed. *See Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726, 732-737, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998)* .

[2] Determining Whether Withholding Judicial Review Will Impose Hardship

In evaluating ripeness, courts will examine the hardship the parties would endure if consideration of the issue were withheld on grounds that the controversy was not ripe. *See Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726, 732-737, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998)* (in determining fitness for review, the court considers: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented).

Warning:

Mere uncertainty as to the validity of a regulation does not constitute hardship if it creates no adverse

legal effects. *See National Park Hospitality Ass'n v. DOI, 538 U.S. 803, 811-812, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003)* (mere uncertainty as to validity of legal rule did not constitute hardship for purposes of ripeness analysis).

[3] Applying Ripeness Doctrine to Actions for Declaratory Judgment

To ensure that a legitimate dispute exists between the parties in a declaratory judgment action, the parties must have adverse legal interests. *See Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941)* (basic question in determining whether there is "controversy" within meaning of Declaratory Judgment Act is whether facts alleged, under all circumstances, show that there is a substantial controversy between parties having adverse legal interests). However, the harm need not have already been committed; a substantial threat of real and immediate harm is sufficient. *See Travelers Insurance Co. v. Obusek, 72 F.3d 1148, 1154 (3d Cir. 1995)* (in appropriate circumstance, litigant can seek declaratory judgment when harm is threatened in future; however, plaintiff must demonstrate that probability of that future event occurring is real and substantial, of sufficient immediacy and reality to warrant issuance of a declaratory judgment); *see also Teva Pharmaceuticals USA, Inc. v. Novartis Pharmaceuticals Corp., 482 F.3d 1330, 1337 (Fed. Cir. 2007)* (doctrine of ripeness focuses on conduct of defendant to determine whether defendant's actions have harmed, are harming, or are about to harm a plaintiff).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 57.22[3], 101.70* et seq.
- *Fed. R. Civ. P. 57* (declaratory judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityRipenessGeneral OverviewCivil ProcedureJusticiabilityRipenessImminenceCivil ProcedureJusticiabilityRipenessRationaleCivil ProcedureJusticiabilityRipenessTests



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.54

§ 1.54 Raising Ripeness Issue

The question of ripeness, like other challenges to a court's subject matter jurisdiction, can be raised as a motion to dismiss under *Fed. R. Civ. P. 12(b)(1)*. It is the burden of the complainant to allege facts demonstrating the propriety of invoking judicial resolution of the dispute. *See Renne v. Geary, 501 U.S. 312, 316, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991)* (it is complainant's responsibility to allege facts clearly demonstrating that complainant is proper party to invoke judicial resolution of dispute and exercise of court's remedial powers). Federal courts can consider the question of ripeness sua sponte. *See Metropolitan Washington Airport Authority v. Citizens For Abatement of Airport Noise, 501 U.S. 252, 265 n.13, 111 S. Ct. 2298, 115 L. Ed. 2d 236 (1991)* (even if parties do not raise ripeness on appeal, it concerns federal court jurisdiction under Article III, so court must consider question on its own initiative).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 101.73.*
- *Bender's Federal Practice Forms* Form No. 57:11.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Fed. R. Civ. P. 12* (defenses and objections).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityRipenessGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsExhaustion of RemediesCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.55

§ 1.55 Determining Whether Matter Is Moot

[1] Determining Whether Case or Controversy Will Remain Live While Litigation Pending

Mootness addresses the issue of standing throughout the litigation, *i.e.*, the requisite personal interest required to establish standing at the outset of the action must continue during the entire time frame of the litigation. *See Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* (personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)); *see also Southern Oregon Barter Fair v. Jackson County, 372 F.3d 1128, 1133-1134 (9th Cir. 2004)* (to avoid mootness, court must determine that issues in case remain live and that parties continue to have legally cognizable interest in outcome throughout proceeding).

A controversy ceases to be real or definite when the issues are no longer "live," or the parties lack a legally cognizable interest in the outcome. *See Powell v. McCormack, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1961)* (case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome). A case is also moot if the court will not be able to grant effective relief. *See Burlington Northern Railroad Co. v. Crow Tribal Council, 940 F.2d 1239, 1244 (9th Cir. 1991)* (case becomes moot when court cannot grant effective relief, and where it is unlikely that the precise conditions of case could ever recur).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 101.90 et seq.*

[2] Determining Whether Case Falls Within Exception to Mootness Doctrine

[a] Acts Capable of Repetition, Yet Evading Review

Although a lawsuit may be technically moot, an exception to the mootness doctrine will be found if the defendant's conduct is capable of repetition, yet will evade review. *See Southern Oregon Barter Fair v. Jackson County, 372 F.3d 1128, 1133-1134 (9th Cir. 2004)* (underlying concern of mootness exception is that, when challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated, then it becomes impossible for the court to

grant any effectual relief whatever to the prevailing party). This exception applies only if the claim of the same litigant will evade review. *See Doe v. Madison School District No. 321, 177 F.3d 789, 797-798 (9th Cir. 1999)* (exception is limited to "extraordinary cases"). For this exception to apply, two elements must be present:

1. The challenged action is inherently too short in duration to be fully litigated before its cessation or expiration; and

2. There is a reasonable expectation that the plaintiff will again be subjected to the same action unless court intervention occurs.

See Unabom Trial v. United States District Court, 183 F.3d 949, 950 (9th Cir. 1999) (a dispute is capable of repetition if there is a reasonable expectation that the same complaining party would be subjected to the same action again; it is likely to evade review if the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration).

Warning:

This exception to mootness is narrow, applies only in exceptional circumstances, and only when both factors are present. *See Minnesota Humane Society v. Clark, 184 F.3d 795, 797 (8th Cir. 1999)* (exception extraordinarily narrow).

[b] Voluntary Cessation of Conduct

The voluntary cessation of the defendant's challenged activity does not moot the controversy unless there is no reasonable possibility the conduct will resume. *See Gluth v. Kangas, 951 F.2d 1504, 1507-1508 (9th Cir. 1991)* (after a long history of denying access to law library, defendant offered no reasonable assurance that alleged violations would not recur); *see also Buono v. Norton, 371 F.3d 543, 546 (9th Cir. 2004)* (mere voluntary cessation of allegedly illegal conduct does not moot case).

Whether the voluntary cessation of activity by a defendant can provide a basis for dismissing a case on mootness grounds turns on two key questions:

1. Whether the defendant is free to return to its "old ways"; and

2. Whether it is likely that the defendant will do so.

See Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 221-222, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000) (voluntary cessation of challenged conduct moots a case only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur, and the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness); *FTC v. Affordable Media, LLC, 179 F.3d 1228, 1237-1238 (9th Cir. 1999)* (standard for voluntary cessation exception is whether defendant is free to return to its illegal action at any time).

[c] Past Acts Having Present, Future or Collateral Consequences

Although a change in circumstances, an intervening event, an amendment to legislation, or a revision in policy may moot a claim in terms of the court's inability to undo or grant effective relief as to past acts or conditions, a case is not moot (and judicial review is still available) if those past acts have present, future, or collateral consequences that may be judicially addressed. *See Spencer v. Kemna, 523 U.S. 1, 13, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)* (once convict's sentence has expired, some concrete and continuing injury other than the now-ended incarceration or parole--some "collateral consequence" of the conviction--must exist if the suit is to be maintained); *Zegarra-Gomez v. INS, 314 F.3d*

1124, 1127 (9th Cir. 2003) (deportation did not moot case as alien continued to suffer actual collateral consequences from deportation).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 101.99.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedureJusticiabilityMootnessEvading Review ExceptionCivil ProcedureJusticiabilityMootnessPublic Interest ExceptionCivil ProcedureJusticiabilityMootnessReal Controversy RequirementCivil ProcedureJusticiabilityMootnessVoluntary Cessation Exception



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.56

§ 1.56 Raising Mootness Issue

As with other defects in subject matter jurisdiction, mootness may be raised at any stage of the litigation. *See In re Kurtzman, 194 F.3d 54, 58 (2d Cir. 1999)* (as with other defects in subject matter jurisdiction, mootness may be raised at any stage of the litigation).

The question of mootness, like other challenges to a court's subject matter jurisdiction, may be treated in a motion to dismiss under *Fed. R. Civ. P. 12(b)(1)*. It is the burden of the complainant to allege facts demonstrating the appropriateness of invoking judicial resolution of the dispute. *See Renne v. Geary, 501 U.S. 312, 316, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991)* (it is complainant's responsibility clearly to allege facts demonstrating that complainant is proper party to invoke judicial resolution of dispute and exercise of court's remedial powers).

Federal courts may raise the issue of mootness sua sponte. *See North Carolina v. Rice, 404 U.S. 244, 245, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971)* (question of mootness is federal jurisdictional question that federal court must resolve before it assumes jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 101.92, 101.101.*
- *Bender's Federal Practice Forms* Form No. 41:13.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Fed. R. Civ. P. 12* (defenses and objections).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.57

§ 1.57 Determining Whether Matter Raises Political Question

The political question doctrine requires federal courts to abstain from the review of constitutional claims that are more amenable to resolution by other branches of the federal government than by a judgment on the merits. *See Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)* (a court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded).

Prominent on the surface of any case held to involve a political question, the Supreme Court has found at least one of the following:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department;

2. A lack of judicially discoverable and manageable standards for resolving the issue;

3. The impossibility of deciding the issue without an initial policy determination of a kind clearly more appropriate for nonjudicial discretion;

4. The impossibility of a court's undertaking independent resolution of the issue without expressing lack of the respect due coordinate branches of government;

5. An unusual need for unquestioning adherence to a political decision already made; or

6. The potential for embarrassment from conflicting pronouncements by various departments on one question.

See Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) ; *see also Nixon v. United States, 506 U.S. 224, 228, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993)* (controversy is nonjusticiable--i.e., involves a political question--when there is a textually demonstrable constitutional commitment of issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it).

It is important to distinguish non-justiciable political questions from questions of compliance with the Constitution and other laws. *See Planned Parenthood Federation, Inc. v. Agency for International Development, 838 F.2d 649, 655-656 (2d Cir. 1988)* (while courts are not competent to formulate national policy or to review controversies that revolve around policy choices and value determinations constitutionally committed to though the limited review that the court undertakes may have an effect on foreign Congress or executive branch, it is a court's duty to determine whether political branches, in exercising their powers, have chosen a constitutionally permissible means of implementing that power); *see also DKT Memorial Fund, Ltd. v. Agency for International Development, 810 F.2d 1236, 1238 (D.C. Cir. 1987)* (whereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 101.110 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityPolitical QuestionsGeneral OverviewCivil ProcedureJusticiabilityPolitical QuestionsForeign AffairsCivil ProcedureJusticiabilityPolitical QuestionsNational SecurityCivil ProcedureJusticiabilityPolitical QuestionsSeparation of PowersCivil ProcedureJusticiabilityPolitical QuestionsTreaties



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.58

§ 1.58 Determining Whether Court Should Abstain from Hearing Case

[1] Applying *Pullman* Abstention Doctrine

Pullman abstention is appropriate when a case presents an uncertain question of state law and state law is susceptible of a construction that will either eliminate the need to decide the federal constitutional question altogether or materially alter the way in which the federal court will view that issue. *See Harris County Commissioners Court v. Moore, 420 U.S. 77, 84, 95 S. Ct. 870, 43 L. Ed. 2d 32 (1975)* ; *see also Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 501, 61 S. Ct. 643, 85 L. Ed. 971 (1941)* (in absence of any showing that methods for securing definitive ruling in state courts cannot be pursued with full protection of constitutional claim, district court should exercise its wise discretion by staying its hands).

A number of factors should inform the decision to abstain. Factors arguing against abstention include delay, cost, doubt as to the adequacy of state procedures for having the state-law question resolved, the existence of factual disputes, and the fact that the case has already been in litigation for a long time. Factors which might favor abstention include the availability of "easy and ample means" for determining the state-law question, the existence of a pending state court action that may resolve the issue, or the availability of a certification procedure, whereby the federal court can secure an expeditious answer. *See Duke v. James, 713 F.2d 1506, 1510 (11th Cir. 1983)* (*Pullman* abstention requires two elements: (1) an unsettled question of state law and (2) that question be dispositive of case and would avoid, or substantially modify constitutional question).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 120.22[1], [2].*
- *Bender's Federal Practice Forms* Form No. 12:220 et seq.

[2] Applying *Thibodaux* Abstention Doctrine

Thibodaux abstention is appropriate when a diversity case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case. *See Louisiana Power &*

Light Co. v. Thibodaux, 360 U.S. 25, 26, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959) (district court exercised fair and well-considered judicial discretion by abstaining on question concerning city's exercise of eminent domain, reflecting proper concern for maintenance of harmonious federal-state relations in a matter close to state's political interests); *see also Colorado River Water Conservation District v. United States, 424 U.S. 800, 814, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* (abstention is appropriate whene there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends result in case at bar). *Thibodaux* abstention is not appropriate if state law is clear. *See City of Tucson v. U.S. West Communications, Inc., 284 F.3d 1128, 1134 (9th Cir. 2002)* (federal district court, sitting in diversity and applying laws that have been addressed by state's highest court, is as competent to hear such a case as any state court).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 120.22[1], [3].*
- *Bender's Federal Practice Forms* Form No. 12:220 et seq.

[3] Applying *Burford* Abstention Doctrine

Burford abstention is designed to prevent federal courts from interfering with the proceedings or orders of state administrative agencies when timely and adequate state court review is available. *See Burford v. Sun Oil Co., 319 U.S. 315, 317-318, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)* (it is in public interest that federal courts should exercise their discretionary power to abstain from hearing a case with proper regard for rightful independence of state governments in carrying out their domestic policy).

Under the *Burford* doctrine, a federal court must decline to interfere with the orders or proceedings of state administrative agencies if either (1) there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" or (2) the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *See Dittmer v. County of Suffolk, 146 F.3d 113, 116 (2d Cir. 1998)* ; *see also New Orleans Public Services, Inc. v. Council of New Orleans, 491 U.S. 350, 361, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989)* (describing requirements for *Burford* abstention).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 120.22[1], [4].*
- *Bender's Federal Practice Forms* Form No. 12:220 et seq.

[4] Applying *Colorado River* Abstention Doctrine

A district court has discretion to abstain from exercising jurisdiction over an action when a concurrent state proceeding is pending, based on "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *See Colorado River Water Conservation District v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* , quoting *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183 (1952)* .

Factors to consider in deciding whether a federal court may abstain in favor of a parallel state action are:

1. The assumption of jurisdiction over any res or property;

2. The inconvenience of the federal forum;

3. The desirability of avoiding piecemeal litigation;

4. The order in which the concurrent forums obtained jurisdiction;

5. The source of the applicable law; and

6. The adequacy of protections in the state court to protect the federal plaintiff's rights.

See Colorado River Water Conservation District v. United States, 424 U.S. 800, 818, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) ; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 23-26, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)* ; *see also Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908, 913 (9th Cir. 1993)* (substantial doubt as to whether state proceedings will resolve federal action precludes stay).

No one factor is necessarily determinative. *See Colorado River Water Conservation District v. United States, 424 U.S. 800, 818, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* . Moreover, the weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 16, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)* (listing factors in addition to those of *Colorado River* doctrine that are relevant to abstention).

Warning:

A stay of proceedings based on the *Colorado River* doctrine is justified only in "exceptional circumstances," which are exceedingly rare. *See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* . The existence of a substantial doubt as to whether the state proceedings will resolve the federal action precludes *Colorado River* abstention. *See United States v. Pikna, 880 F.2d 1578, 1582 (2d Cir. 1989)* (if there is substantial doubt as to jurisdiction of state court to resolve related controversy, federal court may not properly grant the stay); *see also Smith v. Central Arizona Water Conservation District, 418 F.3d 1028, 1033 (9th Cir. 2005)* (existence of substantial doubt as to whether state proceedings will resolve federal action precludes the granting of a stay pursuant to *Colorado River*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 120.22[1], [6].*
- *Bender's Federal Practice Forms* Form No. 12:220 et seq.

[5] Applying First-to-File Rule

The first-to-file rule permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues already has been filed in another district court. *See Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93, 94-95 (9th Cir. 1992)* (normally sound judicial administration would indicate that when two identical actions are filed in courts of concurrent jurisdiction, court that first acquired jurisdiction should try lawsuit and no purpose would be served by proceeding with second action). The rule requires identity of the parties and issues. However, the two actions do not have to be identical for the rule to apply, provided they are "substantially similar." *See Cadle Co. v. Whataburger of Alice, 174 F.3d 599, 603 (5th Cir. 1999)* (under the first-to-file rule, when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases

substantially overlap); *see also Inherent.com v. Martindale-Hubbell, 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006)* (the "sameness" requirement of the first-to-file rule does not mandate that the two actions be identical, but is satisfied if they are substantially similar).

Exception:

A district court retains the discretion to depart from the rule when the filing of the first action shows bad faith or forum shopping, or when the first action was anticipatory. *See Alltrade, Inc. v. Uniweld Products, Inc., 946 F.2d 622, 628 (9th Cir. 1991)* (circumstances under which exception to first-to-file rule typically will be made include bad faith, anticipatory suit, and forum shopping). An action is "anticipatory" when it is an action for declaratory relief filed by a plaintiff with specific indications that a suit against it by the defendant is imminent and that is filed for the purpose of depriving that defendant of its choice of forum. *See Inherent.com v. Martindale-Hubbell, 420 F. Supp. 2d 1093, 1097-1098 (N.D. Cal. 2006)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 57.42[2][b].*
- *Bender's Federal Practice Forms* Form No. 12:210 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAbstentionConstitutional LawThe JudiciaryCase or ControversyConstitutional QuestionsAbstention



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Chapter 1 DETERMINING FORUM
PART G: DETERMINING VENUE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.59

§ 1.59 Checklist for Determining Venue

☐ Determine where the substantial part of events or omissions occurred and other factors bearing on the convenience of the forum. *See §§ 1.60, 1.63 below.*

☐ Consult applicable venue statute. *See § 1.61 below.*

- ○ General venue statute. *See § 1.61 below.*
- ○ Venue provided by statutes governing specific matters. *See §§ 1.65 -1.78 below.*

☐ Determine parties' residence. *See § 1.62 below.*

- ○ If class action, determine residence of class representative. *See § 1.64 below.*
- ○ If defendant is alien, file action in any district in which service of process is proper. *See § 1.66 below.*
- ○ If defendant is United States, or federal agency, official, or employee, file action in place of defendant's or plaintiff's residence or where substantial part of events or omissions occurred or where substantial amount of property at issue located. *See § 1.67 below.*
- ○ If defendant is foreign state, follow venue requirements of *28 U.S.C. § 1391(f). See § 1.68 below.*

☐ Determine whether case multiparty, multidistrict litigation. *See § 1.79 below*.

☐ Determine whether forum selection clause in contract. *See § 1.80 below*.

☐ Raise challenge to improper venue. *See § 1.84 below*.

☐ Determine whether to seek venue transfer based on convenience. *See § 1.81 below*.

- ○ Establish factors supporting transfer request. *See § 1.81[1] below*.
- ○ Establish standing to make transfer request. *See § 1.81[2] below*.
- ○ Determine whether transferor and transferee courts have jurisdiction. *See § 1.81[4] below*.
- ○ Make timely transfer request. *See § 1.81[3] below*.

☐ Decide choice of law after convenience transfer. *See § 1.82 below*.

- ○ Diversity cases. *See § 1.82[1] below*.
- ○ Federal question cases. *See § 1.82[2] below*.
- ○ Cases transferred based on forum selection clause. *See § 1.82[3] below*.

☐ Seek dismissal under forum non conveniens doctrine. *See § 1.85 below*.

- ○ Establish exceptional circumstances. *See § 1.85[1] below*.
- ○ Establish grounds to dismiss. *See § 1.85[3] below*.
- ○ Establish adequacy of alternative forum. *See § 1.85[4] below*.
- ○ Determine convenience of parties. *See § 1.85[5] below*.
- ○ Consider special venue provisions and forum selection clause, if applicable. *See § 1.81[7], [8] below*.
- ○ File timely motion to dismiss. *See § 1.85[2] below*.

- ○ Make timely transfer request. *See § 1.81[3] below*.

- ☐ Seek review of order to transfer venue. *See § 1.83 below*.

- ☐ **Search By Topic:** Civil Procedure > Venue

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueForum Non ConveniensCivil ProcedureVenueIndividual DefendantsCivil ProcedureVenueMultidistrict LitigationCivil ProcedureVenueSpecial Venue



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.60

§ 1.60 Determining Venue Under Federal Law

A venue determination decides whether an action may be heard in the court in which it was brought and is governed exclusively by federal law. *See Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 28, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)* (federal law, specifically *28 U.S.C. § 1404(a)*, governs the question of venue).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.01.*
- *Federal Litigation Guide P 3.80[1].*

Legal Topics:

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



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.61

§ 1.61 Applying General Venue Statute in Most Cases

The general venue statute governs venue of transitory actions "except as otherwise provided by law." *See 28 U.S.C. § 1391*; *see also Ely v. Smith, 764 F. Supp. 1413, 1415 (D. Kan. 1991)* ("under federal law, the true distinction between a local action and a transitory action is the distinction between an action *in rem* and one *in personam*").

When a civil action is based on diversity jurisdiction, the action may generally be brought:

1. Where any defendant resides if all defendants reside in the same state;

2. Where a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

3. Where any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district where the action may otherwise be brought.

See 28 U.S.C. § 1391(a), (c).

When a civil action is not based solely on diversity jurisdiction, the action may generally be brought:

1. Where any defendant resides if all defendants reside in the same state;

2. Where a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

3. Where any defendant may be found, if there is no district where the action may otherwise be brought.

See 28 U.S.C. § 1391(b), (c).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.02.*
- *Federal Litigation Guide P 3.80[1].*
- *28 U.S.C. § 1391* (venue generally).
- *Fed. R. Civ. P. 19* (joinder of persons needed for just adjudication).
- *Waeltz v. Delta Pilots Retirement Plan, 301 F.3d 804, 809 (7th Cir. 2002)* (in the general federal venue statute, Congress has defined the word "resides," in terms of a defendant's amenability to personal jurisdiction; in contrast, it has never defined the clause "may be found" in those terms).
- *Varsic v. United States District Court for Central District of California, 607 F.2d 245, 248 (9th Cir. 1979)* (district court of a district in which case is filed laying venue in the wrong division or district shall, if it be in the interest of justice, transfer such case to any district or division in which it could have been brought).
- *Anrig v. Ringsby United, 603 F.2d 1319, 1324 (9th Cir. 1978)* (in a suit based on both diversity and federal question jurisdiction, only district of proper venue is district where all defendants reside or district in which claim arose; non-resident, non-indispensable party should be dismissed out in order to preserve proper venue for remaining indispensable defendants, rather than dismissing entire action for lack of venue).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial Venue



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.62

§ 1.62 Determining Residence of Parties

[1] Determining Residence of Individuals

For purposes of venue, the residence of an individual is the same as the individual's permanent residence or legal domicile as used in determining diversity. *See Shaw v. Quincy Mining Co., 145 U.S. 444, 449, 12 S. Ct. 935, 36 L. Ed. 768 (1892)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.03[1].*

[2] Determining Residence of Aliens

Actions against aliens can be brought in any district in which personal jurisdiction exists. *See 28 U.S.C. § 1391(d).* Thus, suits against aliens are free from venue restrictions and are subject only to the requirements of personal jurisdiction and service of process. *See Brunette Machine Works, Ltd., v. Kockum Industries, Inc., 406 U.S. 706, 708, 92 S. Ct. 1936, 32 L. Ed. 2d 428 (1972)* (*28 U.S.C. § 1391(d)* provides that an alien may be sued in any district).

This rule applies to alien corporations as well as individuals. *See Brunette Machine Works, Ltd., v. Kockum Industries, Inc., 406 U.S. 706, 714, 92 S. Ct. 1936, 32 L. Ed. 2d 428 (1972)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.03[2].*
- *28 U.S.C. § 1391* (venue generally).

[3] Determining Residence of Public Officials

A civil action in which a defendant is an officer or employee of the United States or any of its agencies acting in an official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which:

1. A defendant in the action resides;

2. A substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

3. The plaintiff resides if no real property is involved in the action.

See 28 U.S.C. § 1391(e).

Merely maintaining an office in a judicial district does not make a federal agency a resident of that district for purposes of venue in a specific action. *See Reuben H. Donnelley Corp. v. Federal Trade Commission, 580 F.2d 264, 267 (7th Cir. 1978)* (nothing in 12 U.S.C. § 1391(e) or its legislative history suggests that Congress also sought to allow a federal agency to be sued wherever it may maintain an office).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.03[3].*
- *28 U.S.C. § 1391* (venue generally).

[4] Determining Residence of Domestic Corporations

[a] Defendant

A corporate defendant resides in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. If there is more than one judicial district in the state, a corporation is deemed to reside in any district in that state within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state. If there is no district that meets that criteria, it is deemed to reside in the district with which it has the most significant contacts. *See 28 U.S.C. § 1391(c).*

[B] Plaintiff

A corporate plaintiff's residence for venue purposes is limited to the state or states of its incorporation. *See Suttle v. Reich Bros. Construction Co., 333 U.S. 163, 166, 68 S. Ct. 587, 92 L. Ed. 614 (1948)* ("residence" of a corporation, within meaning of federal venue statutes, is only in state and district in which it has been incorporated); *see also Merchants Fast Motor Lines v. ICC, 5 F.3d 911, 921 (5th Cir. 1993)* (for venue purposes the residence of a corporate plaintiff, including a membership corporation, is the place of incorporation). This rule is in contrast to the rule for diversity jurisdiction, whereby a corporation is deemed to be a citizen of both the state of its incorporation and of its principal place of business. *See 28 U.S.C. § 1332(c)(1)*; *see also § 1.17 above.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.03[4].*
- *28 U.S.C. § 1332* (diversity jurisdiction).

- *28 U.S.C. § 1391* (venue generally).

[5] Determining Residence of Unincorporated Associations

Unincorporated associations are generally treated like corporations for purposes of determining proper venue. *See Denver & Rio Grande W. R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 556, 562, 87 S. Ct. 1746, 18 L. Ed. 2d 954 (1967)* (it most nearly approximates intent of Congress to recognize the reality of multi-state, unincorporated association such as labor union and to permit suit against that entity, like analogous corporate entity, wherever it is doing business); *see also Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 841-842 (9th Cir. 1986)* (residence of joint venture between two corporations was joint venture's principal place of business); *American Civil Liberties Union v. FCC, 774 F.2d 24, 26 (1st Cir. 1985)* (venue for an unincorporated association, like venue for a corporation, should be determined by looking to residence the association itself rather than that of its individual members).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.03[5].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueAgentsCivil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsCivil ProcedureVenuePartnershipsCivil ProcedureVenuePublic Officials



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.63

§ 1.63 Determining District Where Substantial Part of Events or Omissions Occurred

Venue is proper where a substantial part of the events or omissions giving rise to the claim occurred. *See 28 U.S.C. § 1391(a)(2), (b)(2).* The majority of the events need not have occurred in the district; the statute requires only that a substantial part of the events occurred in the district. *See Kelly v. Echols, 2005 U.S. Dist. LEXIS 37325, at *37 (E.D. Cal. 2005)* , citing *Pecoraro v. Sky Ranch for Boys, Inc., 340 F.3d 558, 563 (8th Cir. 2003)* (it is not necessary that majority of events occurred in district where suit is filed, that events in that district predominate, or that chosen district is "best venue"; rather plaintiffs must show that a "substantial part" of events giving rise to their claims occurred in chosen district).

The determination of what constitutes a "substantial part" takes into consideration the purpose of the venue statute. *See Myers v. Bennett Law Offices, 238 F.3d 1068, 1075-1076 (9th Cir. 2001)* (substantiality of the operative events is determined by assessment of their ramifications for efficient conduct of suit).

The court must focus on the activities of the defendant rather than those of the plaintiff for venue purposes. *See Woodke v. Dahm, 70 F.3d 983, 985 (8th Cir. 1995)* (in determining venue based on events or omissions giving rise to claim, Congress meant to require courts to focus on relevant activities of defendant, not of plaintiff).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.04.*
- *28 U.S.C. § 1391* (venue generally).

Legal Topics:

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



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§ 1.64 Determining Venue for Class Actions

In class actions, venue is determined by the residence of the class representative. Thus, venue is proper if it is proper with respect to the named defendants without regard to unnamed class members. *See, e.g., United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1129 (2d Cir. 1974)* (in class actions where venue is governed by *28 U.S.C. § 1391*, the rule is that only the residence of the named parties is relevant for determining whether venue is proper); *see also* Ch. 7 *below* (general discussion of class actions).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.07.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMultiparty LitigationCivil ProcedureClass ActionsGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.65

§ 1.65 Determining Venue in Actions Removed to Federal Court

The removal statute governs the venue of an action removed from state court to federal court. The statute provides that the action may be removed to the district court and division that encompasses the place where the action is pending. *See 28 U.S.C. § 1441(a)*; *see also Polizzi v. Cowles Magazines, Inc., 345 U.S. 663, 665-666, 73 S. Ct. 900, 97 L. Ed. 1331 (1953)* (proper venue of removed action is district court of United States for the district and division embracing the place where such action is pending). *See also* Ch. 2 *below* (general discussion of removal).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.08.*
- *28 U.S.C. § 1441* (actions removable generally).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalElementsFederal VenueCivil ProcedureVenueGeneral Overview



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§ 1.66 Determining Venue in Actions Against Aliens

An action against an alien may be brought in any district, provided that service of process is proper. *See Brunette Machine Works, Ltd. v. Kockum Industries, Inc., 406 U.S. 706, 708, 92 S. Ct. 1936, 32 L. Ed. 2d 428 (1972)* (*28 U.S.C. § 1391(d)* provides that an alien may be sued in any district). The venue statute regarding aliens applies to alien corporations as well as individuals. *See Brunette Machine Works, Ltd. v. Kockum Industries, Inc., 406 U.S. 706, 714, 92 S. Ct. 1936, 32 L. Ed. 2d 428 (1972)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.30.*
- *Brunette Machine Works, Ltd., v. Kockum Industries, Inc., 406 U.S. 706, 708, 92 S. Ct. 1936, 32 L. Ed. 2d 428 (1972)* .

Legal Topics:

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



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.67

§ 1.67 Determining Venue in Actions Against United States, United States Agency, or United States Officials or Employees

[1] Finding Venue Proper in Several Districts

Venue is proper in an action against the United States, an agency of the United States, or an official or employee of the United States on a claim against such official or employee acting in his or her official capacity:

1. In any judicial district where a defendant in the action resides;

2. In any judicial district where a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

3. In any judicial district where the plaintiff resides if no real property is involved in the action.

See 28 U.S.C. § 1391(e); *see also* *Stafford v. Briggs, 444 U.S. 527, 534-535, 100 S. Ct. 774, 63 L. Ed. 2d 1 (1980)* (Section 2 of the Mandamus and Venue Act of 1962, codified at *28 U.S.C. § 1391(e)*, provides an expanded choice of venue and authorizes service by certified mail on federal officers or agencies located outside the district in which such a suit is filed).

Warning:

This venue statute applies only to actions against the executive branch and does not apply to actions for damages that could be recovered against the official or employee personally. *See* *Kreines v. United States, 33 F.3d 1105, 1108 (9th Cir. 1994)* .

Exception:

Venue is proper for contract claims for amounts not exceeding $10,000 against the United States pursuant to *28 U.S.C. § 1346(a)* in the district where plaintiff resides. *See 28 U.S.C. § 1402(a)*. Contract claims for amounts exceeding $10,000 against the United States must be brought in the United States Court of Federal Claims. *See 28 U.S.C. § 1491*.

Exception:

An action under the Federal Tort Claims Act may be brought in the judicial district where the plaintiff resides or the act or omission giving rise to the claim occurred. *See 28 U.S.C. § 1402(b).*

[2] Establishing Residence

The residence of a defendant federal official for venue purposes is deemed to be the place where he or she performs his or her official duties. *See Neville v. Dearie, 745 F. Supp. 99, 102 (N.D.N.Y. 1990)* (federal officers can have only one official residence for purposes of venue, and this residence is defined as the place where federal officials perform their official duties).

When venue is based on the plaintiff's residence, only one plaintiff needs to reside in the district in which the action is brought for venue to be proper. *See Exxon Corp. v. FTC, 588 F.2d 895, 899 (3d Cir. 1978)* (no requirement that all plaintiffs reside in forum district).

[3] Allowing Nationwide Service of Process

Nationwide service of process by mail is permitted in an action against an officer or agent of the United States. *See 28 U.S.C. § 1391(e).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.31.*
- *28 U.S.C. § 1346* (United States as defendant).
- *28 U.S.C. § 1391* (venue generally).
- *28 U.S.C. § 1402* (United States as defendant).
- *28 U.S.C. § 1491* (claims against United States generally).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenuePublic Officials



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.68

§ 1.68 Determining Venue in Actions Against Foreign States

Venue for an action against a foreign state, its political subdivisions, agencies or instrumentalities may be:

1. In any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

2. In any judicial district in which a vessel or cargo of a foreign state is situated in an action to enforce a maritime lien when it is based on a commercial activity of the foreign state;

3. In any judicial district in which an agency or instrumentality is licensed to do business or is doing business, if the action is brought against the agency or instrumentality of a foreign state as defined in *28 U.S.C. § 1603(b)*; or

4. In the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

See 28 U.S.C. § 1391(f); *see also U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 153 (2d Cir. 2001)* (civil action against foreign state may be brought in any judicial district in which substantial part of events or omissions giving rise to claim occurred).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.32.*
- *28 U.S.C. § 1391(f)* (venue generally--foreign state).

Legal Topics:

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



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§ 1.69 Determining Venue in Actions Against Closed Banks Administered by FDIC

Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver, must be brought within the district in which the association's principal place of business is located. *See 12 U.S.C. § 94*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.33[2].*
- *12 U.S.C. § 94* (action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial Venue



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§ 1.70 Determining Venue in Interpleader Actions

An action of interpleader under *28 U.S.C. § 1335* may be brought in a judicial district in which one or more of the claimants reside. *See 28 U.S.C. § 1397*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.36*.
- *28 U.S.C. § 1335* (interpleader).
- *28 U.S.C. § 1397* (interpleader).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticePleadingsImpleader



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§ 1.71 Determining Venue in Copyright Actions

An action arising under federal statute relating to copyright may be brought in a judicial district in which:

1. The defendant or his or her agent resides; or

2. The defendant or his or her agent is subject to personal jurisdiction.

See 28 U.S.C. § 1400(a); *see also VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1584 (Fed. Cir. 1990)* (*28 U.S.C. § 1400(b)* is a special venue statute applicable, specifically, to all defendants in a particular type of actions, *i.e.*, patent infringement actions).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.39[1], [2].*
- *Nimmer on Copyright § 12.01.*
- *28 U.S.C. § 1400* (patents and copyrights, mask works, and designs).
- *Milwaukee Concrete Studios v. Fjeld Mfanufacturing Co., 8 F.3d 441, 447 (7th Cir. 1993)* (copyright venue statute required that defendant's amenability to personal jurisdiction must relate to the judicial district where the action was filed).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial VenueCopyright LawCivil Infringement ActionsJurisdiction & VenueVenue



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§ 1.72 Determining Venue in Patent Actions

An action for patent infringement may be brought in a judicial district where:

1. The defendant resides; or

2. The defendant committed acts of infringement and has a regular and established place of business.

See 28 U.S.C. § 1400(b).

An action against a corporate infringer may be brought wherever personal jurisdiction may be obtained over the infringer. *See 28 U.S.C. § 1391(c)*; *see also Trintec Industries v. Pedre Promotional Products, 395 F.3d 1275, 1280 (Fed. Cir. 2005)* (venue in a patent action against a corporate defendant exists wherever there is personal jurisdiction; therefore, no separate venue inquiry is necessary).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.39[1], [3].*
- *Chisum on Patents* § 21.02.
- *28 U.S.C. § 1391* (venue generally).
- *28 U.S.C. § 1400* (patents and copyrights, mask works, and designs).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueSpecial VenuePatent LawJurisdiction & ReviewPersonal Jurisdiction & VenueGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.73

§ 1.73 Determining Venue in Shareholder's Derivative Action

An action by a stockholder on behalf of his or her corporation may be brought in any judicial district in which the corporation might have sued the same defendants. *See 28 U.S.C. § 1401.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.40.*
- *28 U.S.C. § 1401* (stockholder's derivative action).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureClass ActionsDerivative ActionsGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.74

§ 1.74 Determining Venue in Antitrust Actions

An antitrust action under the Clayton Act may be brought in any district where:

1. The defendant resides;

2. The defendant is found;

3. The defendant has an agent; or

4. A corporate defendant transacts business.

See 15 U.S.C. §§ 15(a), 22.

In addition, venue is proper in any district permitted by the general venue statute. *See 28 U.S.C. § 1391*; *see also Go-Video, Inc. v. Akai Electric Co., 885 F.2d 1406, 1409 (9th Cir. 1989)* (as general matter, courts have interpreted special venue provisions to supplement, rather than preempt, general venue statutes).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.45.*
- *Antitrust Laws and Trade Regulation (2d ed.)* § 163.01.
- *15 U.S.C. § 15* (suits by persons injured).
- *15 U.S.C. § 22* (district in which to sue corporation).
- *28 U.S.C. § 1391* (venue generally).

- *Delong Equipment Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 855 (11th Cir. 1988)* (in a federal antitrust case, venue may be established under § 4 of the Clayton Act, *15 U.S.C. § 15*, *§ 12* of the Clayton Act, *15 U.S.C. § 22*, or the general federal venue statute, *28 U.S.C. § 1391(b)*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawClayton ActJurisdiction & VenueAntitrust & Trade LawPrivate ActionsGeneral OverviewAntitrust & Trade LawSherman ActGeneral OverviewCivil ProcedureVenueSpecial Venue



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.75

§ 1.75 Determining Venue in Civil Rights Actions

The general venue statute is not applicable to actions under the Civil Rights Act of 1964. *See Johnson v. Payless Drug Stores NW, Inc., 950 F.2d 586, 587-588 (9th Cir. 1991)* (given conflict between *42 U.S.C. § 2000e-5(f)(3)* and *28 U.S.C. § 1391(b)*, well settled principles of statutory construction dictate that later, specific venue provision, § 2000e-5(f)(3), applies rather than earlier, general venue provision, § 1391(b)).

An action under the Civil Rights Act of 1964 may be brought in any judicial district where the defendant is found, or where:

1. The employment records relevant to an unlawful employment practice are maintained and administered; or

2. The aggrieved person would have worked but for an alleged unlawful employment practice.

See 42 U.S.C. § 2000e-5(f)(3); *see also Passantino v. Johnson & Johnson Consumers Products, Inc., 212 F.3d 493, 506 (9th Cir. 2000)* (Title VII authorizes suit in any judicial district in the state in which the unlawful employment practice is alleged to have been committed as well as in district where employment records are kept, in district where plaintiff would have worked but for alleged unlawful practice, and, if those provisions fail to provide forum, in district where defendant keeps its principal office).

Venue is also proper "in any judicial district in the State in which the unlawful employment practice is alleged to have been committed." *See 42 U.S.C. § 2000e-5(f)(3)*. Because of this special provision for state-wide venue, a plaintiff's choice of forum is entitled to greater deference before an intrastate transfer when venue is based on allegations of unlawful employment practices that occurred in the state, but not in the district where the suit was filed. *See Ellis v. Costco Wholesale Corp., 372 F. Supp. 2d 530, 538 (N.D. Cal. 2005)* (plaintiff's choice of forum is entitled to greater deference when case arises under Title VII).

If the defendant is not found in any of the listed districts, the action may be brought in the judicial district in which the principal office of the defendant is located. *See 42 U.S.C. § 2000e-5(f)(3)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.47.*
- *42 U.S.C. § 2000e-5(f)(3)* (venue in actions under Civil Rights Act of 1964).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial VenueCivil Rights LawPractice & ProcedureGeneral OverviewCivil Rights LawSection 1983 ActionsGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.76

§ 1.76 Determining Venue in RICO Actions

An action under the Racketeer Influenced and Corrupt Organization Act (RICO) may be brought in any district in which the defendant:

1. Resides;

2. Is found;

3. Has an agent; or

4. Transacts his or her affairs.

See 18 U.S.C. § 1965(a).

A corporation is "found" in a district for purposes of the RICO venue provision if its officers and agents are present and carrying on the corporation's business within the district. *See Caldwell v. Palmetto State Savings Bank, 811 F.2d 916, 918 (5th Cir. 1987)* (*18 U.S.C. § 1965(a)* provides, any civil action or proceeding under this chapter against any person may be instituted in district court of United States for any district in which such person resides, is found, has an agent, or transacts his affairs); *see also Luten Clarey Stern, Inc., v. Randolph & Hein, Inc., 1991 U.S. Dist. LEXIS 6123, at *2 (S.D.N.Y. 1991)* (a corporation is "found" in a district for purposes of this venue provision if its officers and agents are present and carrying on the corporation's business within the district).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.60.*
- *Civil Rico § 6.01.*
- *18 U.S.C. § 1965(a)* (venue for RICO actions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial VenueCriminal Law & ProcedureCriminal OffensesRacketeeringRacketeer Influenced & Corrupt OrganizationsGeneral OverviewSecurities LawLiabilityRICO ActionsGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.77

§ 1.77 Determining Venue in ERISA Actions

An action under the Employee Retirement Income Security Act (ERISA) may be brought in any district where:

1. The plan is administered;

2. The violation occurred;

3. The plan administrator resides or does business;

4. Any plan asset is located; or

5. Where the defendant resides or may be found.

See 29 U.S.C. § 1370(c); *see also Waeltz v. Delta Pilots Retirement Plan, 301 F.3d 804, 808 (7th Cir. 2002)* (venue provision of Title I of ERISA allows plaintiffs to lay venue where plan is administered, where breach took place, or where defendant resides or may be found).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.49.*
- *29 U.S.C. § 1370(c)* (venue in ERISA actions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial VenuePensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Civil Claims & RemediesVenue



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.78

§ 1.78 Determining Venue in Actions Under Securities Exchange Act of 1934

An action under the Securities Exchange Act of 1934 may be brought in any judicial district where the violation occurred; or where the defendant:

1. Is found;

2. Is an inhabitant; or

3. Transacts business.

See 15 U.S.C. § 78aa.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.60.*
- *15 U.S.C. § 78aa* (jurisdiction of offenses and suits).
- *Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F.3d 1255, 1257 (5th Cir. 1994)* (*15 U.S.C. § 78aa* provides venue in which action under the Securities Exchange Act of 1934 may be brought).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueSpecial VenueSecurities LawAdditional Offerings & the Securities Exchange Act of 1934Jurisdiction & ScopeGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.79

§ 1.79 Determining Venue in Multiparty, Multiforum Cases

Multiparty, multiforum cases involving accidental death to at least 75 persons may be brought in any district where:

1. Any defendant resides; or

2. A substantial part of the accident occurred.

See 28 U.S.C. § 1369(a).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.32A.*
- *28 U.S.C. § 1369* (multiparty, multiforum jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMultidistrict LitigationCivil ProcedureVenueMultiparty Litigation



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.80

§ 1.80 Enforcing Forum Selection Clauses

[1] Applying General Rule

Forum selection clauses requiring an action on a contract to be brought in a specific forum are prima facie valid and ordinarily will be enforced. *See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8-20, 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 the resisting party to be "unreasonable" under the circumstances); *see also Carnival Cruise Lines v. Shute, 499 U.S. 585, 590-594, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)* (including reasonable forum clause in form contract well may be permissible and in a case in admiralty, federal law governs the enforceability of forum-selection clause).

Warning:

An action brought in a forum other than the one contractually agreed on may be dismissed. *See Carnival Cruise Lines v. Shute, 499 U.S. 585, 590-594, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)* . The party opposing the application of the forum selection clause bears a heavy burden of proof. *See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)* ; *see, e.g., Batchelder v. Kawamoto, 147 F.3d 915, 919 (9th Cir. 1998)* (to defeat forum selection clause, party must show it was product of fraud or coercion). Further, a forum selection clause will not be enforced if it is invalid or enforcement would be unreasonable and unjust, *e.g.*, if the inclusion of that clause in the contract was the product of fraud or coercion. *See Marano Enters. of Kan. v. Z-Teca Rests., L.P., 254 F.3d 753, 757 (8th Cir. 2001)* ; *see also Preferred Capital, Inc. v. Associates in Urology, 453 F.3d 718, 722 (6th Cir. 2006)* (valid forum selection clause must not be the product of fraud or overreaching).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 110.01[4][b].*
- *Federal Litigation Guide P 3.80[3].*

[2] Challenging Enforceability of Forum Selection Clauses

Forum selection clauses will not be enforced in any of the following circumstances:

1. The clause is not fundamentally fair. *See Carnival Cruise Lines v. Shute, 499 U.S. 585, 595, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)* , *see, e.g., Batchelder v. Kawamoto, 147 F.3d 915, 919 (9th Cir. 1998)* (adhesion contract may be enforceable if not unreasonable or fundamentally unfair);

2. The clause was obtained through fraud or overreaching. *See Carnival Cruise Lines v. Shute, 499 U.S. 585, 590-594, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)* ; *see, e.g., Batchelder v. Kawamoto, 147 F.3d 915, 919 (9th Cir. 1998)* (to find it unenforceable, party must show that inclusion of forum clause was product of fraud or coercion);

3. The clause violates a strong public policy of the forum. *See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)* (contractual choice of forum clause should be held unenforceable if enforcement would contravene strong public policy of forum in which suit is brought); *see also Jones v. GNC Franchising, Inc., 211 F.3d 495, 497 (9th Cir. 2000)* (forum selection clause unenforceable because it contravened state's strong public policy against such provisions);

4. The clause is not enforceable under governing contractual law. *See Laxmi Investments, LLC v. Golf USA, 193 F.3d 1095, 1097 (9th Cir. 1999)* (forum selection clause not enforceable absent meeting of minds); or

5. Enforcement of the clause would require litigation in a seriously inconvenient forum so as to deprive a party of a meaningful day in court. *See Carnival Cruise Lines v. Shute, 499 U.S. 585, 594, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)* (plaintiffs not deprived of day in court because there was no evidence in the record to indicate that they were physically and financially incapable of pursuing litigation in the chosen forum).

Circuit Split:

Circuits are split as to the standard of review of a refusal to enforce a forum selection clause. *See, e.g., De Energia Electrica de P.R. v. Ericsson, Inc., 201 F.3d 15, 18 (1st Cir. 2000)* (applying de novo standard of review); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 280 n.4 (9th Cir. 1984)* (applying abuse-of-discretion standard of review).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.04[3].*
- *Federal Litigation Guide P 3.80[3].*

[3] Comparing Mandatory and Permissive Forum Selection Clauses

A mandatory forum selection clause designates the exclusive forum in which an action on the contract must be brought. *See American Soda, LLP v. U.S. Filter Wastewater Group, Inc., 428 F.3d 921, 926-927 (10th Cir. 2005)* (mandatory forum selection clause designates exclusive forum in which action on contact must be brought). A challenge to venue of an action filed in the forum designated by a mandatory forum selection clause will not be successful unless the clause is fundamentally unfair. *See Carnival Cruise Lines v. Shute, 499 U.S. 585, 590-594, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)* (forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness).

A permissive forum selection clause provides that a particular forum will have jurisdiction for any action on the contract, but does not state that such jurisdiction is exclusive. *See Dunne v. Libbra, 330 F.3d 1062, 1064 (8th Cir. 2003)* (permissive forum selection clause provides that a particular forum will have jurisdiction for any action on the contract, but does not state that such jurisdiction is exclusive). An action brought in a forum designated in a permissive forum selection clause may be successfully challenged on the basis of convenience to the parties and witnesses. *See Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987)* (forum selection clause can be challenged based on evidence of fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in selected forum so as to deprive that party of a meaningful day in court); *National Union Fire Insurance Co. v. DDJM Partnership, 1987 U.S. Dist. LEXIS 2709, at *6-*9 (S.D.N.Y. 1987)* (compared to a mandatory forum selection clause, a permissive forum selection clause may be successfully challenged on the basis of convenience to the parties and witnesses).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.04[4].*

[4] Seeking Dismissal Based on Forum Selection Clause

Defendants may seek dismissal of a case that has been filed in derogation of a forum selection clause by:

1. Dismissal sought pursuant to a *Fed. R. Civ. P. 12(b)(1)* motion for lack of subject matter jurisdiction. *See AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148, 152 (2d Cir. 1984)* (contractual choice-of-forum clause is held unenforceable if enforcement would contravene strong public policy of forum in which suit is brought, whether declared by statute or by judicial decision); *see also § 4.32 below*; or

2. Dismissal for improper venue under *Fed. R. Civ. P. 12(b)(3)* granted on the basis of a forum selection clause. *See Argueta v. Banco Mexicano, SA, 87 F.3d 320, 324 (9th Cir. 1996)* (court treated party's challenge to forum selection clause as Rule 12(b)(3) motion to dismiss for improper venue); *see also § 4.32 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.04[4][c].*
- *Federal Litigation Guide P 3.80[3].*
- *Bender's Federal Practice Forms* Form No. 12:60.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Chs. 3, 4.
- *Fed. R. Civ. P. 12* (defenses and objections).

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawShippingRegulations & StatutesCarriage of Goods by Sea ActChoice of LawCivil ProcedureVenueGeneral OverviewComputer & Internet LawInternet BusinessContractsInternational ContractsContracts

LawContract Conditions & ProvisionsForum Selection ClausesCopyright LawCivil Infringement ActionsJurisdiction & VenueVenue



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.81

§ 1.81 Transferring Venue for Convenience

[1] Establishing Factors That Support Request for Transfer

When a plaintiff brings an action in a district court with proper venue, the court may, upon proper motion, or consent, transfer the action to any other district (or division within a district) in which the action may have originally been brought provided the moving party establishes that the transfer promotes:

1. The convenience of the parties and witnesses; and

2. The interest of justice.

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 a change of venue within the federal judicial system, and provides that for convenience of parties and witnesses, in interest of justice, district court may transfer any civil action to any other district or division where it might have been brought).

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).

In addition to these three factors expressly set forth in the transfer statute, the courts consider a variety of additional factors thought to have a bearing on the determination, including:

1. The plaintiff's original choice of forum. *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). However, the plaintiff's choice is given less deference when it has little connection to the action. *See 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). Furthermore, the presumption in favor of a plaintiff's choice of forum has little weight in a forum non conveniens analysis when the plaintiff is a foreign citizen and the defendant wants to be sued on the plaintiff's home turf. *See Abad v. Bayer Corp., 563 F.3d 663, 666-667 (7th Cir. 2009)* (when plaintiff is suing far from home, it is less reasonable to assume that the chosen forum is a convenient one);

2. Where the 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);

3. The 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)* (one factor considered in deciding on venue transfer based on convenience is availability of compulsory process to compel the attendance of unwilling witnesses);

4. The location of the 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);

5. The relative court congestion in the two forums. *See Parsons v. Chesapeake & Ohio Railway 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);

6. The relative familiarity of the courts with the applicable law. *See Scottish Air International 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); and

7. Existence of a forum selection clause. *See Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 325 (9th Cir. 1996)* (forum selection clauses are prima facie valid and should not be set aside unless the party challenging enforcement of such a provision can show it is "unreasonable" under the circumstances).

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 a derivative suit or represents a class, the named plaintiff's choice of forum is given less weight); *but see Aloft Media, LLC v. Adobe Systems Inc., 2008 U.S. Dist. LEXIS 23601, at *6-*7 (E.D. Tex. 2008)* (plaintiff's choice of forum is not conclusive or determinative and should not be given elevated status). The convenience of non-party witnesses is an important factor. *In re Commonwealth Oil Refining Co., 596 F.2d 1239, 1247 (5th Cir. 1979)* (one factor in determining whether a venue transfer is convenient is the proximity of the witnesses); *see also Saleh v. Titan Corp., 361 F. Supp. 2d 1152, 1165 (S.D. Cal. 2005)* (convenience of witnesses factor weighed heavily in favor of transfer).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.10 et seq.*
- *Bender's Federal Practice Forms* Form Nos. 12:64, 12:65.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1404* (change of venue).

[2] Establishing Standing to Move for Convenience Transfer

The defendant's motion to transfer venue should establish, by declaration or affidavit, that the proposed transferee forum is more convenient based on 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, PLC 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).

A plaintiff may move to change venue 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)* .

Warning:

A court may, on its own motion, transfer an action based on convenience and 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)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.16.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.

[3] Moving for Transfer in a Timely Manner

The defendant should move for a transfer either before or with 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).

No limit restricts the time 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 and 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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.17.*

- *Bender's Federal Practice Forms* Form Nos. 12:64, 12:65.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.

[4] Establishing Transferor and Transferee Courts Have Proper Venue, Subject Matter Jurisdiction, and Personal Jurisdiction

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). However, a court may grant such a transfer 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 the transfer of cases whether the court in which it is filed has personal jurisdiction over the defendants or not).

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.*

The proposed transferee court must have proper venue under applicable venue statutes at the time the action was originally filed. The transferee court must also have subject matter jurisdiction. *See Hoffman v. Blaski, 363 U.S. 335, 343-344, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* .

The transferee court's right to exercise personal jurisdiction must exist 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 District Court, 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, 343-44, 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).

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)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 111.12, 111.14.*
- *28 U.S.C. § 1631* (transfer to cure want of jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueFederal Venue

TransfersConvenience TransfersCivil ProcedureVenueForum Non Conveniens



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.82

§ 1.82 Deciding Choice of Law After Convenience Transfer to Another Venue

[1] Deciding Choice of Law in Diversity Cases

Following a transfer for convenience pursuant to *28 U.S.C. § 1404(a)* in a diversity case, the transferee court ordinarily will apply the law of the state of the transferor court, including applicable choice of law rules. *See Van Dusen v. Barrack, 376 U.S. 612, 627, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* (where the defendants seek transfer, the transferee district court must apply the state law that would have been applied if there had been no change of venue); *see also Ferens v. John Deere Co., 494 U.S. 516, 524-527, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* (following transfer under *28 U.S.C. § 1404(a)* initiated by a defendant, transferee court must follow choice-of-law rules that prevailed in transferor court). However, if the transferor court following a convenience transfer in a diversity case lacked personal jurisdiction over the defendant, then the transferee court must apply the law of the state of the transferee court. *See Muldoon v. Tropitone Furniture Co., 1 F.3d 964, 967 (9th Cir. 1993)* (in cases transferred due to lack of personal jurisdiction, law of transferee district, including its choice-of-law rules, is applicable).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.02[2][c].*
- *28 U.S.C. § 1404* (change of venue).

[2] Deciding Choice of Law in Federal Question Cases

After a transfer for convenience pursuant to *28 U.S.C. § 1404(a)* in a federal question case, the transferee court ordinarily applies the law as interpreted by its own circuit. *See Wilborn v. Department of Health & Human Services, 49 F.3d 597, 600 (9th Cir. 1994)* (after § 1404(a) transfer, transferee court is bound only by its circuit's precedent); *see also Newton v. Thomason, 22 F.3d 1455, 1460 (9th Cir. 1994)* (transferee court should apply own circuit precedent to federal claim under Lanham Act, not precedent that transferor court would have applied).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.02[2][c].*

- *28 U.S.C. § 1404* (change of venue).

[3] Deciding Choice of Law in Cases Transferred Based on Forum Selection Clause

After a transfer for convenience pursuant to *28 U.S.C. § 1404(a)* based on a forum selection clause, the transferee court should apply the law of the state in which it sits if the law of the state of the transferor court would have required dismissal of the action on the basis of the forum selection clause; however, if the transferor state would not have dismissed the action, the transferee court must apply the law of the transferor state. *See Caribbean Wholesales & Services Corp. v. U.S. JVC Corp., 855 F. Supp. 627, 631 (S.D.N.Y. 1994)* (when case is transferred based on forum selection clause, transferee federal district court applies law of the state in which it sits if state courts of transferor state would have dismissed action for forum non conveniens, but apply law of transferor state if action would not have been dismissed).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.02[2][c].*

- *28 U.S.C. § 1404* (change of venue).

- *Van Dusen v. Barrack, 376 U.S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* (when a case is transferred pursuant to *28 U.S.C. § 1404(a)*, the transferee court must apply the choice-of-law rules that the transferor court would have applied).

- *Mopex, Inc. v. AMEX, LLC, 2002 U.S. Dist. LEXIS 3532, at *15 (S.D.NY. 2002)* (in an exception to the *Van Dusen* rule, when action could not have been maintained in the transferor court, applicable law, including choice of law rules, is state law of the transferee court).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersConvenience TransfersCivil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsChoice of LawForum & Place



Moore's AnswerGuide: Federal Pretrial Civil Litigation

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Chapter 1 DETERMINING FORUM
PART G: DETERMINING VENUE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.83

§ 1.83 Reviewing Order to Transfer Venue

Review of a district court's decision to transfer a case, either within its own circuit or to a district court in another circuit, must be sought in the circuit of the transferor district court. If a case is transferred from an out-of-circuit district court, review is not available in the circuit of the transferee court. *See Posnanski v. Gibney, 421 F.3d 977, 979 (9th Cir. 2005)* (if a transfer is made from district court in one circuit to a district court in another circuit, court of appeals in latter circuit cannot directly review action of first district court in ordering transfer).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.60 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview



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Chapter 1 DETERMINING FORUM
PART G: DETERMINING VENUE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.84

§ 1.84 Challenging Improper Venue

[1] Filing Timely Objection

A defendant must file any objection to improper venue in a timely and sufficient manner. *See 28 U.S.C. § 1406(b)*; *Harrington v. Wilber, 384 F. Supp. 2d 1321, 1326-1327 (D. Iowa 2005)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.36.*
- *Federal Litigation Guide P 3.81[2].*
- *Bender's Federal Practice Forms* Form Nos. 12:60 et seq.
- *28 U.S.C. § 1406* (cure or waiver of defects).
- *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).

[2] Objecting in Answer or Motion to Dismiss

Improper venue can be asserted as a defense in an answer or raised in a motion to dismiss. *See Fed. R. Civ. P. 12(b)(3)*. If venue is improper, the court must either dismiss or, in the interests of justice, transfer the case to a district having proper venue. *See 28 U.S.C. § 1406(a)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.32.*

- *Federal Litigation Guide P 3.81[2], [3].*
- *Bender's Federal Practice Forms* Form Nos. 12:60 et seq.
- *28 U.S.C. § 1406* (cure or waiver of defects).
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *Fed. R. Civ. P. 12* (defenses and objections).

[3] Establishing Standing to Object to Improper Venue

[a] Defendant

Any defendant has standing to object to improper venue. One defendant may not move to dismiss or transfer an action on the ground that venue is improper as to a second defendant unless the second defendant is an indispensable party, in which case the court should dismiss or transfer the entire action. *See Camp v. Gress, 250 U.S. 308, 316, 39 S. Ct. 478, 63 L. Ed. 997 (1919)* (limitation of jurisdiction to district of residence of either the plaintiff or the defendant does not mean also of all plaintiffs or all defendants).

Warning:

The court may on its own motion dismiss or transfer the action after giving the parties notice and an opportunity to be heard. *See 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). The court may transfer an action even if the defendant moves only to dismiss the action for lack of proper venue. *See Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371 n.3 (2d Cir. 1966)* (where a motion asks only that a suit be dismissed for improper venue, the court may *sua sponte* order it transferred). However, the court may not dismiss an action once the defendant has waived objection to improper venue. *See Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371 (2d Cir. 1966)* (because right to attack venue is personal to parties and waivable at will, district judge should not, in absence of extraordinary circumstances, impose his or her choice of forum on parties by deciding on his or her own motion that there was a lack of proper venue).

[b] Plaintiff

In general, a plaintiff waives any objection to venue in the court in which he or she files suit. *See Olberding v. Illinois Central Railway, 346 U.S. 338, 340, 74 S. Ct. 83, 98 L. Ed. 39 (1953)* (plaintiff, by bringing suit in district other than that authorized by statute, relinquished his right to object to venue). If a plaintiff in good faith mistakenly brings an action in a forum without proper venue, the plaintiff may move to transfer the action. *See Manley v. Engram, 755 F.2d 1463, 1467-1471 (11th Cir. 1985)* (when diligent plaintiff in good faith files suit in district where individual defendant appears to reside but actually does not, and objects to venue as soon as defendant's true residence is revealed, no sound policy compels application of original forum's choice of law rules).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.35.*
- *Federal Litigation Guide P 3.81[1].*

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.

[4] Waiving Objection to Improper Venue

A defendant may waive the right to object to improper venue in the following ways:

1. By failing to object in the initial response to the complaint. *See Fed. R. Civ. P. 12(h)(1)*; *but see 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); *see also Engel v. CBS, Inc., 886 F. Supp. 728, 730 (C.D. Cal. 1995)* (no waiver if improper venue defense unavailable when first response to pleading due);

2. By implicitly submitting to the jurisdiction of the court; for example, by making a motion other than one to dismiss. *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); or

3. By defaulting. *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 court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default).

See 28 U.S.C. § 1406(b); *Fed. R. Civ. P. 12(h)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.36*.
- *Federal Litigation Guide P 3.82*.
- *28 U.S.C. § 1404* (change of venue).
- *28 U.S.C. § 1406* (cure or waiver of defects).
- *Fed. R. Civ. P. 12* (defenses and objections).
- *CPL, Inc. v. Fragchem Corp., 512 F.3d 389, 392-393 (7th Cir. 2008)* (district court's *sua sponte* dismissal for lack of venue on basis of contractual arbitration clause was improper because objection to venue can be waived or forfeited).

[5] Determining Whether to Dismiss or Transfer Case

If a plaintiff brings an action in a district or division that is improper under the applicable venue statutes, the court must, on proper motion, either:

1. Dismiss the action; or

2. Transfer the action to a proper district or division if the transfer is in the interest of justice.

See 28 U.S.C. § 1406(a); *see also Johnson v. Payless Drug Stores NW, Inc., 950 F.2d 586, 587-588 (9th Cir. 1991)* (district court was not obliged to transfer plaintiff's action to another district *sua sponte* instead of dismissing the action because plaintiff did not request a transfer).

Dismissal pursuant to *28 U.S.C. § 1406(a)*, which is without prejudice, is not favored by the courts. *See*, *e.g.*, *Friedman v. Revenue Management of New York, Inc., 839 F. Supp. 203, 206 (S.D.N.Y. 1993)* (court dismissed claims based on improper venue without prejudice). When an action is brought in a district where venue is improper, the court may transfer the action to a district where it could have originally been brought, even if the defendant has moved for a dismissal and not a transfer. *See 28 U.S.C. § 1406(a)*; *see also Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993)* (district court may dismiss a case for improper venue, or if it be in the interest of justice, transfer case to any district or division in which it could have been brought).

Warning:

The court may dismiss without prejudice if transfer is not in the interests of justice. *See*, *e.g.*, *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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.34*.
- *Federal Litigation Guide P 3.84*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1406* (cure or waiver of defects).
- *Phillips v. Seiter, 173 F.3d 609, 610 (7th Cir. 1999)* (court is authorized to consider consequences of transfer before deciding whether to transfer; that is implicit in the statute's grant of authority to make such a decision and implies in turn that court can take a peek at the merits, because whether or not suit has any possible merit bears significantly on whether court should transfer or dismiss it).

[6] Establishing Requirements for Transferor Court

[a] Subject Matter Jurisdiction

A court generally does not have authority to transfer an action under *28 U.S.C. § 1406(a)* if the court lacks subject matter jurisdiction over the action, and must dismiss the action. *See Klett v. Pim, 965 F.2d 587, 591 (8th Cir. 1992)* .

If a court lacks subject matter jurisdiction because a federal statute vests exclusive jurisdiction in a specified court, transfer to that court may be available under *28 U.S.C. § 1631*.

[b] Personal Jurisdiction

When the district court where the action was originally filed lacks personal jurisdiction over the defendants, the court may transfer the action to a proper forum under Section 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,

however wrong plaintiff may have been in filing his case as to venue, whether court in which it was filed had personal jurisdiction over defendants or not); *see also Cameron v. Thornburgh, 983 F.2d 253, 257 (D.C. Cir. 1993)* (appellate court may transfer case even though it is likely that it does not have personal jurisdiction over appellees).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.32.*
- *28 U.S.C. § 1406* (cure or waiver of defects).
- *28 U.S.C. § 1631* (transfer to cure want of jurisdiction).

[7] Establishing Requirements for Transferee Court

[a] Venue

The requirements for jurisdiction in the transferee court must be satisfied 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 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).



Strategic Point:

If one or more defendants for whom venue would be improper in the transferee district 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).

[b] Personal Jurisdiction

Proper venue and personal jurisdiction over the defendants must exist in the transferee court. *See Hoffman v. Blaski, 363 U.S. 335, 342-343, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* ; *see also Volkswagen de Mexico, S.A. v. Germanischer Lloyd, 768 F. Supp. 1023, 1028-1029 (S.D.N.Y. 1991)* (venue must be proper and the defendants must be subject to personal jurisdiction in transferee forum).

[c] Subject Matter Jurisdiction

Actions mistakenly filed in federal courts without subject matter jurisdiction may be transferred to courts with exclusive subject matter jurisdiction, such as the Bankruptcy Court, the Court of Federal Claims, or the Federal Circuit. *See 28 U.S.C. § 1631*; *see also Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 818, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* (case not arising under patent law could be transferred from Federal Circuit to another federal

circuit); *Miller v. Hambrick, 905 F.2d 259, 262 (9th Cir. 1990)* (if court finds that there is a want of jurisdiction court will transfer action to any other such court in which action could have been brought if it is in interest of justice).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.33.*
- *Federal Litigation Guide P 3.84[2], [3].*
- *28 U.S.C. § 1631* (transfer to cure want of jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersImproper Venue TransfersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsAnswers



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Chapter 1 DETERMINING FORUM
PART G: DETERMINING VENUE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.85

§ 1.85 Seeking Dismissal Under Doctrine of Forum Non Conveniens

[1] Establishing Exceptional Circumstances

Forum non conveniens is a common law doctrine that permits a court to dismiss an action that is properly before it 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 American Dredging Co. v. Miller, 510 U.S. 443, 447-448, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994) (when another forum has jurisdiction to hear case, and when trial in chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience, or when chosen forum is inappropriate because it affects the court's own administrative and legal problems, court has discretion to dismiss case); *see also 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).

Forum non conveniens is an exceptional tool to be employed sparingly, not a doctrine that compels plaintiffs to choose the optimal forum for their claim. *See Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000)* .

If no adequate alternative forum exists, the court has no 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)* ; *see also Ceramic Corp. of America v. Inka Maritime Corp., 1 F.3d 947, 949 (9th Cir. 1993)* (even when defendant is amenable to process in the alternative forum, there may be rare circumstances in which remedy provided by the alternative forum is 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).

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)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.70 et seq.*
- *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 the amount of deference due is less when the plaintiff is foreign).

[2] Filing Motion to Dismiss in Reasonable Time

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 so that parties already have invested much of time and resources they will expend before trial, presumption against dismissal on grounds of forum non conveniens greatly increases).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.90.*
- *Bender's Federal Practice Forms* Form No. 12:62.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.

[3] Establishing Grounds for Dismissal

The party moving to dismiss based on forum non conveniens bears the burden of establishing:

1. That an adequate alternative forum exists; 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) ; *Dole Food Co. v. Watts, 303 F.3d 1104, 1118-1120 (9th Cir. 2002)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 111.73, 111.74.*
- *Maria Victoria Naviera, S.A. v. Cementos Del Valle, S.A., 759 F.2d 1027, 1031 (2d Cir. 1985)* (when action is commenced in federal court where venue is properly laid, but party contends that more convenient forum exists in a foreign country, district court may dismiss action on ground of forum non conveniens and burden is on the defendant to establish that action should be dismissed).

[4] Determining Adequacy of Alternative Forum

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:

1. The 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. The 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. The array of remedies in the alternative forum is less than in the federal forum. *See Creative Technologies, Ltd. v. Aztech Systems PTE, Ltd., 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 if:

1. The 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 International 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);

2. The defendant is not amenable to service of process in the alternative forum, though the defendant can remedy this by submitting to personal jurisdiction. *See Leetsch v. Freedman, 260 F.3d 1100, 1103-1104 (9th Cir. 2001)* (an alternate forum's adequacy is generally satisfied if the 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 the 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 is amenable to process in alternative forum, there may be rare circumstances in which remedy provided by alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, and dismissal would not be appropriate when the alternative forum does not permit litigation of subject matter of dispute);

4. The plaintiff fears retaliation if he or she goes to the alternative forum. *See Mujica v. Occidental*

Petroleum Corp., 381 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005) (an alternative forum is inadequate if the claimants cannot pursue their case without fearing retaliation);

5. Egregious litigation delays exist in the alternative forum's judicial system. *See, e.g., Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1227-1229 (3d Cir. 1995)* (denial of defendant's motions to dismiss on the 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. The plaintiff is unable to join a necessary third party in the 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 because of the forum's animosity or prejudice toward it).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.92.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *Usha (India), Ltd. v. Honeywell International, Inc., 421 F.3d 129, 135-136 (2d Cir. 2005)* (court held that deference to choice of forum, location of witnesses and evidence, and applicability of law of India all indicated that India was more appropriate forum, but foreign corporations were not precluded from returning to federal court in event that litigation in India proved unduly lengthy).
- *Robinson v. TCI/US West Communications, 117 F.3d 900, 908 (5th Cir. 1997)* (as defendants' scheme to defraud English plaintiff was directed from the United States, court had subject matter jurisdiction; however, the case properly belonged in England, as a forum was available and sufficient evidence existed supporting an interest in litigating the case there).
- *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F.2d 195, 202 (2d Cir. 1987)* (no abuse of discretion in dismissal of personal injury actions because most plaintiffs were Indian citizens located in India and defendant consented to jurisdiction of Indian courts).
- *Industrial Investment Development Corp. v. Mitsui & Co., 671 F.2d 876, 891 (5th Cir. 1982)* (because the foreign court would refuse to entertain plaintiffs' Sherman Act claim, dismissal for forum non conveniens would be functional equivalent of a decision that defendants' acts are beyond the reach of the Sherman Act, and defendants cannot use the rules of forum non conveniens as substitute for the rules concerning extraterritorial application of the Act).

[5] Determining Convenience of Parties

Once the adequacy of an alternative foreign forum has been established, the court must balance 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) .*

Private interest factors that the court may weigh in considering whether to dismiss an action on forum non conveniens grounds include the following:

1. The relative ease of access to sources of proof. *See Creative Technologies, Ltd. v. Aztech Systems PTE, Ltd., 61 F.3d 696, 703 (9th Cir. 1995)* ;

2. The relative ability of the forums to compel the attendance of significant unwilling witnesses at trial. *See Lueck v. Sundstrand Corp., 236 F.3d 1137, 1145 (9th Cir. 2001)* (one factor considered in forum non conveniens analysis is whether unwilling witnesses can be compelled to testify in new forum);

3. The defendant's inability to implead a necessary third party. *See Allstate Life Insurance 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);

4. The relative cost of obtaining the presence of willing witnesses. *See Blanco v. Banco Industrial de Venezuela, S.A., 997 F.2d 974, 982 (2d Cir. 1993)* (most, if not all, of the witnesses whose testimony would be required in this case were located outside the United States; there was no process available to compel their appearance in New York, which in any event would have entailed considerable expense);

5. The financial hardship to the plaintiff from having to bring the action in the 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); and

6. The location of the defendant's assets affecting the ability of the plaintiff to enforce a judgment. *See Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 836 (5th Cir. 1993)* (potential difficulties regarding enforcement of any judgment are among the factors weighed in forum non conveniens analysis).

Public interest factors that the court may weigh in considering whether to dismiss an action on forum non conveniens grounds include the following:

1. The congestion of the 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. The interest in resolving a local controversy in a local forum and the burden of jury duty upon those citizens with less of an interest. *See Creative Technologies, Ltd. v. Aztech Systems PTE, Ltd., 61 F.3d 696, 704 (9th Cir. 1995)* ; *In re Air Crash Over the Taiwan Strait on May 25, 2002, 331 F. Supp. 2d 1176, 1203-1204 (C.D. Cal. 2004)* ; and

3. The likelihood that the district court will have to apply foreign law. *See Scottish Air International, 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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.73.*

[6] Deferring to Plaintiff's Choice of Forum

When the plaintiff is an American citizen or resident, federal courts give the plaintiff's choice of forum significant

deference. *See Adelson v. Hananel, 510 F.3d 43, 53 (1st Cir. 2007)* (plaintiff not only enjoys some deference for original choice of forum, but is entitled to heightened deference when that forum is plaintiff's home). *Overseas National Airways, Inc. v. Cargolux Airlines International, 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).

A court ordinarily gives a foreign plaintiff less deference when determining whether to dismiss an action based on forum non conveniens grounds. *See Ravelo Monegro v. Rosa, 211 F.3d 509, 513-514 (9th Cir. 2000)* (in case brought in United States against American defendants by foreign plaintiff when motion for forum non conveniens has been filed, in contrast to strong presumption in favor of domestic plaintiff's forum choice, foreign plaintiff's choice deserves less deference). 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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.75.*
- *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).

[7] Providing Exemptions for Special Venue Provisions

The doctrine of forum non conveniens does not apply to actions arising under certain federal statutes that have special venue provisions (e.g., the Jones Act or FELA), if there is anything about the specific statute 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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.76.*

[8] Considering Forum Selection Clauses

When an action is brought in a United States district court contrary to a mandatory forum selection clause, forum non conveniens analysis generally does not apply. Rather, the forum selection clause ordinarily 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 the resisting party to be unreasonable under circumstances).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.78.*
- *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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss



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Chapter 1 DETERMINING FORUM
PART H: USING MULTIDISTRICT LITIGATION PROCEDURES

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.86

§ 1.86 Checklist for Using Multidistrict Litigation Procedures

☐ Determine whether the multidistrict litigation statute applies. *See § 1.87 below.*

- ○ Determine whether actions involve one or more common questions of fact.
- ○ Determine whether transfer would provide for the convenience of the parties and witnesses.
- ○ Determine whether transfer would promote the just and efficient conduct of the actions.

☐ Review the Multidistrict Litigation Rules thoroughly, particularly with respect to:

- ○ Form of papers and proof of service. *See § 1.88[1] -[3] below.*
- ○ Proper motion practice. *See § 1.88[4] -[6] below.*
- ○ Filing corporate disclosure statement. *See § 1.88[7] below.*
- ○ Applying for extension of time, if necessary. *See § 1.88[8] below.*
- ○ Hearings. *See § 1.89 below.*
- ○ Determining substantive law. *See § 1.90 below.*

- Determining effect of transfer order. *See § 1.91 below*.
- Tag-along actions. *See § 1.92 below*.
- Terminating actions. *See § 1.93 below*.
- Remands. *See § 1.94 below*.

Search By Topic: Civil Procedure > Venue > Multidistrict Litigation

Legal Topics:

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



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Chapter 1 DETERMINING FORUM
PART H: USING MULTIDISTRICT LITIGATION PROCEDURES

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.87

§ 1.87 Understanding Multidistrict Litigation Procedure

[1] Applying Multidistrict Litigation Statute

The Judicial Panel on Multidistrict Litigation is authorized to transfer to a single district court for coordination and consolidation the pretrial proceedings of civil actions pending in different judicial districts if all of the following requirements are met:

1. The proceedings involve one or more common questions of fact. *See In re Aircraft Accident at Barrow, 474 F. Supp. 996, 999 (JPML 1979)* (presence of different legal theories in some of the actions with regard to alleged liability of each of several defendants did not negate existence of common questions of fact regarding cause or causes of crash and attendant circumstances);

2. Transfer would provide for the convenience of the parties and witnesses. *See In re Vernitron Securities Litigation, 462 F. Supp. 391, 393-394 (JPML 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 would promote the just and efficient conduct of the actions. *See In re Food Lion, Inc., 73 F.3d 528, 532 (4th Cir. 1996)* .

See 28 U.S.C. § 1407; *see In re Cessna Aircraft Distributorship Antitrust Litigation, 460 F. Supp. 159, 161-162 (JPML 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 (JPML 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).

For purposes of transfer under the Multidistrict Litigation statute, the term "civil action" is given the broadest interpretation and encompasses any action that is not a criminal action, is pending in federal district court, and is a suit of a civil nature. *See In re Cintas Corp. Overtime Pay Arbitration Litigation, 444 F. Supp. 2d 1353, 1355 (JPML 2006)*

(motions to compel arbitration are "civil actions" subject to transfer).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.01.*
- *Federal Litigation Guide PP 28.06[3], 43.04[1].*
- *28 U.S.C. § 1407* (multidistrict litigation).

[2] 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, despite personal jurisdiction objections. *See 28 U.S.C. § 1407.* Transfer to any district is permissible and does not violate the due process minimum contacts test because the question is whether the parties had minimum contacts within the United States as a whole. *See Omni Capital International, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 111, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987)* (district court may not exercise jurisdiction over a defendant without authorization to serve process).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.04[1].*
- *Bender's Federal Practice Forms* Form No. 12:68.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1407* (multidistrict litigation).

[3] Considering Factors in Determining Transferee District

In determining the district to which the actions should be transferred, the panel may assess the following factors:

1. The defendants' common location. *See In re "Factor VIII or IX Concentrate Blood Products" Liability Litigation, 853 F. Supp. 454, 455 (JPML 1993)* (transfer can be made to district where defendants have a common location).

2. The location of documents and witnesses necessary to the actions. *See In re Air Crash Disaster Near Coolidge, Ariz. on May 6, 1971, 362 F. Supp. 572, 573 (JPML 1973)* (transfer would best serve convenience of parties and witnesses and promote just and efficient conduct of litigation because many of relevant documents and anticipated witnesses were located in Arizona, where crash occurred);

3. The centrality of the location for the convenience of the parties and witnesses. *See In re Wheat*

Farmers Antitrust Class Action Litigation, 366 F. Supp. 1087, 1088 (JPML 1973) (most appropriate transferee court was district that was most convenient to parties and witnesses, among other things);

4. The district in which the broader-based and earliest actions were filed. *See In re Regents of the University of California, 964 F.2d 1128, 1136 (Fed. Cir. 1992)* (forum chosen because broader-based of the actions, as well as the earliest filed, were there);

5. The district that has the most cases pending. *See In re Republic National-Realty Equities Securities Litigation, 382 F. Supp. 1403, 1407 (JPML 1974)* (transfer may be made to district that has most cases pending);

6. The district in which a significant defendant has a bankruptcy pending. *See In re American Continental Corp./Lincoln Savings & Loan Securities Litigation, 130 F.R.D. 475, 476 (JPML 1990)* (forum appropriate in part because a significant defendant had a bankruptcy pending there);

7. The congestion of the potential transferee forum's docket. *See In re Peruvian Road Litigation, 380 F. Supp. 796, 798 (JPML 1974)* (transfer would enable defendants to jointly present their jurisdictional challenge to plaintiff's claims to a forum with a lighter docket); and

8. Which judge or judges are most familiar with the issues involved. *See In re Plywood Antitrust Litigation, 376 F. Supp. 1405, 1407 (JPML 1974)* (transfer was to forum with judge most familiar with issues in the case).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.04[2].*

[4] Separating Claims

The panel has the authority to separate any claim, crossclaim, counterclaim or third-party claim from the rest of the action and remand the separate part. *See 28 U.S.C. § 1407(a)*; *see In re 1980 Decennial Census Adjustment Litigation, 506 F. Supp. 648, 650-651 (JPML 1981)* (Judicial Panel on Multidistrict Litigation is empowered to couple its order of transfer with simultaneous separation and remand of any claims in an action). The panel has no authority to separate issues. *See In re A.H. Robins Co., 610 F. Supp. 1099, 1101 (JPML 1985)* (Panel does not have power to separate issues in civil actions, assigning one or more to transferee court and one or more to transferor courts).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[6][d].*
- *28 U.S.C. § 1407* (multidistrict litigation).

[5] Remanding Actions

The panel must remand to the transferor court 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).*

A transferee court may not hear the trial of a case that has been transferred to it for "coordinated or consolidated" pretrial proceedings by the Judicial Panel on Multidistrict Litigation. *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 the trial of a case that has been transferred to it for "coordinated or consolidated" pretrial proceedings by the Judicial Panel on Multidistrict Litigation).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[6][b], [c].*
- *28 U.S.C. § 1407* (multidistrict litigation).

[6] Reviewing Transfer Orders

A transfer order issued by the Panel is reviewable only by extraordinary writ issued by the court of appeals. An order denying transfer is not appealable. *See 28 U.S.C. § 1407(e)*; *28 U.S.C. § 1651(a)*; *see*, *e.g.*, *In re New York City Municipal Securities Litigation, 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 must be filed in the court of appeals having jurisdiction over the district in which the hearing on transfer is to be held. *See 28 U.S.C. § 1407(e).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[8].*
- *28 U.S.C. § 1407* (multidistrict litigation).
- *28 U.S.C. § 1651* (writs).

Legal Topics:

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



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Chapter 1 DETERMINING FORUM
PART H: USING MULTIDISTRICT LITIGATION PROCEDURES

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.88

§ 1.88 Practicing Before Judicial Panel on Multidistrict Litigation

[1] Following Rules of Procedure and Admission Requirements



Warning:

At press time, the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation were about to undergo significant amendments and renumbering. For the latest version of the rules, which were set to take effect on October 4, 2010, please refer to the Panel's website at http://www.jpml.uscourts.gov. The rule discussions in this section will be revised in the 2012 edition of the AnswerGuide to reflect the changes.

The Judicial Panel on Multidistrict Litigation has prescribed its own rules of procedure. *See 28 U.S.C. § 1407(f)*; *Multidistrict Rules 1.1-16.1*. 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 1.4.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[1].*
- *28 U.S.C. § 1407* (multidistrict litigation).
- Multidistrict Rule 1.4 (admission to practice before the panel and representation in transferred actions).

[2] Filing Papers with Panel

[a] File in Washington, D.C.

Papers filed with the panel must be filed with the Clerk of the Panel at Clerk of the Panel, 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 5.1.1(a).

Papers may also be filed electronically (via email) to: JPMLeFile@jpml.uscourts.gov *See* Multidistrict Rule 5.1.1(a).

Special rules apply to electronic filing, including the requirement that the electronic filing be done through an attorney who has a CM/ECF account with any United States federal court. *See* Multidistrict Rule 5.1.1(b). There are also specific requirements for the email through which the filing is submitted, and a requirement that the paper be in PDF format. *See* Multidistrict Rule 5.1.1(c).

[b] File Original and Copies

An original and one copy of all papers must be submitted for filing with the Clerk of the Panel except only the original of the following documents need be filed under Multidistrict Rule 5.1.2(a):

1. Proof of service;

2. Notice of appearance;

3. Status notice;

4. Notice of opposition;

5. Notice of related action;

6. Application for an extension of time; and

7. Notice of presentation or waiver of oral argument.

When only an original document needs to be filed, the document may be faxed to the panel office with the prior approval of the Clerk. *See* Multidistrict Rule 5.1.2(d).

A copy of a motion for transfer filed with the panel must also be filed in each district court that will be affected by the motion. Copies of a motion for remand must be filed in the transferee district court in which any action affected by the motion is pending. *See* Multidistrict Rule 5.1.2(c).

[c] Follow Content and Format Requirements

Rule 7.1 prescribes the content and format of pleadings, including a limit of 20 pages for each brief. *See Multidistrict Rule 7.1*.

[d] File Computer Disk and Serve, if Necessary

Whenever an original and one copy is required to be submitted for filing to the Clerk of the Panel pursuant to Multidistrict Rule 5.1.2(a), and when a party is represented by counsel, one additional copy of that paper also must be submitted on a computer readable disk. Multidistrict Rule 5.1.3(a). The paper on the disk must be in Adobe Acrobat (PDF) format. Multidistrict Rule 5.1.3(b).

The disk must contain the entire paper, and the disk label must include certain specified information. *See* Multidistrict Rule 5.1.3(a).

Counsel may serve copies of the disk on the parties; however, a paper copy must also be served with the disk. The proof of service must indicate service of the paper in both paper and electronic format. *See* Multidistrict Rule 5.1.3(c).

A party may be relieved from the requirement of filing an electronic version of the paper by submitting a written application for a waiver, in a timely manner in advance of submission of the paper. Any party seeking a waiver must certify to one of the following in the application:

1. That compliance with the Rule would impose undue hardship;

2. That the text of the paper is not available on disk; or

3. That other unusual circumstances preclude compliance with the requirement.

See Multidistrict Rule 5.1.3(d).

[e] Provide Proof of Service

All filed papers must include a proof of previous or simultaneous service on all other parties in all actions involved in the litigation and must be made as provided in *Fed. R. Civ. P. 5* and *6*. *See* Multidistrict Rule 5.2(a).

The proof of service must indicate the following:

1. The complete name and address of each person served;

2. The party represented by that person; and

3. Why any person a party named in a constituent complaint was not served.

See Multidistrict Rule 5.2(a).

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. Copies of the proof of service must be sent to each person included within the proof of service. *See* Multidistrict Rule 5.2(a).

The proof of service pertaining to a motion to transfer must certify that copies have been mailed or delivered to each district court in which an action is pending that will be affected by the motion. The proof of service pertaining to a motion for remand must certify that a copy of the motion has been mailed or otherwise delivered to the transferee district court in which any action affected by the motion is pending. *See* Multidistrict Rule 5.2(b).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[2].*
- *Fed. R. Civ. P. 5* (serving and filing pleadings).
- *Fed. R. Civ. P. 6* (time).
- Multidistrict Rule 5.1.1 (place of filing papers).

- Multidistrict Rule 5.1.2 (manner of filing papers).
- Multidistrict Rule 5.1.3 (computer generated disk required).
- Multidistrict Rule 5.2 (service of papers filed).
- *Multidistrict Rule 7.1* (form of papers filed).

[3] Filing Timely Notice of Appearance

Within fourteen days of the filing of a motion to transfer, an order to show cause, or a conditional transfer order, each party or designated attorney must file a written notice of appearance. The notice must state 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 5.2(c).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[2][b].*
- Multidistrict Rule 5.2 (service of papers filed).

[4] Requesting Action by Written Motion

All requests for action by the panel must be made by written motion. Every motion must be accompanied by:

1. A brief supporting the motion and setting forth:

    a. The background of the litigation;

    b. The factual and legal contentions of the movant in concisely stated separate portions of the brief with citations of applicable authority; and

2. A schedule setting forth:

    a. The complete, unshortened name of each action involved;

    b. The district court in which the action is pending;

    c. The civil action number of each action; and

    d. The name of the judge assigned each action, if known.

See Multidistrict Rule 7.2(a).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[2][c].*

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *Multidistrict Rule 7.2* (motion practice).

[5] Responding to Motion Within 21 Days

Once a motion is filed with the panel, all other parties must file a response within 21 days. 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 7.2(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 7.2(d)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[2][c]*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *Multidistrict Rule 7.2* (motion practice).

[6] 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 7.3(a).

Any party may file a response to the show cause order within 21 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 7.3(b).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[3][b]*.
- Multidistrict Rule 7.3 (show cause orders).

[7] Filing Corporate Disclosure Statement

Any nongovernmental corporate party to a matter before the panel must file a statement identifying all its parent corporations and listing any publicly held company that owns 10 percent or more of the party's stock. *See* Multidistrict Rule 5.3(a). The statement must be filed within 14 days of the filing of a motion to transfer or remand, an order to show cause, or a motion to vacate a conditional transfer order or a conditional remand order. *See* Multidistrict Rule 5.3(b).

Once a party files a corporate disclosure statement, the party must update the statement to reflect any change 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 5.3(c).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[2][d].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- Multidistrict Rule 5.3 (corporate disclosure statement).

[8] Applying for Extension of Time

An application to extend the time to file a pleading or perform an act required by the Rules of the Judicial Panel on Multidistrict Litigation must:

1. Be in writing; and
2. Request a specific number of additional days.

See Multidistrict Rule 6.2.

The Clerk of the Panel will evaluate the application in relation to the impact on the panel's calendar and on the basis of the reasons set forth in support of the application. *See Multidistrict Rule 6.2.*

Warning:

Only in exceptional circumstances will an extension of time be granted to file a notice of opposition to either a conditional transfer order or a conditional remand order. *See Multidistrict Rule 6.2.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[7].*
- *Multidistrict Rule 6.2* (application for extension of time).

Legal Topics:

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



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Chapter 1 DETERMINING FORUM
PART H: USING MULTIDISTRICT LITIGATION PROCEDURES

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.89

§ 1.89 Scheduling and Holding Hearings in Multidistrict Litigation

[1] Scheduling Hearings



Warning:

At press time, the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation were about to undergo significant amendments and renumbering. For the latest version of the rules, which were set to take effect on October 4, 2010, please refer to the Panel's website at http://www.jpml.uscourts.gov. The rule discussions in this section will be revised in the 2012 edition of the AnswerGuide to reflect the changes.

Whenever an action to transfer cases for coordinated or consolidated pretrial proceedings, or to remand previously transferred cases, is being contemplated, the panel will specify the time, place and subject matter for a hearing and notify counsel of all parties involved. *See 28 U.S.C. § 1407(c)*; Multidistrict Rule 16.1(a).

[2] Holding Hearings and Oral Argument

No transfer or remand determination regarding any action pending in the district court 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 16.1(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 16.1(c).

[3] Entering Appearances for Oral Argument

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 16.1(e).

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 16.1(f).

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 view points. *See* Multidistrict Rule 16.1(g).

Hearings at which oral testimony is presented are discouraged; oral testimony is received only on notice, motion, and order of the panel. *See* Multidistrict Rule 16.1(h).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[4].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1407* (multidistrict litigation).
- Multidistrict Rule 16.1 (hearing sessions and oral argument).

Legal Topics:

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



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.90

§ 1.90 Determining Substantive Law in Multidistrict Litigation

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 Lou Levy & Sons Fashions, 988 F.2d 311, 313 (2d Cir. 1993)* .

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 of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987) , aff'd on other grounds sub nom., Chan v. Korean Air Lines, 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 112.02[1][a], 112.07[2].*
- *Federal Litigation Guide P 43.04[2].*

Legal Topics:

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



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Chapter 1 DETERMINING FORUM
PART H: USING MULTIDISTRICT LITIGATION PROCEDURES

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.91

§ 1.91 Determining Effect of Transfer Order in Multidistrict Litigation



Warning:

At press time, the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation were about to undergo significant amendments and renumbering. For the latest version of the rules, which were set to take effect on October 4, 2010, please refer to the Panel's website at http://www.jpml.uscourts.gov. The rule discussions in this section will be revised in the 2012 edition of the AnswerGuide to reflect the changes.

After transfer, the transferor court is divested of jurisdiction to decide pending matters. *See In re Plumbing Fixture Cases, 298 F. Supp. 484, 495 (JPML 1968)* (after an order changing venue, jurisdiction of transferor court ceases and any steps taken by it are of no effect). 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 TMJ Implants Products Liab. Litig., 872 F. Supp. 1019, 1024 (D. Minn. 1995)* , citing *In re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 364-368 (3d Cir. 1993)* (transferee court has authority to enter dispositive orders terminating cases transferred under *28 U.S.C. § 1407*).

After the filing of a motion to transfer an action before the panel, but before an order issues, the district court in which the action is pending retains its jurisdiction to decide pretrial motions. The district court has the discretion either to stay the action while the motion to transfer is pending or to reach the merits of the pretrial motion. *See* Multidistrict Rule 1.5; *Kohl v. American Home Prods. Corp., 78 F. Supp. 2d 885, 887-888 (W.D. Ark. 1999)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.07[1].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- Multidistrict Rule 1.5 (effect of the pendency of an action before the panel).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMultidistrict Litigation



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Chapter 1 DETERMINING FORUM
PART H: USING MULTIDISTRICT LITIGATION PROCEDURES

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.92

§ 1.92 Transferring Tag-Along Actions in Multidistrict Litigation



Warning:

At press time, the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation were about to undergo significant amendments and renumbering. For the latest version of the rules, which were set to take effect on October 4, 2010, please refer to the Panel's website at http://www.jpml.uscourts.gov. The rule discussions in this section will be revised in the 2012 edition of the AnswerGuide to reflect the changes.

A "tag-along action" is a civil action pending in a district court and involving common questions of fact with actions previously transferred under the multidistrict litigation statute. *See Multidistrict Rule 1.1*; *see also* Multidistrict Rules 7.4, 7.5.

Whether the panel will transfer a tag-along action depends on whether 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 Litigation, 696 F. Supp. 1546, 1546-1547 (JPML 1988)* (if pending litigation involves common questions of fact with other actions in same litigation previously transferred to another district, and transfer of pending litigation to that district for coordinated or consolidated pretrial proceedings there will serve the convenience of parties and witnesses and promote just and efficient conduct of the litigation, then transfer should be ordered).



Strategic Point:

Parties opposing the transfer of a claimed tag-along action may argue that the action is not suitable for transfer because the case is far along in discovery or that their case raises questions that are sufficiently distinct from those in the transferred actions. *See In re Four Seasons Securities Laws Litigation, 362 F. Supp. 574, 575 (JPML 1973)* (because discovery was complete, transfer of action would not have furthered purposes of *28 U.S.C. § 1407*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[5].*
- *Multidistrict Rule 1.1* (definitions).
- Multidistrict Rule 7.4 (conditional transfer orders for "tag-along actions").
- Multidistrict Rule 7.5 (miscellaneous provisions concerning "tag-along actions").

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMultidistrict Litigation



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.93

§ 1.93 Terminating Action in Multidistrict Litigation



Warning:

At press time, the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation were about to undergo significant amendments and renumbering. For the latest version of the rules, which were set to take effect on October 4, 2010, please refer to the Panel's website at http://www.jpml.uscourts.gov. The rule discussions in this section will be revised in the 2012 edition of the AnswerGuide to reflect the changes.

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)* (the transferee court assumes complete jurisdiction and has authority to decide all pretrial motions such as those for summary judgment or approval of a 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 7.6(a).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[6][a].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- Multidistrict Rule 7.6 (termination and remand).

Legal Topics:

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



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.94

§ 1.94 Remanding Action in Multidistrict Litigation

[1] Requesting Remand



Warning:

At press time, the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation were about to undergo significant amendments and renumbering. For the latest version of the rules, which were set to take effect on October 4, 2010, please refer to the Panel's website at http://www.jpml.uscourts.gov. The rule discussions in this section will be revised in the 2012 edition of the AnswerGuide to reflect the changes.

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:

1. On motion of any party;

2. At the suggestion of the transferee district court; or

3. On the panel's own initiative, by either:

    a. Entry of an order to show cause;

    b. A conditional remand order; or

    c. Other appropriate order.

See Multidistrict Rule 7.6(c).

The panel will remand an action before the completion of all pretrial proceedings only on a showing of good cause. *See In re South Central States Bakery Products Antitrust Litigation, 462 F. Supp. 388, 390 (JPML 1978)* .

Warning:

The panel ordinarily is reluctant to order remand absent a suggestion of remand from the transferee district court. *See* Multidistrict Rule 7.6(d).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[6][b].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- Multidistrict Rule 7.6 (termination and remand).

[2] Severing Claims Before Remand

The panel may sever and remand claims, crossclaims, counterclaims, or third-party claims in the interest of judicial economy. *See, e.g.*, *In re IBM Peripheral EDP Devices Antitrust Litigation, 407 F. Supp. 254, 255 (JPML 1976)* (judge concluded the continued presence of a case in the multidistrict proceedings would needlessly retard the progress of the other actions in the litigation and recommended that the panel remand the case to its original district).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[6][d].*

[3] Moving for Remand

If remand is sought by motion of a party, the motion must be accompanied by an affidavit reciting the following:

1. Whether the moving party has requested a suggestion of remand from the transferee district court; how the court responded to any request; and if no request was made, why;

2. Whether all common discovery and other pretrial proceedings have been completed in the action sought to be remanded, and, if not, what remains to be done;

3. Whether all orders of the transferee district court have been satisfactorily complied with, and, if not, what remains to be done; and

4. A copy of the transferee district court's final pretrial order, if that order has been entered.

See Multidistrict Rule 7.6(d).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[6][b].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- Multidistrict Rule 7.6 (termination and remand).

[4] Responding to Order to Show Cause Within 21 Days

When the Panel enters an order to show cause why an action or actions should not be remanded, any party may file a response within 21 days of the filing of the order unless otherwise provided for in the order. Any party may file a reply brief limited to new matters within seven days of the filing of a party's response to the order to show cause. The failure to respond to an order to show cause is treated as acquiescence to the remand. *See* Multidistrict Rule 7.6(e).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[6][c].*
- Multidistrict Rule 7.6 (termination and remand).

[5] Determining Authority of Transferor Court After Remand

After remand, the transferor judge has complete control of the action from the point of remand forward. However, the transferor judge is not permitted to modify orders issued by the transferee judge. *See In re Food Lion, Inc., 73 F.3d 528, 532-533 (4th Cir. 1996)* ; *see also 28 U.S.C. § 1407.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.06[3].*
- *28 U.S.C. § 1407* (multidistrict litigation).

[6] Designating Record After Remand Order

When the parties receive a remand order from the Clerk, the parties must provide the clerk of the transferee court with the following:

1. A designation of the contents of the record to be remanded, composed of those parts of the files and records necessary for all proceedings to be conducted following remand; and

2. Copies of any pleading or other matter filed to enable the clerk to comply with the order to remand.

See Multidistrict Rule 7.6(g).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.06[3].*
- Multidistrict Rule 7.6 (termination and remand).

[7] Opposing Conditional Remand Order

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. *See* Multidistrict Rule 7.6(f)(i). A conditional remand order does not become effective until filed with the transferee court. *See* Multidistrict Rule

7.6(f)(iv).

The Clerk of the Panel must serve the order on each party, but wait 14 days to file the order with the transferee court to allow each party an opportunity to file a notice of opposition. *See* Multidistrict Rule 7.6(f)(iii).

If the Clerk of the Panel receives a notice of opposition within the 14 days, the Clerk will not file the conditional remand order until further order of the panel. *See* Multidistrict Rule 7.6(f)(ii).

On receipt of a conditional remand order, a party opposing remand must act within the following limits:

1. 14 days from the issuance of the order to file a notice of opposition. *See* Multidistrict Rule 7.6(f)(ii); and

2. 14 days from the filing of its notice of opposition to file a motion to vacate the conditional remand order and supporting brief. *See* Multidistrict Rule 7.6(f)(iii).

If the opposing party fails to file a timely motion to vacate, the failure is treated as a withdrawal of the opposition and the Clerk will file the conditional remand order with the transferee district court. *See* Multidistrict Rule 7.6(f)(iii).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[6][c].*
- Multidistrict Rule 7.6 (termination and remand).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsGeneral OverviewCivil ProcedureVenueMultidistrict Litigation



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Chapter 1 DETERMINING FORUM
PART I: ANALYZING ARBITRATION REQUIREMENTS AND ADR OPTIONS

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.95

§ 1.95 Checklist for Analyzing Arbitration Requirements and ADR Options

☐ Determine if parties have entered into a pre-dispute arbitration agreement, either as part of an underlying contract between them or as a separate document. *See § 1.96[2] below*.

☐ If action concerning dispute has been filed in district court, and no pre-dispute arbitration agreement exists, review court annexed ADR options required or available for cases in litigation in the particular district. *See § 1.96[1] below*.

☐ If parties do not have pre-dispute arbitration agreement, consider contacting opposing party to agree to mediate or arbitrate dispute. *See § 1.96[3] below*.

☐ In reaching agreement to arbitrate, bear in mind limitations on judicial review and need to specify rules of conduct in agreement. *See §§ 1.97, 1.98 below*.

☐ If parties have pre-dispute arbitration agreement, or are considering agreeing to arbitrate dispute:

- ○ Determine whether agreement is within scope of Federal Arbitration Act (FAA); *See § 1.100[4] below*.
- ○ Consider impact of FAA on decision to arbitrate dispute. *See § 1.100[1] -[3] below*.

☐ If agreement is within scope of FAA:

- ○ Determine if particular dispute is arbitrable under existing agreement, including potential statutory claims, if any; *See §§ 1.99, 1.100[4] below*.

- ○ Determine whether parties entered valid contract to arbitrate. *See § 1.99[1] below*.
- ○ Consider whether court involvement may be required to determine arbitrability. *See § 1.99[2] below*.
- ○ Have arbitrator decide procedural questions regarding arbitration. *See § 1.99[3] below*.

☐ Enforce arbitration agreement, if necessary. *See § 1.101 below*.

- ○ Demand arbitration under agreement; *See § 1.101[1] below*.
- ○ Move to compel arbitration. *See § 1.101[2] below*.
- ○ Move for stay pending arbitration, if necessary. *See § 1.101[3] below*.

☐ Attack arbitration agreement, if necessary. *See § 1.102 below*.

- ○ Evaluate arbitration agreement under state contract law; *See § 1.102[1] below*.
- ○ Raise contract defenses. *See § 1.102[2] below*.
- ○ Submit challenges to existence or validity of arbitration provisions to court. *See § 1.102[3] below*.
- ○ Submit other challenges to underlying contract to arbitrator. *See § 1.102[4] below*.

☐ Waive right to seek arbitration. *See § 1.103 below*.

☐ **Search By Topic:** Civil Procedure > Alternative Dispute Resolution

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.96

§ 1.96 Determining Options and Strategy for Arbitration or Other ADR

[1] Requiring Arbitration or Other ADR for Cases in Litigation

Federal district courts are required to devise, implement, and administer an alternative dispute resolution (ADR) program to be used in civil actions. *See 28 U.S.C. §§ 651-658*. As a result, a civil suit filed in any of the district courts may be subject to referral for some type of ADR process during the course of litigation.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.55*.
- *Federal Litigation Guide PP 50.02, 50.18*.
- *28 U.S.C. §§ 651-658* (alternative dispute resolution).

[2] Requiring Arbitration, Instead of Litigation, Under Pre-Dispute Agreement

Parties may agree, often as part of an underlying contract, to submit any disputes that might arise between them to arbitration instead of litigation. *See Sole Resort, S.A. de C.V. v. Allure Resorts Management, LLC, 450 F.3d 100, 104 (2d Cir. 2006)* ; *see also Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1208 (9th Cir. 1998)* (when parties agree to submit their disputes to it, they have agreed to arbitrate these disputes through to completion, *e.g.*,an arbitrators' decision, either binding or non-binding, and cannot seek recourse to courts before that time). An agreement may provide for either binding arbitration, which results in a final decision without court litigation, or nonbinding arbitration, which attempts to resolve the dispute before going to court. *See Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1208 (9th Cir. 1998)* .

[3] Agreeing to Mediate or Arbitrate After Dispute Arises

If no pre-dispute arbitration agreement exists between parties, the parties nonetheless may agree to mediate or arbitrate after a dispute has arisen. *See General Motors Corp. v. Pamela Equities Corp., 146 F.3d 242, 246 (5th Cir. 1998)*

(parties may agree to the submission to arbitration of existing controversies without any previous contract to do so).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.50, 16.53[2][e], 16.53[3][a][i].*

- *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)* (arbitration agreement trades procedures and opportunity for review of courtroom for simplicity, informality, and expedition of arbitration).

- *Apollo Computer v. Berg, 886 F.2d 469, 473 (1st Cir. 1989)* (an agreement may provide for either binding arbitration, which results in a final decision without court litigation, or nonbinding arbitration, which attempts to resolve the dispute before going to court).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionMediations



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.97

§ 1.97 Determining Limitations on Judicial Review of Arbitration Decisions

The Federal Arbitration Act gives federal courts very limited authority to review arbitration decisions, because broad judicial review would diminish the benefits of arbitration. *See Lifescan, Inc. v. Premier Diabetic Services, Inc., 363 F.3d 1010, 1012 (9th Cir. 2003)* ; *see also 9 U.S.C. §§ 10, 11.*



Strategic Point:

The Federal Arbitration Act does not provide an independent basis for subject matter jurisdiction. A litigant seeking federal court review of an arbitration award must specify in the petition an independent basis for federal jurisdiction. *See Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc., 431 F.3d 1320, 1325 (11th Cir. 2005)* ; *see also Luong v. Circuit City Stores, Inc., 368 F.3d 1109, 1111 (9th Cir. 2004)* (federal courts must have an independent basis for federal jurisdiction to hear claims under the Federal Arbitration Act).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 201.31[3], 202.11[7].*
- *9 U.S.C. §§ 10, 11* (grounds for modification or vacatur of arbitration award).
- *Carpenter Local No. 1027, Mill Cabinet-Industrial Division v. Lee Lumber and Building Material Corp., 2 F.3d 796, 797-798 (7th Cir. 1993)* (judicial review of arbitration awards is limited).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionJudicial Review



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.98

§ 1.98 Specifying Rules for Conduct of Arbitration

Commercial arbitration agreements are enforced according to their terms and according to the intentions of the parties. *See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)* . The parties may specify in the agreement the rules under which the arbitration will be conducted. *See Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)* . Nevertheless, the parties' ability to freely agree to the process and procedures for arbitration under the FAA may be circumscribed in some respects. For example, the Supreme Court has held that the statutory grounds for expedited judicial review to confirm, vacate, or modify arbitration awards under §§ 9-11 of the FAA are exclusive and may not be supplemented by contract. *See Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254, 259 (2008)* (Congress enacted FAA to replace judicial indisposition to arbitration with national policy favoring it and placing arbitration agreements on equal footing with other contracts).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.53[3][a][i].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.99

§ 1.99 Determining Whether Dispute Is Arbitrable Under Existing Agreement

[1] Determining Whether Parties Agreed to Arbitrate Under State Contract Law

When determining the existence and validity of an agreement to arbitrate, federal courts apply ordinary state-law principles that govern the formation of contracts. *See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)* .

Although generally a nonsignatory is not bound by an arbitration clause, under ordinary contract and agency principles (*e.g.*, incorporation by reference, assumption, agency, veil-piercing/alter-ego, estoppel, third-party beneficiary) a nonsignatory may be required to arbitrate. *See Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th Cir. 2006)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 38.33[2][b].*
- *Thomson-CSF, S.A. v. American Arbitration Association, 64 F.3d 773, 776 (2d Cir. 1995)* (a nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency).
- *South Carolina Tees, Inc. v. Avondale Inc. (In re Cotton Yarn Antitrust Litig.), 505 F.3d 274, 279-280 (4th Cir. 2007)* (arbitration is a "usage of trade" in textile industry and, therefore, arbitration agreement is implied in any contract between merchants in that industry unless contract expressly provides otherwise).
- *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., -- U.S. --, 130 S. Ct. 1758, 176 L. Ed. 2d 605, 624 (2010)* (party may not be compelled to submit to class arbitration under Federal Arbitration Act without contractual basis for concluding that party agreed class-wide arbitration would be available).

[2] Having Court Decide Question of Arbitrability

The court will decide whether the parties have agreed to arbitrate or not, unless the parties clearly and unmistakably provide otherwise. *See AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)* .

When a party seeks to compel an arbitration, the court has two roles:

1. To determine whether a valid agreement to arbitrate exists; and

2. If a valid agreement exists, to decide whether the agreement encompasses the dispute at issue.

See Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719-721 (9th Cir. 1999) .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 203.12[1].*

[3] Having Arbitrator Decide Procedural Questions Regarding Arbitration

Procedural questions that grow out of a dispute and bear on its final disposition are presumptively for the arbitrator to decide. *See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)* . Thus, the arbitrator, not the court, should decide issues of whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met. *See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 203.12[1].*

- *Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)* (the NASD's time limit rule falls within the class of gateway procedural disputes that the arbitrator should decide).

- *United Steelworkers of Am. v. Saint Gobain Ceramics & Plastics, Inc., 505 F.3d 417, 419 (6th Cir. 2007)* (overruling circuit precedent, and agreeing with other circuits and Supreme Court's *Howsam* decision, en banc Sixth Circuit held that dispute over contractual time limits for seeking arbitration is presumptively for arbitrator to decide, unless contractual language requires judicial resolution of disputes over time limits).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrability



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.100

§ 1.100 Using Federal Arbitration Act (FAA) to Move Parties into Arbitration

[1] Establishing Policy Favoring Arbitration

The Federal Arbitration Act (FAA) manifests a federal policy favoring arbitration, and was enacted to overrule the judiciary's long-standing reluctance to enforce agreements to arbitrate and to place such agreements on the same footing as other contracts. *See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)* (Congress enacted FAA to replace judicial indisposition to arbitration with national policy favoring it and placing arbitration agreements on equal footing with other contracts); *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)* (FAA's purpose was to reverse longstanding judicial hostility to arbitration agreements and place them on same footing as other contracts).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 131.32[3][a], 203.12[1].*

[2] Applying to Contracts Involving Interstate Commerce

The FAA provides that a written arbitration agreement in a maritime transaction or a contract involving interstate commerce, whether entered into prior to or after a dispute between the parties arises, is valid, irrevocable, and enforceable, except upon such grounds as exist at law or equity for the revocation of any contract. *See 9 U.S.C. § 2.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 124.08[5].*
- *9 U.S.C. § 2* (validity, irrevocability, and enforcement of agreements to arbitrate).

[3] Providing Procedural Rules for Court Proceedings Related to Arbitration

The FAA provides procedural rules for proceedings in federal court to:

1. Apply for a stay of a pending suit involving an issue referable to arbitration under an arbitration agreement. *See 9 U.S.C. § 3*;

2. Petition for an order compelling arbitration pursuant to an arbitration agreement. *See 9 U.S.C. § 4*;

3. Apply for appointment of an arbitrator. *See 9 U.S.C. § 5*; and

4. Apply to confirm, vacate, modify, or correct an arbitration award. *See 9 U.S.C. §§ 9, 10, 11.*

The Federal Rules of Civil Procedure apply only to the extent that matters of procedure are not provided for under the FAA. *See Fed. R. Civ. P. 81(a)(3).*

The parties may not expand the scope of the FAA procedural rules by their arbitration agreement. *See Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254, 259 (2008)* (statutory grounds for expedited judicial review to confirm, vacate, or modify arbitration awards under §§ 9-11 are exclusive and may not be supplemented by contract).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 81.08[1].*
- *9 U.S.C. § 3* (stay of proceedings where issue therein referable to arbitration).
- *9 U.S.C. § 4* (failure to arbitrate under agreement).
- *9 U.S.C. § 5* (appointment of arbitrators or umpire).
- *9 U.S.C. § 9* (award of arbitrators; confirmation; jurisdiction; procedure).
- *9 U.S.C. § 10* (same; vacation; grounds; rehearing).
- *9 U.S.C. § 11* (same; modification or correction; grounds; order).
- *Fed. R. Civ. P. 81* (applicability in general).

[4] Finding Statutory Claims Arbitrable Under FAA

[a] Claims Arbitrable in Absence of Contrary Congressional Intent

Arbitration agreements are enforceable under the FAA even when statutory claims are asserted, unless there is a clear Congressional intent to preclude arbitration. *See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987) .*

[b] Statutory Claims Held Arbitrable

Claims under various federal statutes have been found arbitrable under the FAA, pursuant to an enforceable arbitration agreement between the parties, including:

1. Sherman Act, *15 U.S.C. § 1 et seq.. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)* (enforced arbitration agreement in antitrust case);

2. Section 10(b) of the Securities Exchange Act of 1934, *15 U.S.C. § 78j(b). See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)* (arbitration per agreement provided adequate means of enforcing the provisions of the Securities Exchange Act);

3. Section 12(2) of the Securities Act of 1933, *15 U.S.C. § 77l(a)(2). See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 482-483, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)* (arbitration agreements, which are in effect, a specialized kind of forum-selection clause, should not be prohibited under the Securities Act of 1933);

4. Racketeering Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. § 1961 et seq.. See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238-239, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)* (there is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the FAA);

5. Age Discrimination in Employment Act (ADEA), *29 U.S.C. § 621 et seq.. See 14 Penn Plaza LLC v. Pyett, -- U.S. --, 129 S. Ct. 1456, 1461, 173 L. Ed. 2d 398 (2009)* (collective bargaining agreement provision that clearly and unmistakably requires union members to arbitrate claims asserted under the ADEA is enforceable as a matter of federal law); *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26-27, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)* (nothing in text of ADEA or its legislative history explicitly precludes arbitration, nor is arbitration inconsistent with statutory framework and purposes of ADEA);

6. Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.. See EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 749 (9th Cir. 2003)* (enforcement of arbitration agreements entered into as a condition of employment is not precluded for claims under the Civil Rights Act of 1964);

7. Fair Labor Standards Act, *29 U.S.C. § 201 et seq.. See Kuehner v. Dickinson & Co., 84 F.3d 316, 319-320 (9th Cir. 1996)* (plaintiff failed to carry her burden of showing that when Congress enacted the FLSA, it restricted enforcement of contracts to arbitrate FLSA claims); and

8. Employee Retirement Income Security Act (ERISA), *29 U.S.C. § 1001 et seq.. See Bird v. Shearson Lehman/American Express, Inc., 926 F.2d 116, 122 (2d Cir. 1991)* (Congress did not intend to preclude a waiver of a judicial forum for statutory ERISA claims and Federal Arbitration Act requires courts to enforce agreements to arbitrate such claims).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 203.12[1].*
- *15 U.S.C. § 1 et seq.* (Sherman Act).
- *15 U.S.C. § 78j(b)* (Section 10(b) of the Securities Exchange Act of 1934).
- *15 U.S.C. § 77l(a)(2)* (Section 12(2) of the Securities Act of 1933).

- *18 U.S.C. § 1961 et seq.* (Racketeering Influenced and Corrupt Organizations Act (RICO)).
- *29 U.S.C. § 621 et seq.* (Age Discrimination in Employment Act (ADEA)).
- *42 U.S.C. § 2000e et seq.* (Title VII of the Civil Rights Act of 1964).
- *29 U.S.C. § 201 et seq.* (Fair Labor Standards Act).
- *29 U.S.C. § 1001 et seq.* (Employee Retirement Income Security Act (ERISA)).
- *Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)* (FAA mandates enforcement of agreements to arbitrate statutory claims and burden is on party opposing arbitration, to show that Congress intended to preclude a waiver of judicial remedies for statutory rights at issue).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & Exceptions



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Chapter 1 DETERMINING FORUM
PART I: ANALYZING ARBITRATION REQUIREMENTS AND ADR OPTIONS

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.101

§ 1.101 Enforcing Arbitration Agreement Within Scope of FAA

[1] Demanding Arbitration Pursuant to Agreement

A party seeking to enforce an arbitration agreement should make a demand for arbitration in accordance with the terms of the agreement. The method of making the demand may be stated in the agreement or in the rules of the arbitration service provider specified in the agreement. Any rules specified in the agreement should be reviewed for requirements such as form of the demand, time limitations, and forum fee deposits.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 203.12[1].*
- *Federal Litigation Guide P 50.18.*

[2] Moving to Stay Pending Action, if Any

[a] Court Must Grant Stay if Issue Is Referable to Arbitration

If any suit or proceeding is brought on any issue referable to arbitration under an arbitration agreement, a party may move to stay the action until an arbitration has been had in accordance with the terms of the agreement. *See 9 U.S.C. § 3.*

If the court is satisfied that the issue involved in the suit or proceeding is referable to arbitration, the court must stay the pending action, providing the applicant for the stay is not in default in proceeding with the arbitration. *See 9 U.S.C. § 3.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 203.12[1].*

- *Bender's Federal Practice Forms* Form No. 12:109.
- *9 U.S.C. § 3* (stay of proceedings where issue therein referable to arbitration).

[b] Order Refusing Stay Is Appealable; Order Granting Stay Is Not

An order refusing to stay an action until an arbitration has been had in accordance with the terms of the parties' agreement is appealable. *See 9 U.S.C. § 16(a)(1)(A).*

Generally, an appeal cannot be taken from an interlocutory order staying an action to permit an arbitration in accordance with the parties' agreement. *See 9 U.S.C. § 16(b)(1)*; *see also 28 U.S.C. § 1292(b).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 203.12[1].*
- *9 U.S.C. § 16* (appeals).
- *28 U.S.C. § 1292* (interlocutory decisions).

[3] Moving to Compel Arbitration, if Necessary

[a] Petition Must Be Made to Court That Would Otherwise Have Jurisdiction

If one party to a dispute fails, neglects, or refuses to arbitrate in accordance with a written arbitration agreement, the other party may petition for an order directing that the arbitration proceed in the manner provided for in the agreement. *See 9 U.S.C. § 4.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 38.33[2][a], 110.48[2].*
- *Federal Litigation Guide P 50.18.*
- *Bender's Federal Practice Forms* Form No. 12:110.
- *9 U.S.C. § 4* (failure to arbitrate under agreement).

[b] Court Must Order Arbitration if Agreement Is Not in Issue

If, after the hearing on the petition, there is no issue as to the making of the arbitration agreement or the parties' failure to comply, the court will order arbitration. The hearing and proceedings, under the arbitration agreement, must be within the district in which the petition is filed. *See 9 U.S.C. § 4.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 38.33[2][a].*

- *9 U.S.C. § 4* (failure to arbitrate under agreement).

[c] Court Must Determine Arbitrability of Dispute if Agreement Is in Issue

If the making of the arbitration agreement or the failure, neglect, or refusal to perform the agreement is in issue, the court must proceed summarily to trial. *See 9 U.S.C. § 4*.



Strategic Point:

Except in cases of admiralty, the party in default may demand a jury trial of the issue. *See 9 U.S.C. § 4*. If the jury finds that no agreement in writing for arbitration was made or that there is no default as to such agreement, the proceeding must be dismissed. *See 9 U.S.C. § 4*. If the jury finds that an agreement in writing for arbitration was made or that there is a default, the court must summarily order the parties to proceed with the arbitration in accordance with the agreement. *See 9 U.S.C. § 4*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 38.33[2][a], 203.12[1].*
- *9 U.S.C. § 4* (failure to arbitrate under agreement).

[d] Order Denying Petition Is Appealable; Order Granting Petition Is Not

An order denying a petition to compel arbitration in accordance with the parties' agreement is appealable. *See 9 U.S.C. § 16(a)(1)(B)*.

Generally, an appeal cannot be taken from an interlocutory order directing an arbitration to proceed in accordance with the parties' agreement. *See 9 U.S.C. § 16(b)(2)*; *see also 28 U.S.C. § 1292(b)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 202.11[7].*
- *9 U.S.C. § 16* (appeals).
- *28 U.S.C. § 1292* (interlocutory decisions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending ArbitrationCivil ProcedureAlternative Dispute ResolutionJudicial Review



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.102

§ 1.102 Attacking Arbitration Agreement

[1] Evaluating Arbitration Agreement Under State Contract Law

The court must apply ordinary state-law principles that govern the formation of contracts to determine the validity of an arbitration agreement. *See Inland Bulk Transfer Co. v. Cummins Engine Co., 332 F.3d 1007, 1014 (6th Cir. 2003)* . State law cannot impose requirements on arbitration agreements that are not required for other contracts. *See Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)* (courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 131.32[3][a].*

[2] Raising Contract Defenses

An arbitration agreement is evaluated as any other contract, and generally applicable contract defenses, such as fraud, duress, or unconscionability may render the agreement unenforceable. *See Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 131.32[3][a].*

- *Sphere Drake Insurance v. All American Insurance Co., 256 F.3d 587, 592 (7th Cir. 2001)* (to avoid arbitration, party must show that arbitration clause itself vitiated by fraud, or lack of consideration or assent, so that parties never agreed to arbitrate their disputes).

[3] Submitting Challenges to Existence or Validity of Arbitration Provisions to Court

When contract defenses are raised that challenge the existence or validity of an arbitration agreement, the court must decide whether the defenses preclude enforcement of the agreement. *See 9 U.S.C. § 4.*

If the arbitration agreement is part of an underlying contract, the court determines defenses asserting that:

1. The contract between the parties, which includes the arbitration provision, is void. *See Three Valleys Municipal Water District v. E.F. Hutton, 925 F.2d 1136, 1140-1141 (9th Cir. 1991)* (party who contests making of a contract containing an arbitration provision cannot be compelled to arbitrate threshold issue of existence of agreement to arbitrate, and only a court can make that decision); or

2. A contract exists between the parties, but the arbitration provision itself is unenforceable. *See Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 403-404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)* (federal court may consider only issues relating to making and performance of agreement to arbitrate).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 203.12[1].*
- *9 U.S.C. § 4* (failure to arbitrate under agreement).
- *Enderlin v. XM Satellite Radio Holdings, Inc., 483 F.3d 559 (8th Cir. 2007)* (it was for district court, and not arbitrator, to decide whether arbitration clause was void as claimed by customer bringing claims under state deceptive trade practices act).

[4] Submitting Other Challenges to Underlying Contract to Arbitrator

When the existence of the underlying contract is admitted, defenses that go to the underlying contract, rather than to the arbitration provision, must be determined by the arbitrators, not the court. *See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449, 126 S. Ct. 1204, 163 L. Ed. 2d 1038, 1046 (2006)* ; *Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)* . Furthermore, the FAA overrides not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency. Thus, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA. *See Preston v. Ferrer, 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917, 923 (2008)* (lower courts erred in ruling that state Labor Commissioner had authority to determine, in first instance, whether arbitration agreement was valid).

Courts may not consider challenges to a contract's validity or enforceability as defenses against arbitration. *See Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)* (by statute, a federal court is not allowed to consider claims of fraud in the inducement of the arbitration contract generally).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 38.33[2][d].*

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.103

§ 1.103 Waiving Right to Seek Arbitration

The parties to an arbitration agreement can waive the right to seek arbitration. *See Britton v. Co-op Banking Group, 916 F.2d 1405, 1412-1413 (9th Cir. 1990)* . Although the waiver may be express or implied, merely engaging in action inconsistent with an arbitration provision does not, in itself, constitute waiver. *See ATSA of California, Inc. v. Continental Insurance Co., 702 F.2d 172, 175 (9th Cir. 1983)* .

Waiver of arbitration rights will not be lightly inferred, and will not be inferred simply by a party's inconsistent acts, but usually involves a finding of prejudice due to those acts. *See Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968)* (sufficient prejudice to infer waiver might be found, for example, if the party seeking the stay took advantage of judicial discovery procedures not available in arbitration).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 38.52[3][d].*
- *Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 925 (3d Cir. 1992)* (either party to an arbitration agreement can waive its right to seek arbitration).
- *Gavlik Construction Co. v. H. F. Campbell Co., 526 F.2d 777, 783 (3d Cir. 1975)* (waiver is not to be lightly inferred; it is not inconsistency of party's actions, but presence or absence of prejudice that is determinative of issue of waiver of arbitration, and merely answering on merits, asserting counterclaim or crossclaim, or participating in discovery, without more, will not necessarily constitute a waiver).
- *Britton v. Co-op Banking Group, 916 F.2d 1405, 1412-1413 (9th Cir. 1990)* (a party seeking to prove waiver of a right to arbitrate must demonstrate (1) knowledge of existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to party opposing arbitration resulting from such inconsistent acts).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsWaivers



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Chapter 1 DETERMINING FORUM
PART J: MOVING TO DISQUALIFY JUDGE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.104

§ 1.104 Checklist for Moving to Disqualify Judge

☐ Determine ground(s) for disqualification of judge, if any:

○ Judge has personal bias or prejudice either against the party seeking disqualification or in favor of any adverse party. *See § 1.109[2] below*.

○ Judge's impartiality reasonably might be questioned. *See § 1.109[1] below*.

○ Judge or lawyer associated with judge's private law practice was involved in the matter under prescribed circumstances. *See § 1.109[3] below*.

○ Judge, while in government employment and in such capacity (1) participated as counsel, adviser or material witness concerning the proceeding or (2) expressed an opinion concerning the merits of the particular case in controversy. *See § 1.109[4] below*.

○ Judge, individually or as a fiduciary, or judge's spouse or minor child residing in judge's household (1) has a financial interest in the subject matter in controversy or in a party to the proceeding or (2) has any other interest that could be substantially affected by the outcome of the proceeding. *See § 1.109[5] below*.

○ Judge or judge's spouse, or person within third degree of relationship to either, or spouse of such person (1) is a party to the proceeding, or an officer, director, or trustee of a party; (2) is acting as a lawyer in the proceeding; (3) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or (4) is to the judge's knowledge likely to be a material witness in the procceding. *See § 1.109[6] below*.

☐ Determine appropriate procedure to raise issue of disqualification: *See § 1.105 below*.

○ By filing affidavit and motion pursuant to *28 U.S.C. § 144* to disqualify district court judge because of bias or prejudice. *See § 1.105[2] below*.

○ By raising issue of disqualification, without or without filing formal motion, for ground(s) specified in *28 U.S.C. § 455*. *See § 1.105[3] below*.

☐ If moving to disqualify judge because of bias or prejudice pursuant to *28 U.S.C. § 144*, prepare and file timely motion with: *See § 1.106 below*.

○ Affidavit stating facts and reasons for disqualification. *See § 1.106[2] below*.

○ Certificate of counsel. *See § 1.106[2][d] below*.

☐ If moving to disqualify judge because of bias or prejudice pursuant to *28 U.S.C. § 144*, proceed on motion after initial determination of affidavit's sufficiency. *See §§ 1.107*, *1.108 below*.

☐ If seeking disqualification of judge pursuant to *28 U.S.C. § 455*, and formal motion is appropriate under the circumstances, or judge fails to recuse himself or herself after oral or written suggestion, prepare and file motion for disqualification. *See § 1.109[7] below*.

☐ If seeking disqualification of judge pursuant to *28 U.S.C. § 455*, raise issue of disqualification in timely manner by oral or written suggestion to court, if appropriate under the circumstances. *See § 1.109[8] below*.

☐ If seeking disqualification of judge pursuant to *28 U.S.C. § 455*, judge may be allowed to divest self of interest to avoid disqualification. *See § 1.109[9] below*.

☐ **Search By Topic:** Civil Procedure > Judicial Officers > Disqualifications and Recusals

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsFederal JudgesCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal Bias



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Chapter 1 DETERMINING FORUM
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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.105

§ 1.105 Asserting Appropriate Grounds for Disqualifying Judge

[1] Judge May Be Disqualified Only For Cause in Federal Court

In federal court, a judge may be disqualified only for cause, under either *28 U.S.C. § 144* or *455*.

Warning:

Disqualification of a judge in federal court is not a common event. It is important that a disqualification motion be handled in a courteous way and be based on good cause.

[2] Disqualifying Judge for Bias or Prejudice Under 28 U.S.C. § 144

28 U.S.C. § 144 provides that a party may move for disqualification of a judge on the ground of personal bias or prejudice. *See 28 U.S.C. § 144*. The statute applies only to district court judges and magistrate judges and provides only one ground for disqualification. *See 28 U.S.C. § 144*.

[3] Seeking Judge's Recusal Under 28 U.S.C. § 455

28 U.S.C. § 455 is a recusal statute that applies to any justice, judge, or magistrate judge of the United States in any proceeding. *See 28 U.S.C. § 455(a)*.

Although *28 U.S.C. § 455* specifies numerous circumstances when recusal is required (e.g., personal knowledge of disputed evidentiary facts), it does not contain a procedure for enforcement of its provisions. The statute is deemed to be self-enforcing on the part of the judge. *See United States v. Sibla, 624 F.2d 864, 867-868 (9th Cir. 1980)* . Nevertheless, if a judge does not recuse himself or herself as required by *28 U.S.C. § 455*, a party may move for disqualification on the grounds specified in that statute. *See In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994)* (no motion is required to precipitate a judge's recusal under *28 U.S.C. § 455*; however, parties may raise the issue by motion).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.20*.

- *28 U.S.C. § 144* (bias or prejudice of a judge).

- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).

- *Delesdernier v. Porterie, 666 F.2d 116, 121 (5th Cir. 1982)* (party seeking disqualification must do so in timely manner under either statute).

- *United States v. Heldt, 668 F.2d 1238, 1272 (D.C. Cir. 1981)* (proceeding under *28 U.S.C. 455* may give party seeking disqualification opportunity to raise issue without a formal motion).

- *United States v. Sciarra, 851 F.2d 621, 635 (3d Cir. 1988)* (*28 U.S.C. § 455(b)* mandates disqualification for personal bias concerning a party, but subsection (a) requires recusal in any proceeding in which the judge's impartiality might be questioned).

[4] Determining Which Statute to Use When Grounds Exist Under Both

Both *28 U.S.C. §§ 144* and *455* provide for disqualification or recusal of a district court judge on the grounds of personal bias or prejudice, and the test for disqualification is the same under both statutes. *See United States v. Conforte, 624 F.2d 869, 880 (9th Cir. 1980)* (standards for measuring grounds of disqualification under both *28 U.S.C. § 144* and *§ 455* is similar, but the sections reach different factual contexts). The party seeking disqualification must do so in a timely manner under either statute. *See Molina v. Rison, 886 F.2d 1124, 1131 (9th Cir. 1989)* (motion to disqualify or recuse judge under *28 U.S.C. § 144* or *28 U.S.C. § 455* must be made in a timely fashion).

Proceeding under *28 U.S.C. § 455* may give the party seeking disqualification the opportunity to raise the issue without a formal motion, but instead informally by an oral or written suggestion without filing a formal motion. The party may then move for disqualification if the judge fails to recuse himself or herself. *See In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994)* (no motion is required to precipitate a judge's recusal under *28 U.S.C. § 455*; however, parties may raise the issue by motion).

However, a motion to disqualify a judge pursuant to *28 U.S.C. § 455* may be heard by the challenged judge, unless a local rule provides for assignment of the motion to another judge for hearing. *See In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994)* . If a motion is necessary, the party seeking disqualification should consider filing a motion for disqualification under *28 U.S.C. § 144*, if possible, because the statute requires that the motion be heard by a judge other than the judge being challenged. *See 28 U.S.C. § 144*. Raising the issue of disqualification pursuant to *28 U.S.C. § 144* requires filing a motion and affidavit. *See 28 U.S.C. § 144*.

The party seeking disqualification should also consider whether any of the grounds specified under *28 U.S.C. § 455(b)(2)-(5)* exist, in addition to the alleged personal bias or prejudice. *See Hook v. McDade, 89 F.3d 350, 356 (7th Cir. 1996)* . A motion for disqualification on the grounds of personal bias or prejudice must be supported by specific facts and reasons for the belief that such bias or prejudice exists. *See Grimes v. United States, 396 F.2d 331, 333 (9th Cir. 1968)* (reasons and facts for belief litigant entertains are essential part of affidavit supporting motion to disqualify judge and must give fair support to charge of a bent of mind that may prevent or impede impartiality of judgment).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.20*.

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.

- *28 U.S.C. § 144* (bias or prejudice of a judge).

- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).

- *LoCascio v. United States, 473 F.3d 493, 495 (2d Cir. 2007)* (party may move for disqualification if the judge fails to recuse himself or herself).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsFederal JudgesCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal Bias



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1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.106

§ 1.106 Disqualifying Judge Under 28 U.S.C. § 144

[1] Moving to Disqualify Judge Because of Bias or Prejudice

A party to any proceeding in a district court may move to disqualify the judge before whom the proceeding is pending on the ground that the judge has a personal bias or prejudice either against the moving party or in favor of any adverse party. *See 28 U.S.C. § 144*.

To constitute grounds for disqualification, the personal bias or prejudice generally must stem from an extrajudicial source. *See Liteky v. United States, 510 U.S. 540, 544-545, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)* . Adverse judicial rulings alone do not constitute a valid basis for disqualification based on alleged bias or prejudice. *See Liteky v. United States, 510 U.S. 540, 556, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.60[2].*
- *Bender's Federal Practice Forms* Form No. 63:50.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *28 U.S.C. § 144* (bias or prejudice of a judge).

[2] Supporting Motion with Affidavit

[a] Affidavit Must Be Timely and Sufficient

A party asserting bias on the part of a district judge under *28 U.S.C. § 144* must file an affidavit raising the issue, accompanied by a certificate of counsel stating that the affidavit is made in good faith. The affidavit must be "timely." *See 28 U.S.C. § 144*; *see also Molina v. Rison, 886 F.2d 1124, 1131 (9th Cir. 1989)* (motion to disqualify or recuse a judge under *28 U.S.C. § 144* or *28 U.S.C. § 455* must be made in a timely fashion).

Although *28 U.S.C. § 144* provides that the affidavit must be filed not less than 10 days before the beginning of the term at which the proceeding is to be heard, that specific requirement has no effect because terms of court have been abolished. *See 28 U.S.C. § 138*. Nevertheless, a motion for disqualification should be filed with reasonable promptness after the ground for the motion is ascertained. *See Preston v. United States, 923 F.2d 731, 733 (9th Cir. 1991)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.61.*
- *Bender's Federal Practice Forms* Form No. 63:60.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *28 U.S.C. § 138* (court terms abolished).
- *28 U.S.C. § 144* (bias or prejudice of a judge).
- *Green v. Branson, 108 F.3d 1296, 1305 (10th Cir. 1997)* (to prevail on motion under *28 U.S.C. § 144* to recuse judge, litigant must file timely and sufficient affidavit establishing that judge has a personal bias or prejudice).

[b] Affidavit Must State Facts and Reasons for Disqualification

The affidavit must state the facts and reasons for the belief that the bias or prejudice exists. *See 28 U.S.C. § 144*. The affidavit must be definite as to time, place, and incidents. *See Berger v. United States, 255 U.S. 22, 33-34, 41 S. Ct. 230, 65 L. Ed. 481 (1921)* (in affidavit seeking disqualification of judge, reasons and facts for belief the litigant entertains are essential part of affidavit and must give fair support to charge of a bent of mind that may prevent or impede impartiality of judgment); *see also Grimes v. United States, 396 F.2d 331, 333 (9th Cir. 1968)* (reasons and facts for belief litigant entertains are essential part of affidavit supporting motion to disqualify and must give fair support to charge of a bent of mind that may prevent or impede impartiality of judgment).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.62[1].*
- *Bender's Federal Practice Forms* Form No. 63:60.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *28 U.S.C. § 144* (bias or prejudice of a judge).
- *Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987)* (affidavit supporting motion to disqualify judge must state with required particularity identifying facts of time, place, persons, occasion, and circumstances).

[c] Each Party May File Only One Affidavit in Any Case

A party may file only one affidavit in support of a disqualification motion in any case. *See 28 U.S.C. § 144*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.62[1][a][iii].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *28 U.S.C. § 144* (bias or prejudice of a judge).

[d] Affidavit Must Be Accompanied by Certificate of Counsel

The affidavit must be accompanied by a certificate of counsel of record stating that it is made in good faith. *See 28 U.S.C. § 144.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.62[1][b].*
- *Bender's Federal Practice Forms* Form No. 63:60.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *28 U.S.C. § 144* (bias or prejudice of a judge).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsExtrajudicial ConductCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPrior Involvements



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Chapter 1 DETERMINING FORUM
PART J: MOVING TO DISQUALIFY JUDGE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.107

§ 1.107 Making Initial Determination of Affidavit's Sufficiency to Disqualify Judge

The challenged judge may review the affidavit only to determine if it is legally sufficient, that is, timely filed and stating facts and reasons indicating bias or prejudice. *See LoCascio v. United States, 473 F.3d 493, 498 (2d Cir. 2007)* . The judge against whom the affidavit is directed cannot determine the truth or falsity of the facts stated in the affidavit. *See United States v. Clark, 605 F.2d 939, 942 (5th Cir. 1979)* ; *see also United States v. Montecalvo, 545 F.2d 684, 685 (9th Cir. 1976)* (challenged judge is entitled to pass upon the legal sufficiency of the affidavit filed against him or her, but cannot pass on the truth or falsity of the facts as stated in the affidavit).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 63.04[1], 63.63[1].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsFederal JudgesCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview



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Chapter 1 DETERMINING FORUM
PART J: MOVING TO DISQUALIFY JUDGE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.108

§ 1.108 Proceeding on Motion to Disqualify Judge After Initial Determination of Affidavit's Sufficiency

[1] Assigning Motion to Another Judge, if Affidavit Sufficient

After the affidavit has been determined to be sufficient, a judge other than the challenged judged must be assigned to hear the motion for disqualification. *See 28 U.S.C. § 144*.

[2] Denial of Motion, if Affidavit Insufficient

If the challenged judge determines that the affidavit is insufficient, the motion for disqualification is denied. The underlying matter remains pending before the challenged judge, but the party seeking disqualification can seek immediate appellate review by a filing a petition for a writ of mandamus. *See In re Cement Antitrust Litigation, 673 F.2d 1020, 1025 (9th Cir. 1982)* (if dissatisfied with district judge's decision regarding affidavit supporting motion to disqualify judge and confident that the litigation will be greatly disrupted, party may seek a writ of mandamus from court of appeals).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 63.04, 63.63[2].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *28 U.S.C. § 144* (bias or prejudice of a judge).
- *Bell v. Chandler, 569 F.2d 556, 560 (10th Cir. 1978)* (appeals court disqualified judge after case brought before it on writ of mandamus following judge's decision that affidavit against him insufficient).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial

OfficersJudgesDisqualifications & RecusalsFederal JudgesCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview



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Chapter 1 DETERMINING FORUM
PART J: MOVING TO DISQUALIFY JUDGE

1-1 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 1.109

§ 1.109 Raising Grounds for Judge's Recusal Under 28 U.S.C. § 455

[1] Showing Judge's Impartiality Might Reasonably Be Questioned

A judge must disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned. *See 28 U.S.C. § 455(a)*; *see also Focus Media, Inc. v. NBC., 378 F.3d 916, 929 (9th Cir. 2004)* . For purposes of *28 U.S.C. § 455*, "proceeding" includes pretrial, trial, appellate review, or other stages of litigation. *See 28 U.S.C. § 455(d)(1)*.

The question is whether a reasonable person with knowledge of all the facts would perceive a significant risk that the judge will resolve the case on a basis other than the merits, with the reasonable person being a "well-informed, thoughtful observer," as opposed to a "hypersensitive or unduly suspicious person." *See Clemens v. United States District Court, 428 F.3d 1175, 1178 (9th Cir. 2005)* , citing *In re Mason, 916 F.2d 384, 386 (7th Cir. 1990)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.20*.
- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).
- *United States v. Gipson, 835 F.2d 1323, 1324 (10th Cir. 1988)* (*28 U.S.C. § 455(a)* establishes an objective test for disqualification; it asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge).
- *United States v. Miranne, 688 F.2d 980, 985 (5th Cir. 1982)* (a judge must disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned).

[2] Showing Judge Has Personal Bias or Prejudice

A judge must disqualify himself or herself if he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. *See 28 U.S.C. § 455(b)(1)*.

To constitute grounds for disqualification, the personal bias or prejudice generally must stem from an extrajudicial source, not from conduct or rulings made during the course of the proceeding. *See Liteky v. United States, 510 U.S. 540, 544-545, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)* (for alleged bias and prejudice to be disqualifying, it must stem from extrajudicial source); *Focus Media, Inc. v. NBC, 378 F.3d 916, 930 (9th Cir. 2004)* (judicial rulings alone almost never constitute valid basis for a bias or partiality motion, because in and of themselves they cannot possibly show reliance upon an extrajudicial source).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.21.*
- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).
- *Fletcher v. Conoco Pipe Line Co., 323 F.3d 661, 665 (8th Cir. 2003)* (adverse ruling does not constitute a sufficient basis for disqualification without a clear showing of bias or partiality).
- *Mitchell v. Kirk, 20 F.3d 936, 938 (8th Cir. 1994)* (partiality that develops during the course of proceedings can be the basis of recusal only when judge displays a deep-seated favoritism for or antagonism against a party).

[3] Showing Judge or Lawyer Associated with Judge's Private Law Practice Served As Lawyer or Witness in Controversy

A judge must disqualify himself or herself if:

1. In private practice, the judge served as a lawyer in the matter in controversy;

2. A lawyer with whom the judge previously practiced law served, during their association, as a lawyer concerning the matter; or

3. The judge or such lawyer has been a material witness concerning the matter in controversy.

See 28 U.S.C. § 455(b)(2).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.30[1]-[3].*
- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).

[4] Showing Judge Participated in Matter While in Government Employment

A judge must disqualify himself or herself if he or she served in governmental employment and in such capacity:

1. Participated as counsel, adviser, or material witness concerning the proceeding; or

2. Expressed an opinion concerning the merits of the particular case in controversy.

See 28 U.S.C. § 455(b)(3).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.30[4].*
- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).

[5] Showing Judge, Spouse, or Minor Child Has Financial or Other Interest in Matter

[a] As Individual or Fiduciary

A judge must disqualify himself or herself if the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household:

1. Has a financial interest in the subject matter in controversy or in a party to the proceeding; or

2. Has any other interest that could be substantially affected by the outcome of the proceeding.

See 28 U.S.C. § 455(b)(4).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.31[1].*
- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).

[b] Legal or Equitable Interest

"Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party. *See 28 U.S.C. § 455(d)(4).*

Exceptions:
Exceptions include:

1. Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund. *See 28 U.S.C. § 455(d)(4)(i)*;

2. An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization. *See 28 U.S.C. § 455(d)(4)(ii)*;

3. The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the judge's interest. *See 28 U.S.C. § 455(d)(4)(iii)*; and

4. Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities. *See 28 U.S.C. § 455(d)(4)(iv).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.31[2].*
- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).

[c] Judge Responsible for Knowing Interests

A judge must inform himself or herself about his or her personal and fiduciary financial interest, and must make a reasonable effort to inform himself or herself about the personal financial interests of his or her spouse and minor children residing in his or her household. *See 28 U.S.C. § 455(c).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.31[3].*
- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).

[6] Showing Judge or Judge's Relative Has Involvement in Proceeding

A judge must disqualify himself or herself if the judge or judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

1. Is a party to the proceeding, or an officer, director, or trustee of a party. *See 28 U.S.C. § 455(b)(5)(i)*;

2. Is acting as a lawyer in the proceeding. *See 28 U.S.C. § 455(b)(5)(ii)*;

3. Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding. *See 28 U.S.C. § 455(b)(5)(iii)*; or

4. Is to the judge's knowledge likely to be a material witness in the proceeding. *See 28 U.S.C. § 455(b)(5)(iv).*

See In re National Union Fire Insurance Co., 839 F.2d 1226, 1228-1229 (7th Cir. 1988) .

Exception:

The "rule of necessity" is an exception to the requirement of disqualification under *28 U.S.C. § 455(b)(5)(i)*. Under the rule of necessity, a judge is not disqualified to try a case because of a personal interest in the matter at issue if the case cannot be heard otherwise. *See United States v. Will, 449 U.S. 200, 213, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980)* ("rule of necessity" provides that although a judge should not, if it can be avoided, take part in the decision of a case in which judge has any personal interest, judge must do so if the case cannot be heard otherwise); *Tapia-Ortiz v. Winter, 185 F.3d 8, 10 (2d Cir. 1999)* (under rule of necessity, judge is qualified to decide a case even if judge has an interest in it, when case cannot be heard otherwise).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.32.*

- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).

- *Ignacio v. Judges of the U.S. Court of Appeals for the Ninth Circuit, 453 F.3d 1160, 1163-1165 (9th Cir. 2006)* (rule of necessity applied when plaintiff indiscriminately sued all judges of Ninth Circuit).

[7] Moving for Disqualification if Judge Does Not Recuse Self

Although the statute does not specify a procedure for disqualification, a party may move for disqualification pursuant to *28 U.S.C. § 455* if a judge fails to recuse himself or herself. *See In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994)* (no motion is required to precipitate a judge's recusal under *28 U.S.C. § 455*, but parties may raise the issue by motion).



Strategic Point:

A motion to disqualify a judge pursuant to *28 U.S.C. § 455* may be heard by the challenged judge, unless a local rule provides for assignment of the motion to another judge for hearing. *See In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994)* . If a motion is necessary, the party seeking disqualification should consider filing a motion for disqualification under *28 U.S.C. § 144*, if possible, because the statute requires that the motion be heard by a judge other than the judge being challenged. *See 28 U.S.C. § 144*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 63.60[2], 63.61[2].*

- *Bender's Federal Practice Forms* Form No. 63:50.

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.

- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).

- *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., 690 F.2d 1157, 1162 (5th Cir. 1982)* (although the matter is ultimately within the discretion of the challenged judge, recusal motions should only be transferred in unusual circumstances).

- *United States v. Gigax, 605 F.2d 507, 511 (10th Cir. 1979)* (*28 U.S.C. § 455* requires that a judge disqualify or recuse himself where his impartiality might reasonably be questioned, while the procedure under *28 U.S.C. § 144* is to disqualify a judge prior to trial on motion of a party).

[8] Seeking Disqualification Under 28 U.S.C. § 455 in Timely Manner

There is no "per se" rule as to what constitutes a timely motion under *28 U.S.C. § 455*, but the party seeking recusal must file a motion with reasonable promptness after the ground for the motion is ascertained. *See Preston v. United States, 923 F.2d 731, 733 (9th Cir. 1991)* (recusal motions should be filed with reasonable promptness after the ground for such a motion is ascertained).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.61[2].*

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.

- *LoCascio v. United States, 473 F.3d 493, 497 (2d Cir. 2007)* (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. Pearson, 203 F.3d 1243, 1276 (10th Cir. 2000)* (a party filing a motion to recuse must do so promptly once it knows of the facts on which it relies in its motion).

[9] Allowing Judge to Divest Self of Interest to Avoid Disqualification

If a judge to whom a matter has been assigned would be disqualified based on a financial interest of the judge, spouse, or minor child (other than an interest that could be substantially affected by the outcome), and if those grounds are discovered after substantial judicial time has been devoted to the matter, disqualification nonetheless is not required if the person with the financial interest divests himself or herself of the interest that provides the grounds for disqualification. *See 28 U.S.C. § 455(f).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 63.31[3].*

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.

- *28 U.S.C. § 455* (disqualification of justice, judge, or magistrate).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPrior Involvements



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Chapter 2 REMOVAL

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation 2.syn

§ 2.syn Synopsis to Chapter 2: REMOVAL

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[4] Addition of Parties

§ 2.29 Remand Shifts Jurisdiction to State Court

§ 2.30 Seeking Reconsideration After Remand Order

§ 2.31 Seeking Appellate Review of Remand Order

[1] Orders Denying Remand

[2] Orders Granting Remand

[a] Remand Based on Procedural Defect or Lack of Subject Matter Jurisdiction Is Not Reviewable

[b] Remand Based on Substantive Decision Apart From Jurisdictional Issue Is Subject to Review if Contained in Separate Order

[c] Remand Based on Discretionary Decline of Jurisdiction Is Subject to Review



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Chapter 2 REMOVAL
PART A: PROCEDURAL CONTEXT

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.01

§ 2.01 Procedural Context--Removal

A case's potential for removal is an important consideration, particularly when the defendant lives or is located outside the forum state. The test for removal is whether the case could have been originally brought in federal court. *See 28 U.S.C. § 1441*. To evaluate the availability of removal, counsel must evaluate the two categories of federal court jurisdiction: federal question jurisdiction and jurisdiction based on diversity of citizenship. For detailed discussion of these categories, see Ch. 1 *above*.

Strategically, the defendant may seek to eliminate any "home court advantage" or to transfer the case to a federal venue in another locality, which requires that the defendant first remove, then transfer under federal law.

Violating the strict statutory deadlines can result in waiver of removal rights, so timing is a key concern when seeking removal. *See § 2.05 below*.

Parties should consider how differences between state and federal practice may affect the pace of the proceedings (e.g., court congestion). It may take longer to obtain a trial date in federal court, but federal court motion calendars are generally less crowded. In addition, federal courts generally have more law clerks and may be more able to handle complex pretrial motions.

Legal Topics:

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



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Chapter 2 REMOVAL
PART B: EVALUATING CASE FOR REMOVAL

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.02

§ 2.02 Checklist for Evaluating Case

☐ Ascertain whether removal would be desirable for client:

○ **Federal rules.** Are procedures or evidentiary rules in federal court preferable?

○ ***Erie* Doctrine.** Under *Erie*, certain federal rules are applied, rather than their state counterparts, when hearing a state claim based on diversity jurisdiction. Defendant should investigate whether any such procedural differences would be significant to the case. *See § 2.18 below* .

○ **Local practice.** Review local district court rules and consider advantages and disadvantages of federal local practice.

○ **Familiarity.** Litigants often choose the forum where they are more comfortable or more experienced. Conversely, a defendant may consider whether the federal forum would be a more difficult venue for plaintiff's counsel.

○ **Jury trials.** In some cases, it is more likely that a matter could be tried to a jury in federal court than it would in state court.

○ **Jury pools.** The populations within federal districts, particularly large districts, are often demographically distinct from those in the encompassed state districts. Defendants contemplating a jury trial should consider whether the federal jury pool is likely to be more favorable to the case than its state counterpart.

○ **Jury unanimity.** Federal civil juries must be unanimous. Consider whether this

point might favor the plaintiff or the defendant.

○ **Interlocutory appeals.** The right to seek interlocutory appeals may differ in federal and state courts.

○ **Docket congestion.** Consider relative congestion in state and federal court civil dockets.

○ **Geography.** The federal courthouse may be more convenient to the defendant or to defense counsel.

○ **Alternative dispute resolution.** Consider relative availability of mandatory alternative dispute resolution procedures.

○ **Transfer.** Consider availability within federal court system to seek transfer to more convenient forum in different state or to seek consolidation with existing MDL action. *See §§ 1.59 -1.94 above*.

○ **Assignment of single judge.** A single assigned judge in federal court may mean more familiarity with the case, greater speed to trial, etc., than the various duty judges who may be involved with a case in state court.

○ **Peremptory challenge of judge.** In state court, litigants may be entitled to a single peremptory challenge against the assigned judge. In federal court, judges may be disqualified only for cause, which is a very difficult standard to meet. *See §§ 1.104 -1.109 above*.

○ **Judge's interpretation of law.** If state law has not been clearly defined by the state courts, consider whether federal courts have previously interpreted the state law and whether that interpretation is favorable compared to the likely interpretation by a state court judge.

○ **Remand.** Check to ensure that grounds for remand are nonexistent or minimal. *See § 2.23 below*.

☐ Ascertain whether removal is possible:

○ Was case originally filed in state court? *See 28 U.S.C. §§ 1441(a), 1446(a). See § 2.07 below*.

○ Is there federal question jurisdiction? *See 28 U.S.C. § 1441. See § 2.06 below*.

○ Is there diversity jurisdiction? *See 28 U.S.C. §§ 1332, 1441. See § 2.07 below*.

- ○ If other than a qualified class action, will all defendants join? *See 28 U.S.C. §§ 1446(b), 1453(b). See § 2.09 below.*

- ○ Can removal notice be timely filed? *See 28 U.S.C. § 1446(b). See §§ 2.05, 2.17 below.*

- ○ Do particular removal statutes apply? *See § 2.10 below.*

- ○ Is there a valid forum selection clause? *See § 2.05[2] below.*

- ○ Have defendants already submitted to state court jurisdiction? *See § 2.05[2] below.*

☐ Note that a state court plaintiff may strategically choose to prevent removal by:

- ○ Avoiding federal law claims. *See § 2.06 below.*

- ○ Choosing defendants strategically (e.g., joining legitimate nondiverse or local defendants). *See §§ 2.06, 2.07 below.*

- ○ Limiting demand for damages. *See § 2.07[3][a] below.*

- ○ Serving defendants strategically (e.g., serving defendant least likely to remove first and staggering service thereafter to other defendants). *See § 2.17 below.*

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

Legal Topics:

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



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Chapter 2 REMOVAL
PART B: EVALUATING CASE FOR REMOVAL

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.03

§ 2.03 Using Removal to Transfer Case From State Court to Federal Court

[1] Removal Available If Case Could Have Been Brought in Federal Court

Removal statutes permit defendants to transfer a civil action filed in state court to the corresponding federal district court when the case could have originally been brought in federal court. Removal is usually based on federal question or diversity jurisdiction. *28 U.S.C. § 1441*; *see also §§ 1.02 -1.24 above*.

[2] Several Key Restrictions Apply Under General Removal Statute

The general removal statute, *28 U.S.C. § 1441*, includes the following restrictions on removal:

1. Only civil actions brought in state court may be removed;

2. The district courts must have original jurisdiction over the action;

3. Only the defendant or all defendants may remove; and

4. The action must be removed to the federal district court for the district and division in which the state action is pending.

[3] Special Removal Statutes Allow for Removal in Other Special Circumstances

Removal is also available under certain special circumstances specified in other statutes. *See 28 U.S.C. §§ 1441-1445*; *see also § 2.10 below*.

Warning:

Counsel must ensure that all statutory requirements are strictly met, whatever type of removal is chosen. *See 28 U.S.C. §§ 1441-1447*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.)* Ch. 107.
- *Federal Litigation Guide P 1.60 et seq*.
- *28 U.S.C. § 1441* (actions removable generally).

Legal Topics:

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



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Chapter 2 REMOVAL
PART B: EVALUATING CASE FOR REMOVAL

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.04

§ 2.04 Basing Removal on Either Federal Question or Diversity Jurisdiction

[1] Federal Question Cases

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)*; *see also §§ 1.02 -1.08 above*.

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)*.

[2] Diversity Cases: Resident Defendant Bars Removal in Most Cases

A diversity action is usually removable only if:

1. Complete diversity exists between the parties; and

2. None of the parties in interest properly joined and served as defendant is a citizen of the state where the action is pending.

28 U.S.C. § 1441(b).

However, complete diversity is not required in class actions or mass actions governed by the Class Action Fairness Act of 2005, which applies to civil actions commenced on or after February 18, 2005. *See 28 U.S.C. § 1332(d)*; *see also § 2.07[7] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14*.
- *Federal Litigation Guide P 1.61*.

- *Bender's Federal Practice Forms* Form No. 81:260.
- *28 U.S.C. § 1332* (jurisdiction based on diversity of citizenship).

Legal Topics:

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



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Chapter 2 REMOVAL
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1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.05

§ 2.05 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).*

Circuit Split:
Circuit courts are split as to whether federal district courts have authority to remand sua sponte for procedural defects. *See § 2.22 below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.18[2].*
- *Federal Litigation Guide P 1.62.*
- *28 U.S.C. § 1446(b)* (notice of removal of civil action or proceeding).

[2] Waiving Right to Remove Through Forum Selection Clause

[a] Forum Selection Clauses Must Be Clear and Unequivocal

Domestic and international forum selection clauses are prima facie valid. *Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)* (forum selection clauses are prima facie valid and are enforceable absent a clear showing that enforcement would be unjust or unreasonable); *see also § 1.80 above.* The waiver must be clear and unequivocal and designate an exclusive forum to resolve disputes. *See 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).

Circuit Split:

Circuits are split as to the standard of review of a refusal to enforce a forum selection clause. *See, e.g., De Energia Electrica de P.R. v. Ericsson, Inc., 201 F.3d 15, 18 (1st Cir. 2000)* (applying de novo standard of review); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 280 n.4 (9th Cir. 1984)* (applying abuse-of-discretion standard of review).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.18[1][a], [b].*
- *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.14, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (forum-selection clauses that are freely negotiated and are not unreasonable and unjust are enforceable).
- *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 clause enforceable unless clearly unreasonable and unjust, fraudulent or overreaching).
- *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 the forum).
- *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., 940 F.2d 550, 553-554 (9th Cir. 1991)* (party asserting waiver has the burden of proof).

[b] Effect on Other Defendants

Other defendants who are not parties to the agreement may be barred from removing the action when removal must be joined by all defendants. *See §§ 2.09, 2.15[3] below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.18[4].*

[3] 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 that clearly and unequivocally manifest submission to state court jurisdiction (and the abandonment of the right to a federal forum) after it appears that the case is removable. *See Schmitt v. Insurance Co. of North America, 845 F.2d 1546, 1548 (9th Cir. 1988)* (removal waived by filing permissive cross-complaint).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.18[3].*

Legal Topics:

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



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Chapter 2 REMOVAL
PART B: EVALUATING CASE FOR REMOVAL

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.06

§ 2.06 Determining Whether Case Removable Based on District Court's Original Federal Question Jurisdiction

[1] Federal Question Actions Are Removable by Defendant

If the plaintiff initiates a federal question action in state court, the defendant may remove the case to federal court regardless of citizenship, residence, or amount in controversy. *28 U.S.C. § 1441(a), (b)*; *see also § 2.04[1] above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[3][a].*

[2] Analyzing Federal Question Jurisdiction

[a] Action Must Arise Under Federal Law

District courts have original jurisdiction of civil actions arising under the Constitution, treaties, or laws of the United States. U.S. Const, art. III, § 2; *28 U.S.C. § 1331*. 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. *Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 13, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)* (original federal jurisdiction available only if substantial disputed question of federal law is necessary element of state claim); *see also § 1.03 above* (federal question jurisdiction defined).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[3][a].*
- *Bender's Federal Practice Forms* Form No. 81:192.
- *28 U.S.C. § 1331* (federal question jurisdiction).

- *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 125 S. Ct. 2363* , 162 Ed. 2d 257 (2005) (federal cause of action is not a necessary condition for exercising jurisdiction over state-law claims that implicate significant federal issues).

[b] Applying Well-Pleaded Complaint Rule

Federal question jurisdiction exists only 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 was properly removed); *see also § 1.03 above* (federal question jurisdiction defined).

Exception:

Under the artful pleading doctrine, a plaintiff may not defeat removal by omitting to plead necessary federal questions. If a court finds that a plaintiff has "artfully pleaded" claims, 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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 103.40 et seq., 107.14[3][a][iii].*
- *28 U.S.C. § 1331* (federal question jurisdiction).

[c] Removing Claim Over Which State Court Did Not Have Jurisdiction Is Generally Permissible

A federal district court may adjudicate any claim in an action removed under § 1441, 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 § 1441 is not the basis for removal, circuit courts require state court subject matter jurisdiction under the derivative jurisdiction doctrine. *See, e.g., 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.) § 107.15[1][b][vi].*
- *28 U.S.C. § 1441* (actions removable generally).
- *28 U.S.C. § 1442* (removal by federal officer).

[d] Removing Case Based on Federal Defense Generally Impermissible

A case is 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)* (a defense that relies on the preclusive effect of a prior federal judgment or the pre-emptive effect of a federal statute will not provide a basis for removal).

Exception:

Under the complete pre-emption doctrine, the pre-emptive force of a statute is so "extraordinary" that it converts an ordinary state common law complaint into one stating a federal claim. *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); *see also § 2.06[4] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[3][a][v].*

[e] Removing Case Based on Defendant's Federal Question Counterclaim Impermissible

A defendant may not remove a case solely based on 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 a federal question into action that asserts a state-law claim to create an action arising under federal law).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[3][a][vi].*

[3] Removing Entire Case Based on Federal Question Claim

If a removable claim presents a federal question and is part of a case including *related* state law claims, the entire case may ordinarily be removed based on the court's supplemental jurisdiction. *See 28 U.S.C. §§ 1367, 1441(c).*

Whenever 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 all 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, the asserted claims must have arisen from different sets of acts that are not transactionally related); *see also § 2.28 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.)* Chs. 106, 107.
- *Bender's Federal Practice Forms* Form No. 81:190.
- *28 U.S.C. § 1367* (supplemental jurisdiction).
- *28 U.S.C. § 1441(c)* (joinder of claims or causes of action otherwise not removable).

[4] Removing Cases Entirely Preempted by Federal Law

When Congress provides for an exclusive federal remedy, federal courts will usually have exclusive jurisdiction. An action may be removed if the asserted claim has been completely preempted by federal law, even if no federal claim for relief appears on the face of the complaint. *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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalElementsRemovability



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Chapter 2 REMOVAL
PART B: EVALUATING CASE FOR REMOVAL

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.07

§ 2.07 Determining Whether Case Removable Based on District Court's Original Diversity Jurisdiction

[1] Case Must Meet Amount in Controversy and Diversity of Citizenship Requirements

A defendant may be able to remove a case if the case could have originally been brought in federal court under diversity jurisdiction. *28 U.S.C. § 1441(a)*.

A district court has diversity jurisdiction over any civil action in which the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and the action is between:

1. Citizens of different states;

2. Citizens of a state and citizens or subjects of a foreign state;

3. Citizens of different states, with foreign citizens or subjects as additional parties; or

4. A foreign state as plaintiff and citizens of a state or different states as defendants.

28 U.S.C. § 1332(a); *see also § 1.10 above* (statutory requirements for diversity jurisdiction).

Exception:
Under the Class Action Fairness Act of 2005, a district court also has 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*. *28 U.S.C. §§ 1332(d)(2)*, *1453(b)*; *see § 2.07[7] below; see also § 1.23 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 23.63A*, *107.14[2]*.
- *Bender's Federal Practice Forms* Form Nos. 81:193, 81:208, 81:263.

- *28 U.S.C. § 1332(a)* (basic requirements for diversity jurisdiction).
- *28 U.S.C. § 1332(d)(2)* (diversity jurisdiction requirements under CAFA).
- *28 U.S.C. § 1453(b)* (removal of class actions).

[2] Removal Not Permitted If Any Defendant Is Citizen of State in Which Action Is Filed

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. *28 U.S.C. § 1441(b)*.

Exception:

Under the Class Action Fairness Act of 2005, a qualified class action may be removed without regard to whether any defendant is a citizen of the state in which the action is brought. *28 U.S.C. §§ 1332(d)(2), 1453(b)*; *see also § 1.23 above*; *§ 7.08 below* **.**

Circuit Split:

The majority of circuits holds that the forum defendant rule contained in *28 U.S.C. § 1441(b)* is procedural, not jurisdictional. Therefore, a violation of the forum defendant rule could be a waivable defect if not objected to within 30 days. *Bailey v. Texas Co., 47 F.2d 153, 155 (2d Cir. 1931)* (forum-defendant rule is nonjurisdictional); *but see Horton v. Conklin, 431 F.3d 602, 605 (8th Cir. 2005)* (in Eighth Circuit, presence of local defendant constitutes jurisdictional defect that can be raised at any time).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[2][e].*
- *Bender's Federal Practice Forms* Form Nos. 81:263, 81:264.

[3] Removal Not Permitted in Certain Domestic Relations or Probate Cases

Diversity jurisdiction does not apply to certain domestic relations cases. *Ankenbrandt v. Richards, 504 U.S. 689, 703, 112 S. Ct. 2206, 119 L. Ed. 2d 468 (1992)* (domestic relations cases belong to the laws of the states and not to those of the United States).

Federal courts also lack diversity jurisdiction over probate cases. *Markham v. Allen, 326 U.S. 490, 494, 66 S. Ct. 296, 90 L. Ed. 256 (1946)* (federal court has no jurisdiction to probate a will or administer an estate). However, this exception is narrow and only applies if a matter is purely probate in nature, *e.g.*, that the federal court is being asked directly to probate or annul a will or administer an estate, or is being asked to adjudicate the right to property that is in the custody of a state probate court. *See Marshall v. Marshall, 547 U.S. 293, 312, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006)* (when a matter is otherwise within federal jurisdiction, federal courts are not barred from adjudicating that matter by the probate exception); *see also § 1.11 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[2][a][ii].*

- *Bender's Federal Practice Forms* Form No. 81:260 et seq.

[4] Satisfying Complete Diversity Requirement

[a] Consider Citizenship of All Named Defendants

The citizenship of all *named* defendants is relevant for diversity jurisdiction. *See 28 U.S.C. § 1441(a).*

A named defendant need not negate the existence of a potential defendant whose presence would destroy diversity. If an entity is neither named nor joined as a defendant, it cannot be deemed a real party in interest whose presence would destroy diversity. *Lincoln Prop. Co. v. Roche, 546 U.S. 81, 84, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005)* (properly joined defendant need not negate existence of potential codefendant whose presence would destroy diversity).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[2][f][iii].*

[b] Citizenship of Nominal, Sham, or Fraudulently Joined Defendants Irrelevant

The 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)* (nondiverse defendant properly deemed fraudulently joined and disregarded).

A defendant seeking to establish that another, nondiverse defendant has been fraudulently joined must show:

1. No possibility exists that the plaintiff will be able to establish a cause of action against the nondiverse defendant in state court; and/or

2. The plaintiff's pleadings of jurisdictional facts constitute outright fraud.

Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1066-1067 (9th Cir. 2001) (joinder of a non-diverse defendant is deemed fraudulent and is ignored for determining diversity, if the plaintiff fails to state a cause of action against a resident defendant, and failure is obvious according to settled rules of state).

Warning:

Defendants should move for an order under *Fed. R. Civ. P. 12(b)(6)* to dismiss the suit against any sham parties to eliminate the duty to serve those parties with copies of all process. Plaintiffs should conduct discovery to identify and serve unnamed defendants as soon as practicable to ensure that the identification of any diversity-destroying defendant is known before the defendant seeks removal. *See Lincoln Prop. Co. v. Roche, 546 U.S. 81, 84, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005)* .

Warning:

Alleging fraudulent joinder could damage a defendant's case. Sanctions may be imposed for improper removal if the co-defendant is not fraudulently joined; the plaintiff's case may be strengthened by a finding of some possibility of recovery; and the removal may delay the resolution of a weak case in state court.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[2][c][iv].*
- *Bender's Federal Practice Forms* Form No. 81:20.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Fed. R. Civ. P. 12(b)(6)* (motion to dismiss for failure to state a claim).

[c] Timing of Determination of Diversity

For removal, diversity of citizenship must be shown:

1. At the time that the lawsuit is commenced; and

2. At the time of removal.

See Pullman Co. v. Jenkins, 305 U.S. 534, 537-538, 59 S. Ct. 347, 83 L. Ed. 334 (1939) ; *see also Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 570-571, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004)* (court upheld dismissal for lack of subject-matter jurisdiction).

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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[2][d][i].*

[d] Proving Diversity

A defendant seeking removal based on diversity jurisdiction has the burden of establishing diversity. *Pullman Co. v. Jenkins, 305 U.S. 534, 540, 59 S. Ct. 347, 83 L. Ed. 334 (1939)* .

A case is removable on diversity grounds if the initial pleading setting forth the claim alleges facts indicating diversity. *See 28 U.S.C. § 1446(b).* Only the citizenship of named defendants is relevant. *See § 2.07[4][a] above*; *see also § 1.11 above.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[2][f][iii].*
- *Hertz Corp. v. Friend, -- U.S. --, 130 S. Ct. 1181, 175 L. Ed. 2d 1029, 1041-1042 (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).

[5] Satisfying Amount in Controversy Requirement

[a] Amount in Controversy Must Exceed $75,000 in Most Cases

To support diversity jurisdiction, the amount in controversy must usually exceed $75,000, exclusive of interest and costs. *28 U.S.C. § 1332(a)*. The test to determine the amount in controversy is not the sum that is ultimately awarded to the plaintiff, but the sum that is demanded by the plaintiff when the complaint is filed. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289-290, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* (recovery of less than jurisdictional amount does not divest federal court of jurisdiction).

Although federal law determines the amount in controversy, federal courts look to state law in a diversity case to determine the nature and amount of damages. *Horton v. Liberty Mut. Ins. Co. 367 U.S. 348, 352-353, 81 S. Ct. 1570, 6 L. Ed. 2d 890 (1961)* .

Exception:

The Class Action Fairness Act of 2005 requires that the matter in controversy exceed the sum or value of $5 million, exclusive of interest and costs. *28 U.S.C. § 1332(d)(2)*; *see also § 1.23 above*.

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)* ; *see also §§ 1.22, 1.32 above*.

Strategic Point:

Defense counsel should investigate in good faith the amount in controversy before seeking removal to avoid Rule 11 sanctions. *See Fed. R. Civ. P. 11*; *see also §§ 11.02 -11.05 below*. Counsel should consider requesting a stipulation from the plaintiff that damages do not exceed the jurisdictional minimum.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.)* Chs. 106, 107.
- *28 U.S.C. § 1332* (jurisdiction based on diversity of citizenship).
- *Fed. R. Civ. P. 11* (signing of papers).

[b] Timing of Determination of Amount in Controversy

The amount in controversy is determined based on the plaintiff's 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)* .

Warning:

After an action has been removed, a plaintiff cannot defeat diversity jurisdiction by voluntarily reducing his or her claim below the jurisdictional amount. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 292, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[2][g][ii].*

[c] Proving Amount in Controversy

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); *see also* Ch. 1 *above*.

Circuit Split:

For cases under the Class Action Fairness Act of 2005, the majority of circuits hold that the burden of proof remains with defendant. *See Abrego v. Dow Chem. Co., 443 F.3d 676, 685 (9th Cir. 2006)* (under CAFA burden of establishing removal jurisdiction remains on proponent of federal jurisdiction); *but see Natale v. Pfizer, 379 F. Supp. 2d 161, 168 (D. Mass. 2005)* (stating minority viewpoint that burden is on party opposing removal); *see also* Ch. 7 *below* (general coverage of class actions).

Removal is proper if it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional minimum. If the claim appears to have been made in good faith, then the sum claimed by the plaintiff controls for removal purposes unless it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed. *Singer v. State Farm Mut. Auto. Ins., 116 F.3d 373, 375 (9th Cir. 1997) , citing St. Paul Mercury Indem. Co. v. Red Cab Co. 303 U.S. 283, 288-290, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* (must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal). A removing defendant has a heavy burden in rebutting this presumption.

If the jurisdictional amount is not alleged in the complaint or is not facially apparent, federal courts 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:

To avoid removal of a personal injury case, allege less than the jurisdictional amount of damages in the statement of damages.

Attorneys fees count towards the jurisdictional amount requirement. *Missouri State Life Ins. Co. v. Jones, 290 U.S. 199, 202, 54 S. Ct. 133, 78 L. Ed 267 (1933)* . Depending on state statute, attorney's fees are allocated to the named plaintiffs. *Grant v. Chevron Phillips Chem. Co. L.P., 309 F.3d 864, 874 (5th Cir. 2002)* ; *Free v. Abbott Lab. (In re Abbott Lab.), 51 F.3d 524, 529 (5th Cir. 1995)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[2][g][v].*
- *Weinstein's Federal Evidence (2d Ed.)* Ch. 408.
- *Bender's Federal Practice Forms* Form Nos. 81:193, 81:215.

- *Rising-Moore v. Red Roof Inns, Inc., 435 F.3d 813, 816 (7th Cir. 2006)* (evidence of estimated value of plaintiff's injury, contained in plaintiff's settlement offers, was admissible in slip-and-fall case to determine amount in controversy for purposes of federal jurisdiction).

- *Boyer v. Snap-On Tools Corp., 913 F.2d 108, 110-112 (3d Cir. 1990)* (removing defendant has heavy burden to show that plaintiff's allegation of damages is erroneous).

[6] Minimal Diversity Under Multiparty, Multiforum Trial Jurisdiction Act of 2002

[a] "Minimal Diversity" Rule Confers Original Federal Court Jurisdiction in Civil Cases Arising From Catastrophic Accidents

The Multiparty, Multiforum Trial Jurisdiction Act of 2002 provides for original jurisdiction of certain civil actions involving minimal diversity between adverse parties when at least 75 natural persons have died in a single accident at a discrete location. *See 28 U.S.C. § 1369*.

There is minimal diversity between adverse parties if any party is a citizen of a state and any adverse party is a citizen of another state, a citizen or subject of a foreign state, or a foreign state. *28 U.S.C. § 1369(c)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 102.22*.

- *28 U.S.C. § 1369(a)* (multiparty/multiforum jurisdiction generally).

- *28 U.S.C. § 1369(c)* (minimal diversity defined).

[b] Removal in Minimal Diversity Cases

In addition to the general rules on diversity jurisdiction-based removal, a defendant in a state-court civil action may remove an action to federal district court if either:

1. The action could have been brought under the district court's minimal diversity jurisdiction provision (*28 U.S.C. § 1369*); or

2. The defendant is a party to an action that is or could have been brought under the district court's minimal diversity jurisdiction, even if the action could not have been brought in a district court as an original matter.

28 U.S.C. § 1441(e)(1).

The action is removable if it arises from the same accident as the state court action, even if it could not have been originally brought in district court. If an action is removable, it must be removed to the district court for the district and division embracing the place where the action is pending. *28 U.S.C. § 1441(e)(1)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.11[4]*.

- *Bender's Federal Practice Forms* Form Nos. 81:208, 81:263, 81:291.
- *28 U.S.C. § 1369* (multiparty/multiforum jurisdiction).
- *28 U.S.C. § 1441(e)(1)* (removal of action subject to multiparty/multiforum jurisdiction).

[7] Minimal Diversity Under Class Action Fairness Act of 2005

Under the Class Action Fairness Act of 2005, a district court has diversity jurisdiction over certain multistate class actions in which the matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs, and diversity of citizenship exists between any member of a class of plaintiffs and any defendant. *See 28 U.S.C. § 1332(d)(2)*. A defendant in a qualifying class action filed in state court may remove that action to federal district court 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)*. Note that the Class Action Fairness Act applies to civil actions "commenced" on or after February 18, 2005. "Commenced" means the date the complaint is filed, not the date the case is removed. *Bush v. Cheaptickets, Inc., 425 F.3d 683, 688-689 (9th Cir. 2005)* ("commencement" refers to when the action was initiated in state court, according to state procedures). On the other hand, some circuit courts have recognized that removal may be made under CAFA based on events that take place after the case was originally filed. For example, an amendment that adds a claim under federal law or that adds a new defendant may open a window for removal even thought the original complaint was filed before the effective date of the Act. *See Springman v. AIG Mktg, Inc., 523 F.3d 685, 690 (7th Cir. 2008)* (substitution of new defendant constituted "commencement" of suit against new defendant, so that suit commenced after effective date of CAFA); *see also* Ch. 7 (general coverage of class actions).

There are a number of exceptions to the grant of jurisdiction under CAFA. For example, under the "home state" exception, a federal district court should decline jurisdiction when two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state in which the action was originally filed. *See 28 U.S.C. § 1332(d)(4)(B)*. At least one circuit court of appeals has held that plaintiffs are entitled to structure their class action to include only class members residing in a particular state, so as to avoid removal under the Class Action Fairness Act. *See Grimsdale v. Kash N' Karry Food Stores, Inc. (In re Hannaford Bros. Customer Data Sec. Breach Litig.), 564 F.3d 75, 79 (1st Cir. 2009)* .

Circuit Split:

Federal courts disagree as to whether removal may be made under CAFA in some cases based on events that take place after the case was originally filed, in essence finding that the new event constitutes "commencement" of the action. *See Springman v. AIG Mktg, Inc., 523 F.3d 685, 690 (7th Cir. 2008)* (recognizing circuit split); *Smith v. Nationwide Property & Casualty Ins. Co., 505 F.3d 401, 405-406 (6th Cir. 2007)* (addition of new class claims constituted "commencement" of suit for purposes of CAFA); *Prime Care of Northeast Kansas, LLC v. Humana Ins. Co., 447 F.3d 1284, 1285-1286 (10th Cir. 2006)* (addition of new claim sufficiently distinct from prior pleadings may "commence new action" removable under CAFA); *Braud v. Transport Service Co., 445 F.3d 801, 803-804 (5th Cir. 2006)* (when a lawsuit "commenced" for purposes of CAFA is determined by state law); *but see McAtee v. Capital One, F.S.B., 479 F.3d 1143, 1145-1148 (9th Cir. 2007)* (circuit adopts bright-line approach that disregards post-filing developments and simply inquires whether initial complaint was filed before or after CAFA's effective date).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14[2][a][iv].*

- *Bender's Federal Practice Forms* Form Nos. 81:208, 81:263, 81:291.
- *28 U.S.C. § 1332(d)(2)* (diversity of citizenship requirements under Class Action Fairness Act).
- *28 U.S.C. § 1453(b)* (removal of class actions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalElementsRemovability



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Chapter 2 REMOVAL
PART B: EVALUATING CASE FOR REMOVAL

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.08

§ 2.08 Determining Whether Party May Seek Removal

[1] Right of Removal Generally Limited

[a] Defendants

Under the general removal statute, only defendants may remove a civil action from a state to a federal court for the district and division within which the action is pending. *28 U.S.C. §§ 1441(a), 1446(a).*

Federal law determines whether a party is a defendant, prevailing over a state court's characterization or alignment of the parties. *Chicago, R. I. & P. R. Co. v. Stude, 346 U.S. 574, 580, 74 S. Ct. 290, 98 L. Ed. 317 (1954)* (relevant issue is construction of federal removal statute; federal law determines status as defendant).

District courts will not recharacterize a plaintiff as a defendant for removal purposes, even if state law characterizes the plaintiff as defendant under the following circumstances. *See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104-109, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)* :

1. When the plaintiff is defending a counterclaim (cross-complaint); or

2. When the plaintiff is defending against a crossclaim by a co-plaintiff.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.11.*
- *28 U.S.C. § 1441(a)* (removable actions).
- *28 U.S.C. § 1446(a)* (procedure for removal by defendants).

[b] Third-Party Defendants

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 Eng'rs, 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).



Strategic Point:

Special removal statutes may provide an independent basis for a third-party defendant to remove the case. *People by Lungren v. Keating, 986 F.2d 346, 348 (9th Cir. 1993)* (third-party defendant may remove; involuntary nature of change precludes original defendant from removing); *see 2.10 below* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 107.11[1][b][iv], 107.15[4].*

[c] Defendant Intervenor

An action may be removable by an intervening defendant if the following other removal requirements are met:

1. The original action would have been removable;

2. The time for removing the action has not expired (*see § 2.05[1] above*); and

3. The original defendants join in the notice of removal, or may be disregarded for removal purposes.

On the other hand, if the sole basis for removing the action is a claim raised through the intervention of the intervening defendant, the intervenor may not remove the action. *See Hopkins Erecting Co. v. Briarwood Apartments, 517 F. Supp. 243, 248 (E.D. Ky. 1981)* (majority of cases hold that defendants of claims introduced by crossclaim, third-party claim, and intervention are not entitled to remove).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 107.11[1][b][v], 107.30[3].*

[2] Statutory Right of Specific Plaintiffs to Remove

The general removal statute does not permit plaintiffs to remove an action that they filed in state court except when:

1. The Resolution Trust Corporation (RTC) is the plaintiff seeking removal. *See 12 U.S.C. § 1441a(l)(3)*; *§ 2.10[6] below ;*

2. The Federal Deposit Insurance Corporation (FDIC) is the plaintiff seeking removal. *See 12 U.S.C. § 1819(b)(2)(B)*; *§ 2.10[7] below* ; or

3. The district court has jurisdiction under *28 U.S.C. § 1334* (bankruptcy-related proceedings); *see § 28 U.S.C. § 1452(a)*; *§ 2.10[8] below* .

See 28 U.S.C. § 1441(a) (removal may be limited by Act of Congress).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.12.*

Legal Topics:

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



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Chapter 2 REMOVAL
PART B: EVALUATING CASE FOR REMOVAL

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.09

§ 2.09 Meeting Requirements for Joining in Notice of Removal

[1] Except in Qualified Class Action, All Defendants Must Join in Notice of Removal

All served defendants must usually join in the notice of removal. *See 28 U.S.C. § 1446(b)*. An exception exists for class actions that qualify for minimal diversity jurisdiction; in such class actions, any defendant may remove the action without the consent of all other defendants. *28 U.S.C. § 1453(b)* (applicable to civil actions commenced on or after February 18, 2005).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.11[1][c].*
- *Federal Litigation Guide P 1.63.*
- *28 U.S.C. § 1446(b)* (notice of removal).

[2] Failure of Defendants to Join Defeats Removal

When defendants must join in the notice of removal, the failure of one defendant to join in the removal notice constitutes a procedural defect that precludes removal. *28 U.S.C. § 1446(b)*; *see 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 § 2.17[2] below* (discussing timing issues with multiple defendants).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.11[1].*
- *Federal Litigation Guide P 1.63.*

- *28 U.S.C. § 1446(b)* (notice of removal).

[3] Failure of All Defendants to Join Is Waivable Defect

The failure of all defendants to join the removal notice is a procedural defect that is deemed waived unless objected to within 30 days. *Parrino v. FHP, Inc., 146 F.3d 699, 703 (9th Cir. 1998)* (failure of one defendant to join in removal notice until almost two months after service of complaint is procedural defect that was cured by joinder).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.11.*
- *Federal Litigation Guide P 1.63.*

[4] In Special Cases, Not All Defendants Need Join

The requirement that all defendants join the removal notice has several exceptions:

1. **Unserved defendants.** Any defendant who was not served with state court process need not join in the removal notice. *Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423, 1429 (9th Cir. 1984) .*

2. **Improperly served defendants.** Improperly served defendants need not join in the removal notice. *Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423, 1429 (9th Cir. 1984) .*

3. **Nominal parties.** Nominal or formal parties, being neither necessary nor indispensable, are not required to join in the removal notice. *Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980) .*

4. **Statutory removal.** If removal is based on specific statutory authorization, only the statutorily authorized defendants must join in the removal notice. *Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co., 644 F.2d 1310, 1314-1315 (9th Cir. 1981)* (federal officer removal).

In all cases, the removal notice must expressly explain the absence or nonjoinder of any codefendants. *P. P. Farmers' Elevator Co. v. Farmers Elevator Mut. Ins. Co., 395 F.2d 546, 548 (7th Cir. 1968)* (better practice dictates that the removal petition indicate why there are nonjoining defendants).

For statutory removal (*see § 2.10 below*), the presence of an independent basis for removal, such as federal question jurisdiction, does not require that all defendants join in the removal notice. *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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.11[1].*

Legal Topics:

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



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Chapter 2 REMOVAL
PART B: EVALUATING CASE FOR REMOVAL

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.10

§ 2.10 Using Special Removal Statutes

[1] Actions Brought Against Federal Agencies and Officers

[a] Who May Remove Action

A civil action brought in state court against any of the following types of defendants may be removed by the defendant to the federal district court in the district and division where the action is pending:

1. The United States or any of its agencies or officers sued in an official or individual capacity for any act under color of law of that office. *See 28 U.S.C. § 1442(a)(1)*;

2. A property holder whose title is derived from an officer of the United States, when the state court action or prosecution affects the validity of any law of the United States. *See 28 U.S.C. § 1442(a)(2)*;

3. Any officer of the courts of the United States, for any act under color of office or in the performance of his or her duties. *See 28 U.S.C. § 1442(a)(3)*; or

4. Any officer of either the House of Representatives or the Senate, for any act in the discharge of official duties. *See 28 U.S.C. § 1442(a)(4)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.11[1].*
- *28 U.S.C. § 1442(a)* (removal by federal officer).
- *Bender's Federal Practice Forms* Form No. 81:213.

[b] Original Federal Jurisdiction Not Required Apart From Statute

The statutory authorization for federal officer removal is independent of general removal procedures and does not require that the federal court have original federal jurisdiction apart from the statute. *Mesa v. California, 489 U.S. 121, 124-125, 128, 134-138, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989)* (federal question is raised in the federal officer's removal petition that constitutes the federal law under which the action against the federal officer arises).



Strategic Point:

28 U.S.C. § 1442, unlike *28 U.S.C. § 1441*, allows removal to federal court even if the action could not have been commenced in federal court.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[1][b][i].*

[c] Federal Official Defendant

To remove a state court case, a federal official defendant must:

1. Establish that he or she is a federal officer or was acting under the direction of a federal officer;

2. Raise a colorable federal defense to the plaintiff's claims; and

3. Show a causal nexus between the acts performed under color of office and the plaintiff's claims.

Mesa v. California, 489 U.S. 121, 124-125, 128, 134-136, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989) (constitutional basis for removal jurisdiction under § 1441(a) is federal officer's substantive immunity defense arising under federal law); *but see Watson v. Philip Morris Cos., -- U.S. --, 127 S. Ct. 2301, 168 L. Ed. 2d 42, 50 (2007)* (lawsuit against private company cannot be shifted to federal court merely because company was acting under federal agency regulations).

Circuit Split:

The courts are split on whether federal officers may remove an action in which they are merely stakeholders or garnishees. *See, e.g., Hexamer v. Foreness, 981 F.2d 821, 823 (5th Cir. 1993)* (removal prohibited); *Nationwide Investors v. Miller, 793 F.2d 1044, 1046-1047 (9th Cir. 1986)* (removal permissible).

A private party may qualify for federal officer removal if the party can prove:

1. Its actions were taken under the direction of a federal officer;

2. The party has a federal defense to the plaintiff's claims;

3. The party can demonstrate a causal nexus between the plaintiff's claims and the acts allegedly performed by the defendant under orders of a federal officer; and

4. The party can demonstrate that it is a "person" within the meaning of *28 U.S.C. § 1442*.

See Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1251 (9th Cir. 2006) (a party seeking removal under *28 U.S.C. § 1442* must show causal nexus between its actions and federal officer's directions).



Strategic Point:

Removal as a federal officer defendant under *28 U.S.C. § 1442(a)(1)* has three distinct advantages. First, not all defendants need join in the removal notice. Second, unlike other removal statutes, when federal officers and their agents seek removal under *28 U.S.C. § 1442(a)(1)*, that statute is interpreted broadly in favor of removal. Third, the defendant's 30 days to remove begins when the plaintiff discloses sufficient facts for federal officer removal, even if the defendant was previously aware of a different basis for removal. *Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1253 (9th Cir. 2006)* ; *see also Jefferson County v. Acker, 527 U.S. 423, 431, 119 S. Ct. 2069, 144 L. Ed. 2d 408 (1999)* (rejecting a "narrow, grudging interpretation" of the statute).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[1][b].*
- *Bender's Federal Practice Forms* Form No. 81:213.
- *28 U.S.C. § 1442(a)(1).*

[d] Entire Action Removed

In general, when a federal official removes a case, the entire case is removed, even if the action involves claims that are not otherwise removable. *Dillon v. Mississippi Military Dep't, 23 F.3d 915, 919 (5th Cir. 1994)* (removal of putative federal employees under *28 U.S.C. § 2679*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[1][b][v].*
- *28 U.S.C. § 1442(a)(1)* (removal by federal official).

[e] Retaining Case After Dismissal of Federal Agency or Officer

A district court has discretion to retain jurisdiction and adjudicate a case following the dismissal of the federal officer or agency that initially removed the case. *Nebraska v. Bentson, 146 F.3d 676, 678 (9th Cir. 1998)* (in case properly removed under *28 U.S.C. § 1442(a)(1)*, court dismissed claim against IRS). Courts will ordinarily remand the case absent compelling reasons to retain the case. *District of Columbia v. Merit Systems Protection Bd., 762 F.2d 129, 133 (D.C. Cir. 1985)* (when federal party eliminated early, federal courts in this circuit and elsewhere regularly remand cases removed under *28 U.S.C. § 1442(a)(1)*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[1][b][v].*
- *Bender's Federal Practice Forms* Form No. 81:260.
- *28 U.S.C. § 1442(a)* (removal by federal official).

[2] Actions Brought Against Members of Armed Forces

A member of the armed forces may remove a case based on acts committed under color of office or concerning which he or she claims any right, title, or authority under federal law respecting the armed forces or under the law of war. *See 28 U.S.C. § 1442a*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[1][b][v].*
- *28 U.S.C. § 1442a* (removal by federal official).

[3] Civil Rights Actions

[a] Defendants in Certain Civil Rights Cases May Remove

Section 1443 permits removal of civil rights cases not otherwise removable when the defendant can show that:

1. The right allegedly denied the defendant arises under a federal law providing for specific civil rights stated in terms of racial equality; and

2. The defendant is denied or cannot enforce the specified federal rights in state court;

Johnson v. Mississippi, 421 U.S. 213, 219-222, 95 S. Ct. 1591, 44 L. Ed. 2d 121 (1975) (removal under § 1443(1) was not warranted based solely on allegations that charges against petitioners were unconstitutional).

The following civil actions or criminal prosecutions may be removed under *28 U.S.C. § 1443*:

1. Actions in which the defendant is denied or cannot enforce his or her civil rights in state court; and

2. Actions in which the defendant is being sued for an act he or she committed under color of authority derived from a law providing for equal rights, or for refusing to do an act on the ground that it would be inconsistent with that law.

Removal under this restrictive basis is increasingly unusual. If the complaint underlying the state court action alleges violations of rights under federal civil rights laws, the case may be removable under the general removal statute, relying on federal question jurisdiction. *See 28 U.S.C. § 1441(a)*; *Harris v. Birmingham Bd. of Educ., 817 F.2d 1525, 1526-1527 (11th Cir. 1987)* (violation of federal civil rights laws removable as federal question).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[3].*
- *Bender's Federal Practice Forms* Form No. 81:214.
- *28 U.S.C. § 1443* (removal of civil rights cases).

[b] Acts Under Color of Authority Derived From Civil Rights Laws

A defendant sued for performing acts under color of authority derived from any civil rights laws, or charged with refusing to perform an act because it would be inconsistent with civil rights laws, may remove a state civil or criminal action to federal court in restricted circumstances. *28 U.S.C. § 1443(2)*; *Greenberg v. Veteran, 889 F.2d 418, 421-422 (2d Cir. 1989)* (refusal clause enacted to provide a federal forum to state officers who uphold locally unpopular equal protection rights).

Removal on this basis is restricted to federal laws providing civil rights defined in terms of racial equality. *Greenwood v. Peacock, 384 U.S. 808, 825-828, 86 S. Ct. 1800, 16 L. Ed. 2d 944 (1966)* (insufficient civil rights wrongfully denied by state officials before trial and that charges are false, or that defendant is unable to obtain fair trial in particular state court).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[3].*
- *28 U.S.C. § 1443* (removal of civil rights cases).

[4] Civil Actions Against Foreign States

[a] Foreign State May Remove Case

A foreign state defendant may remove any civil case to the district court for the district and division where the action is pending. *28 U.S.C. § 1441(d)*. A foreign state's option to remove is broad:

1. The entire action is removed, including otherwise nonremovable claims; and
2. The foreign state defendant may unilaterally remove, even over the objection of any other defendant.

After removal, the action must be tried without a jury, even if a right to a jury trial existed in state court. *28 U.S.C. § 1441(d)*.

[b] Timing for Removal for Foreign States

The foreign state must file the removal notice within 30 days after receiving a copy of the initial pleading. The 30-day period may be extended for cause shown. *28 U.S.C. §§ 1441(d), 1446(b)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[4].*
- *28 U.S.C. §§ 1330, 1602-1611* (jurisdictional immunity of foreign states).
- *28 U.S.C. § 1441(d)* (removal by foreign state).

[5] Foreclosure Actions Against United States

A state court action brought against the United States seeking to quiet title to, foreclose a mortgage or other lien on, or partition or condemn real or personal property on which the United States claims a mortgage or other lien may be removed by the United States. *See 28 U.S.C. §§ 1444, 2410*.

28 U.S.C. § 2410 waives the federal government's immunity for certain quiet title or secured lending actions.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[4].*
- *Bender's Federal Practice Forms* Form No. 81:213.
- *28 U.S.C. § 1444* (removal of foreclosure action against United States).
- *28 U.S.C. § 2410* (waiver of federal government immunity for specified quiet title or secured lending actions).

[6] Resolution Trust Corporation Cases

[a] Scope of Removal

The Resolution Trust Corporation (RTC) is expressly authorized to remove any state court actions, suits, or proceedings in which the RTC is a party. *12 U.S.C. § 1441a(l)(3).* If the RTC is a party, the entire case is deemed to arise under federal law and the district courts have original federal question jurisdiction over every claim in the action. *12 U.S.C. § 1441a(l)(1)*; *Brockman v. Merabank, 40 F.3d 1013, 1015-1016 (9th Cir. 1994)* (district court has original jurisdiction over state law claims against non-RTC defendants for which RTC is potentially liable).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[6][a].*
- *12 U.S.C. § 1441a(l)* (removal by RTC).

[b] Time for Removal for Resolution Trust Corporation

The RTC must remove either within 30 days after the RTC is served as a party in any capacity; or within 90 days after being substituted as a party. *12 U.S.C. § 1441a(l)(3).*

Courts, however, have permitted the RTC to remove at any stage in the proceedings before the judgment becomes final, even when the case is on appeal, as long as the state appellate proceedings have not been exhausted. *In re 5300 Memorial Investors, Ltd., 973 F.2d 1160, 1162 (5th Cir. 1992)* (after state appellate court decision while on appeal to highest state court).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[6][b].*
- *Bender's Federal Practice Forms* Form No. 81:190.
- *12 U.S.C. § 1441a(l)* (removal by RTC).

[c] Venue

The RTC may remove to any of the following districts. *12 U.S.C. § 1441a(l)(3)*:

1. The district in which the state action is pending;

2. The District of Columbia district court; or

3. If the case arises out of RTC actions relating to an institution for which a receiver has been appointed, the district encompassing the institution's principal place of business.

A district court may transfer venue for the convenience of the parties. *28 U.S.C. § 1404*; *see also § 1.81 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[6][c]*.
- *28 U.S.C. § 1404* (change of venue).

[d] Appeal of Remand

If the case is remanded, the RTC may seek appellate review of the remand. *12 U.S.C. § 1441a(l)(3)(C)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[6][d]*.
- *12 U.S.C. § 1441a(l)(3)(C)* (appellate review of remand).

[7] Federal Deposit Insurance Corporation Cases

[a] Scope of Removal

In general, all civil actions involving the Federal Deposit Insurance Corporation (FDIC) arise under the laws of the United States. *12 U.S.C. § 1819(b)(2)(A)*.

The FDIC is expressly authorized to remove any action, suit, or proceeding filed in state court against the FDIC, or in which the FDIC is a substituted as a party, except when:

1. The FDIC is acting in its capacity as a receiver of a state insured depository institution by the exclusive appointment by state authorities, and is a party other than a plaintiff;

2. The case involves only the preclosing rights against the state insured depository institution or obligations owing to depositors, creditors, or stockholders by that institution; and

3. The case involves the interpretation of only state law.

12 U.S.C. § 1819(b)(2)(B), (D).

[b] Time for Removal for FDIC

The FDIC must remove the action within 90 days after the date the action is filed against the FDIC or the FDIC is substituted as a party. *12 U.S.C. § 1819(b)(2)(B).*

[c] Appeal of Remand

If the case is remanded, the FDIC may seek appellate review of the remand. *12 U.S.C. § 1819(b)(2)(C).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[7].*
- *12 U.S.C. § 1819(b)(2)* (removal by FDIC).

[8] Claims Related to Bankruptcy Cases

[a] Any Party May Remove Related Claims

Any party to a state court claim or cause of action that falls within bankruptcy jurisdiction may remove that claim or cause of action (but not the entire civil action unless the district court has independent jurisdiction over the other claims) to the district court where the related bankruptcy action is pending. *See 28 U.S.C. §§ 1334, 1452(a).*

Cases arising under the Bankruptcy Code and all claims and causes of action arising in or related to bankruptcy proceedings fall within bankruptcy jurisdiction. *28 U.S.C. § 1334(b).* Federal courts broadly define when a lawsuit is related to a bankruptcy case. *Pacor, Inc. v. Higgins, 743 F.2d 984, 994* (3d Cir. 1984) (broad jurisdiction to deal expeditiously with matters connected with bankruptcy estate); *see also In re Dow Corning Corp., 86 F.3d 482, 489-495 (6th Cir. 1996)* (a lawsuit is related to a bankruptcy case when the outcome of the lawsuit could conceivably affect an estate being administered in bankruptcy).

Exception:
Removal is not permitted in proceedings before the United States tax court or a civil action by the government to enforce that unit's police or regulatory power. *City & County of San Francisco v. PG & E Corp., 433 F.3d 1115, 1123-1127 (9th Cir. 2006)* (claims by state, city and county for restitution of ratepayer-generated dollars under California Unfair Practices Act were "police or regulatory power" actions exempt from removal because they were primarily designed to protect the public).

Exception:
A federal court must abstain from exercising its jurisdiction, on timely motion by any party, if:

1. The state court action is based on a state law claim or cause of action;

2. That claim or cause of action is related to a bankruptcy core proceeding (as defined in *28 U.S.C. § 157(b)(2)*);

3. Federal courts would not have jurisdiction but for the bankruptcy claim; and

4. The matter can be timely adjudicated in a state court of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2).

[b] Party Seeking Removal Must Serve and File Verified Notice

The party seeking removal must file a verified notice, in the bankruptcy court in the district where the civil action is pending, containing:

1. A short, plain statement of the facts that entitle the party to remove;

2. A statement of whether the proceeding is a core or noncore proceeding (as defined in *28 U.S.C. § 157(b)(2)*); and if the proceeding is noncore, whether the applicant consents to the entry of final orders by the bankruptcy judge; and

3. A copy of all process and pleadings in the action.

Fed. R. Bank. P. 9027(a).

Promptly after filing the notice with the district court, the party seeking removal must serve a copy of the notice on all parties and on the state court. *Fed. R. Bankr. P. 9027(b), (c).*

[c] Timing of Notice If Bankruptcy Action Filed Before Civil Action

The time for filing a removal notice depends on whether the bankruptcy or civil action was filed first. If the bankruptcy action was filed first, the notice must be filed before the earlier of:

1. Thirty days after receipt of the initial pleading that contains a civil claim or cause of action that the party seeks to remove; or

2. Thirty days after receipt of the summons, if the initial pleading for the civil claim or cause of action was filed with the court but not served with the summons.

Fed. R. Bank. P. 9027(a)(3).

[d] Timing of Notice If Bankruptcy Action Filed After Civil Action

If the civil action was filed first, the notice must be filed before the latest of:

1. Ninety days after the order for relief in the bankruptcy action; or

2. Thirty days after the order terminating the stay, providing that the civil action was stayed under the Bankruptcy Code; or

3. In a Chapter 11 reorganization, 30 days after a trustee is qualified, but no more than 180 days after the order for relief.

Fed. R. Bankr. P. 9027(a)(2).

[e] Party May File Verified Statement After Notice of Removal

Any party who has filed a pleading in connection with the removed claim or cause of action may file a verified statement within 10 days of the filing of the removal notice with the district court that must:

1. Admit or deny any allegation in the removal notice as to whether the proceeding is core or noncore; and

2. Give or withhold consent to the entry of final orders by the bankruptcy judge in noncore proceedings.

Fed. R. Bankr. P. 9027(e)(3).

[f] District Court Has Discretion to Remand

After removal, the district court has broad discretion to remand the removed claim or cause of action based on equity. *28 U.S.C. § 1452(b)*; *see In re Dow Corning Corp., 86 F.3d 482, 489-495 (6th Cir. 1996)* (factors to consider in determining whether to remand).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[8].*
- *Collier on Bankruptcy (15th ed.)* P 3.07.
- *28 U.S.C. § 157(b)(2)* (definition of core proceedings in bankruptcy).
- *28 U.S.C. § 1334* (federal jurisdiction over bankruptcy proceedings).
- *28 U.S.C. § 1452* (removal of claims related to bankruptcy cases).
- *Fed. R. Bankr. P. 9027* (removal of bankruptcy case).

[9] Fair Labor Standards Act

Actions under the Fair Labor Standards Act (FLSA) are removable. *Breuer v. Jim's Concrete of Brevard, Inc. 538 U.S. 691, 694-700, 123 S. Ct. 1882, 155 L. Ed. 2d 923 (2003)* (fact that Section 216(b) of FLSA states that wage suit "may be maintained" in federal or state court does not prevent removal of FLSA actions).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15[12].*

[10] Securities Litigation Uniform Standards Act

The Securities Litigation Uniform Standards Act (SLUSA) authorizes removal to federal district court of "[a]ny covered class action brought in any State court involving a covered security" as set forth in the Act's preclusion provision. *15 U.S.C. § 77p(c)*; 78bb(f)(2). The preclusion provision prohibits the maintenance of covered class actions based on state law in any court (state or federal) by a private party alleging (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security. *15 U.S.C. § 77p(b).* A "covered class action" is a suit in which damages are sought on behalf of more than 50 people. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 83, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006)* (citing *15 U.S.C. § 78bb(f)(5)(B)*). A "covered security" is one traded nationally and listed on a regulated national exchange. *Merrill*

Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 83, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006) (citing *15 U.S.C. § 78bb(f)(5)(E)*). Removal jurisdiction under SLUSA is co-extensive with preclusion; a district court has no jurisdiction over a case removed under SLUSA unless maintenance of the case is precluded under the Act. *Kircher v. Putnam Funds Trust, 547 U.S. 633, 640-644, 126 S. Ct. 2145, 165 L. Ed. 2d 92 (2006)* (order remanding case removed pursuant to SLUSA on ground district court lacked subject matter jurisdiction because claims did not come within SLUSA's preclusion provision is not reviewable).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.)* § 23.90.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalBasisCases Involving Federal OfficersCivil ProcedureRemovalElementsRemovabilityCivil ProcedureRemovalProceedingsGeneral Overview



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Chapter 2 REMOVAL
PART B: EVALUATING CASE FOR REMOVAL

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.11

§ 2.11 Some Types of Actions Are Statutorily Nonremovable

The following actions are not removable to federal court:

1. **Actions against railroads.** A civil action against a railroad, or its receivers or trustees, arising under the Federal Employer's Liability Act (FELA). *See 28 U.S.C. § 1445(a)*;

2. **Actions against common carriers.** A civil action against a common carrier, or its receivers or trustees, to recover damages for delay, loss or injury of shipments arising under federal statutes regulating carriers unless the amount in controversy exceeds $10,000, exclusive of interest and costs. *See 28 U.S.C. § 1445(b)*;

3. **Workers' compensation actions.** A civil action in any state court arising under that state's workers' compensation laws. *See 28 U.S.C. § 1445(c)*; and

4. **Securities claims.** A civil action based on claims arising under the Securities Act of 1933. *15 U.S.C. § 77v(a)*; *see Emrich v. Touche Ross & Co., 846 F.2d 1190 (9th Cir. 1988)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.17.*
- *28 U.S.C. § 1445* (nonremovable actions).

Legal Topics:

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



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§ 2.12 Removal by State Can Waive Sovereign Immunity

A state's act of removing a lawsuit from state court to federal court waives its *Eleventh Amendment* immunity, at least in the context of state law claims to which the state has explicitly waived sovereign immunity from state court proceedings. *Lapides v. Board of Regents, 535 U.S. 613, 623-624, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002)* (removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum). *See U.S. Const., amend. XI.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.03.*
- *Moore's Federal Practice (3d Ed.)* Ch. 123.
- *U.S. Const., amend. XI* (suits against states; restriction of judicial power).
- *Embury v. King, 361 F.3d 562, 566 (9th Cir. 2004)* (state that removes a case to federal court waives its *Eleventh Amendment* immunity as to *all* claims in the case, including federal law claims and claims asserted after removal).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureFederal & State InterrelationshipsSovereign ImmunityWaiver



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Chapter 2 REMOVAL
PART C: REMOVING CASE

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.13

§ 2.13 Checklist for Drafting and Filing Notice of Removal

☐ **Draft notice of removal**. Include short and plain statement of the grounds for removal. *See § 2.15 below*.

○ **Federal question cases.** In cases removed based on federal question jurisdiction, allege that the case arises under federal law and identify the statutory basis for the claim. *See § 2.15[1][b] below*.

○ **Diversity cases.** In cases removed based on diversity jurisdiction, allege requirements for diversity jurisdiction. *See § 2.15[1][c] below*.

○ **Special statute cases**. In cases removed based on a special removal statute, identify the special removal statute and allege the jurisdictional facts supporting removal under that statute. *See 28 U.S.C. §§ 1441, 1446; § 2.15[1][d] below* .

☐ **Join all defendants in notice of removal.** All defendants served with summons in an action must join in the notice of removal. *See § 2.15[3] below*.

☐ **Consider timing requirements for filing notice of removal under Section 1446(b).** Make sure notice is filed within *30 days* after the earlier of the following. *See 2.17[1] below* .

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

○ The date on which the *first* defendant receives a copy of a pleading, motion, or

order from which it first may be ascertained that the case has become removable.

☐ **Consider special one-year timing requirement in diversity cases.** In diversity cases, file notice no more than one year after original complaint was filed, unless case is qualified class action in which case one-year limit does not apply. *See 28 U.S.C. §§ 1446(b), 1453*; *§ 2.17[1] below* .

☐ **File notice of removal and attachments in federal court.** The notice of removal must be filed in the federal district court in the district and for the division in which the state court action is pending, together with the statutory filing fee. File notice with a copy of all process, pleadings, and orders served on the removing defendant in the action. *See § 2.14 below*.

☐ **Provide notice of filing to adverse parties.** Promptly after filing a notice of removal, the defendant or defendants must give separate written notice of the filing to all adverse parties. *See 28 U.S.C. § 1446(d)*; *§ 2.16[3] below* .

☐ **File notice of removal with state court clerk.** Promptly after filing a notice of removal, the defendant or defendants must file a copy of each notice of removal with the clerk of the state court where the case was originally filed. *See 28 U.S.C. § 1446(d)*; *§ 2.16[3] below* .

☐ **Make any amendments to notice within statutorily mandated timeframe.** A notice of removal may be freely amended:

- ○ Within the original 30-day notice period;
- ○ After the 30-day notice period if the amendment corrects defective allegations of jurisdiction, but not to add a new basis for removal jurisdiction. *See 28 U.S.C. §§ 1446(b), 1653*; *§ 2.16[6] below* .

☐ **Search by Topic:** Civil Procedure > Removal > Proceedings

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalProceedingsNoticesCivil ProcedureRemovalProceedingsTime Limitations



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Chapter 2 REMOVAL
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§ 2.14 Notice of Removal Is Filed in District and Division Where State Action Is Pending

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. *28 U.S.C. § 1446(a).*

Venue principles applying to actions originally filed in federal courts do not apply to removed actions. It is irrelevant that venue would not have been proper under the general venue statute in the district to which a case is properly removed. *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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.13.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.

Legal Topics:

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



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§ 2.15 Preparing Notice of Removal

[1] Contents of Notice

[a] Statement of Grounds

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 defendant must plainly indicate that the requirements for federal jurisdiction are met based on:

1. Federal question jurisdiction. *28 U.S.C. § 1331*; *see § 2.06 above*;

2. Diversity jurisdiction. *28 U.S.C. § 1332*; *see § 2.07 above*; or

3. Jurisdiction based on special removal statutes. *See § 2.10 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.30*.
- *Federal Litigation Guide P 1.65[1]*.
- *Bender's Federal Practice Forms* Form No. 81:190 et seq.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *Fed. R. Civ. P. 8(a)* (claims for relief).

[b] 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. *28 U.S.C. § 1441(b)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14*.
- *Bender's Federal Practice Forms* Form No. 81:192.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.

[c] Diversity Cases

In a case removed based on diversity jurisdiction, the removal notice must allege:

1. Satisfaction of diversity. *See § 2.07 above*; and
2. Facts showing that the requisite amount in controversy is met. *See § 2.07 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.14*.
- *Bender's Federal Practice Forms* Form No. 81:193.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.

[d] Special Statute Cases

In a case removed on the basis of a special removal statute, the notice must allege the special removal statute and the requisite jurisdictional facts supporting removal under that statute.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.15*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.

[2] Signing Pursuant to Rule 11 Required

The notice of removal must be signed pursuant to Rule 11. *28 U.S.C. § 1446(a)*; *see Fed. R. Civ. P. 11*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.30[2][a][ii]*.
- *Federal Litigation Guide P 1.65[2]*.

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.

[3] Joining of All Served Defendants Required

[a] All Defendants Must Consent

All defendants served with summons in an action must join but need not actually sign the notice of removal. *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).



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) .*

Circuit Split:

The Sixth Circuit has held that neither a signature nor a written statement of other defendants is needed if counsel consents to removal. *Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 201-202 (6th Cir. 2004)* (unequivocal consent on non-signing defendant's behalf in notice of removal sufficient).

[b] Exceptions for Defendants With Independent Right of Removal and Defendants in Qualified Class Actions

A defendant with an independent right of removal, such as a federal agency or officer, may remove the entire case without the consent of other defendants. *See, e.g., 28 U.S.C. § 1442(a)(1)*; *see also § 2.10 above*.

Any defendant in a multistate class action that meets the modified diversity requirements of the Class Action Fairness Act of 2005 may remove the action without the consent of all defendants. *28 U.S.C. § 1453(b)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 107.15, 107.30.*
- *Federal Litigation Guide P 1.65[3].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1446(a)* (notice of removal).

Legal Topics:

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



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§ 2.16 Filing Notice in Appropriate Court

[1] Filing in District Where State Court Action Is Pending

File the notice of removal in the federal district court in the district and for the division in which the state court action is pending. *28 U.S.C. § 1446(a)*; *Fed. R. Civ. P. 8(a)*.

[2] Filing State Court Papers

File the notice with a copy of all process, pleadings, and orders served on the removing defendant in the action. *28 U.S.C. § 1446(a)*.

[3] Noticing Adverse Parties and Filing Notice With State Court

Promptly after filing a notice of removal, 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. *28 U.S.C. § 1446(d)*.

[4] Effect of Filing Notice

Removal is effected once the copy of the removal notice served on adverse parties is filed with the court. Once the case is removed, the state court may not proceed unless and until the case is remanded. *28 U.S.C. § 1446(d)*; *see 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).

[5] Removal to Wrong District Does Not Deprive District Court of Subject Matter Jurisdiction

Removal of a case to the wrong district court is a procedural defect that does not deprive the district court of subject matter jurisdiction. *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).

[6] Amending Notice of Removal

A notice of removal may be freely amended:

1. Within the original 30-day notice period. *28 U.S.C. 1446(b)*; *see § 2.17 below*; or

2. After the 30-day period if the amendment corrects defective allegations of jurisdiction, but not to add a new basis for removal jurisdiction. *28 U.S.C. § 1653*; *USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 199-206 (3d Cir. 2003)* (removal notice may be amended within 30 days or after to correct defective jurisdictional allegations).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.30.*
- *Bender's Federal Practice Forms* Form No. 81:190 et seq.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1446* (procedure for removal).
- *Fed. R. Civ. P. 8(a)* (claims for relief).

Legal Topics:

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



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Chapter 2 REMOVAL
PART C: REMOVING CASE

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.17

§ 2.17 Meeting Deadline For Filing Notice of Removal

[1] Thirty-Day Period and One-Year Limit in Section 1446

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.

28 U.S.C. § 1446(b).

If subsequent events reveal the existence of diversity jurisdiction after the complaint has been served, a defendant must remove within 30 days. *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, first clear notice of removability, because answer clarified that challenged conduct occurred wholly within federal enclave).

If the case is removable based on an initial pleading, formal service is required to begin the 30-day removal period. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-349, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)* (named defendant's removal time is triggered by simultaneous service of summons and complaint, or receipt of complaint, after and apart from service of summons, but not by mere receipt of complaint unattended by any formal service).

For diversity jurisdiction, removal under 1446(b) must take place within one year of the commencement of the action. *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).

Exception:

The 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. *28 U.S.C. § 1453(b).*



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. *Harris v. Bankers Life & Cas. Co., 425 F.3d 689, 694* (9th Cir. 2005) (no duty to investigate potential reasons for removal).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.30[2][a][iv].*
- *Federal Litigation Guide P 1.66[1].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1446(b)* (time for filing notice of removal).
- *28 U.S.C. § 1453(b)* (time for removing action under Class Action Fairness Act).
- *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).
- *Chapman v. Powermatic, Inc., 969 F.2d 160, 163 (5th Cir. 1992)* (inquiry into defendant's subjective knowledge or that of reasonable person would inject needless uncertainty and inefficiency into removal process).

[2] Timing Issues With Multiple Defendants

Traditionally, most courts have held that the 30-day removal period *begins to run when the first defendant is served*, provided that the case is removable at that time. *Getty Oil v. Insurance Co. of N. Am., 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 against the traditional rule with multiple defendants. These circuits permit 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, e.g., 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).

Exception:

In a class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005, any defendant may remove the action without the consent of all defendants. *28 U.S.C. § 1453(b).* Because there is no unanimity requirement in such a case, the failure of the first-served defendant to file a removal notice within 30 days of service would not preclude a subsequently served defendant from removing the action.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.30[3][a][i].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1446(b)* (time for filing notice of removal).
- *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-349, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)* (only formal, proper service on the defendant triggered the time period for filing a notice of removal).
- *Marano Enters. v. Z-Teca Restaurants, 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).
- *McKinney v. Board of Trustees of Mayland Community College, 955 F.2d 924, 927-928 (4th Cir. 1992)* (individual defendants have 30 days from the time they are served with process or with a complaint to join in an otherwise valid removal petition).
- *Varney v. Johns-Manville Corp., 653 F. Supp. 839, 840 (N.D. Cal. 1987)* (removal period begins when first defendant served).

[3] Subsequent Notices of Removal Are Not Barred

Successive removals are not per se barred. *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).

Warning:

Counsel should carefully weigh whether new circumstances warrant a successive removal motion. *Midlock v. Apple Vacations W., 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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.30[4].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1446(b)* (time for filing notice of removal).

[4] Removal May Be Based on Subsequent Pleadings and Other Papers

[a] Voluntary Acts of Plaintiff After Initial Pleading May Make Case Subject to Removal

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. *28 U.S.C. § 1446*, Commentary on 1988 Revision of Section 1446; *see 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)* .

Warning:

Plaintiff's counsel should amend the complaint with care, as voluntary changes to the complaint can make a case removable. *Self v. General Motors Corp., 588 F.2d 655, 656-659 (9th Cir. 1978)* (because plaintiff is master of complaint, only plaintiff's voluntary changes can make case removable).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.30[3][a][ii][B].*
- *Federal Litigation Guide* Ch. 1.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1446* (procedure for removal).
- *Fed. R. Civ. P. 15(a)* (amendment of pleadings).

[b] Thirty-Day Period Triggered by Paper Indicating That Case Is Removable

If a case is not initially removable, the 30-day period during which the defendant must file the removal notice begins to run when 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. *28 U.S.C. § 1446(b). Other paper* may include correspondence, written or oral discovery responses. *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").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.30[3][e].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1446* (procedure for removal).

[5] Removing After State Court Judgment

A case may be removed after judgment has been entered by a state court but before the case is finally determined through the state appellate process, provided that other applicable time limitations are met. *RTC v. Bayside*

Developers, 43 F.3d 1230, 1236-1237 (9th Cir. 1994) (removal proper when judgment subject to appellate review in state courts, at any point before highest state court enters final judgment).

Circuit Split:

The Eleventh Circuit requires a party seeking an appeal to file a timely Rule 59(e) motion (within 28 days after entry of judgment) to modify or vacate the order or judgment of the state court. *Resolution Trust Corp. v. Bakker, 51 F.3d 242, 244 (11th Cir. 1995)* (case decided when Rule 59(e) provided 10-day period for filing motion). Other circuits relieve the parties of the strict time requirement of Rule 59(e). Most courts, however, provide for some type of consideration by the district court of the state court judgment after removal. *See, e.g., Resolution Trust Corp. v. Allen, 16 F.3d 568, 573 (4th Cir. 1994)* (requiring sua sponte order adopting state court judgment).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.31[3].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Chs. 4, 12.
- *Fed. R. Civ. P. 59(e)* (motion to alter or amend judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalProceedingsNoticesCivil ProcedureRemovalProceedingsTime Limitations



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1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.18

§ 2.18 Federal District Court Advances Case After Removal Notice Filed in State Court

[1] Jurisdiction Shifts to Federal Court

Once a copy of the notice of removal is filed with the clerk of the state court in which the action is pending, jurisdiction to advance the case lies with the federal district court. The state court is divested of jurisdiction and must stop all proceedings unless and until the case is remanded. *28 U.S.C. § 1446(d).*

[2] State Court Orders Remain in Effect Until Modified

State court rulings remain in effect until modified or supplanted by the federal court. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 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; absent the holding of a Rule 65 hearing, the restraint will be a nullity).

Circumstances that may warrant reconsideration of state court decisions include:

1. When a procedural issue determined in state court is subsequently governed by a Federal Rule of Civil Procedure. *See Redfield v. Continental Cas. Co., 818 F.2d 596, 605 (7th Cir. 1987)* ; and

2. When a decision in state court is clearly erroneous. *See Quinn v. Aetna Life & Cas. Co., 616 F.2d 38, 40 (2d Cir. 1980)* .

[3] Federal Rules Govern Procedural Issues

The Federal Rules of Civil Procedure govern all procedural issues after removal, including service of process on unserved or improperly served defendants. *28 U.S.C. § 1448*; *Fed. R. Civ. P. 81(c).*

[4] In Diversity Case, State Law Governs Substantive Issues

If the case was removed based on diversity jurisdiction, the law of the state (including choice of law provisions) in which the action was originally filed governs substantive issues. *See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58*

S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938) . In determining state law when there is no specific guidance from the state's highest court, a federal court may look to (1) lower state court decisions and state supreme court dicta, (2) the lower federal court rulings in the case, (3) the general rule on the issue, (4) the rule in other states looked to by the forum's state courts, and (5) other available sources such as treatises and law review commentaries. *Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 397 (5th Cir. 1986)* .

[5] Neither Repleading nor New Jury Request Necessary

The defendant is not required to file new pleadings in federal court unless the court orders it. *See Fed. R. Civ. P. 81(c)(2)*. If either party formally requested a jury in state court before removal, that request need not be renewed in federal court. *Fed. R. Civ. P. 81(c)(3)*.

[6] Subsequent Transfer of 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 § 1.84 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 107.31, 124.01* et seq.
- *28 U.S.C. § 1404(a)* (change of venue).
- *28 U.S.C. § 1406(a)* (cure or waiver of defects in venue).
- *28 U.S.C. § 1446(d)* (divestment of state court jurisdiction).
- *28 U.S.C. § 1448* (process after removal).
- *Fed. R. Civ. P. 81(c)* (removed actions).
- *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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPrior State Court OrdersCivil ProcedureRemovalProceedingsGeneral Overview



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§ 2.19 All State Court Proceedings Before Removal Remain in Effect

All state court injunctions and orders, as well as other state court proceedings occurring before removal, remain in effect after removal until dissolved or modified by the district court. Similarly, all bonds, undertakings, or security given by a party before removal remain valid and effectual following removal. *28 U.S.C. § 1450*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.31[3].*
- *28 U.S.C. § 1450* (validity of provisional relief granted before removal).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.20

§ 2.20 Checklist for Moving for Remand

☐ Ascertain whether client would benefit from case being remanded to state court.

☐ Ascertain whether there is a basis for remand.

- ○ Lack of subject matter jurisdiction.
- ○ Procedural defect in removal.
- ○ Abstention.
- ○ Forum selection clause.

☐ If grounds for remand exist, determine when motion must be filed.

- ○ Motion based on jurisdictional defect can be made at any time.
- ○ Motion based on procedural defect must be made within 30 days of filing of removal notice. *28 U.S.C. § 1447(c)*; *see § 2.25 below*.

☐ Prepare motion for order remanding removed action to state court.

- ○ Clearly state basis for motion. *See § 2.26 below*.

○ Include request for costs and attorney's fees incurred as result of removal. *See § 2.27 below*.

○ Timely file and serve motion. *28 U.S.C. § 1447*.

☐ **Search by Topic:** Civil Procedure > Removal > Postremoval Remands

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsGeneral OverviewCivil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural Defects



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1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.21

§ 2.21 Seeking Remand by Joining Additional Defendants to Destroy Federal Subject Matter Jurisdiction

A plaintiff seeking remand to the state forum that he or she previously selected may attempt to join additional defendants to destroy diversity jurisdiction. The district court may either deny joinder or permit joinder and remand. *28 U.S.C. § 1447(c),(e).*



Warning:

If the attempt fails, the plaintiff may lose credibility with the judge. Most judges don't appreciate it when either side tries to manipulate jurisdiction

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.41[2][d].*
- *Federal Litigation Guide P 1.69[1].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1447(e)* (joinder of additional defendants after removal).
- *Cobb v. Delta Exports, Inc., 186 F.3d 675, 676-677 (5th Cir. 1999)* (fraudulent joinder doctrine inapplicable when plaintiff seeks to join additional non-diverse defendants after case is properly removed; rather, court has discretion under Section 1447(e) to refuse to permit joinder, or to permit joinder but then must remand the case to state court).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalProceedingsFraudulent Joinder



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§ 2.22 Initating Procedure for Remand

[1] Sua Sponte Remand by Court

A removed action may be remanded sua sponte by the court. *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").

Circuit Split:

Circuit courts are split on whether a district court may sua sponte remand a case based on a *procedural defect*, as opposed to lack of subject matter jurisdiction. The predominant view disallows sua sponte procedural remands. *See e.g., Kelton Arms Condo. Owners Ass'n Inc. 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); *but 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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.41[1][a][2].*
- *28 U.S.C. § 1447(c)* (procedure for remand).
- *Ellenburg v. Spartan Motors Chassis, Inc., 519 F.3d 192, 199 (4th Cir. 2008)* (case of first impression in which Fourth Circuit joined several sister circuits in holding that district court may not remand case *sua sponte* based on procedural defect).
- *Fax Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 487-488 (2d Cir. 1998)* (when party fails to object to improper removal, court may not remand *sua sponte* if district court has subject matter jurisdiction).
- *Page v. City of Southfield, 45 F.3d 128, 132-134 (6th Cir. 1995)* (district courts lack discretion to remand *sua sponte* for procedural defects).

- *In re FMC Corp. Packaging Sys. Div., 208 F.3d 445, 450-451 (3d Cir. 2000)* (district courts lack authority to *sua sponte* remand removed action based on procedural defect in removal notice).

[2] Motion by Party

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)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.41[1][b].*
- *Federal Litigation Guide P 1.69[2].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1447(c)* (procedure for remand).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsGeneral OverviewCivil ProcedureRemovalPostremoval RemandsMotions for Remand



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1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.23

§ 2.23 Ascertaining Grounds for Motion to Remand

[1] Statutory Grounds

The key statutory grounds for remand are:

1. Lack of subject matter jurisdiction, including both diversity jurisdiction and federal question jurisdiction; and

2. Procedurally defective removal.

28 U.S.C. § 1447(c).

[2] Nonstatutory Grounds

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)* ; *see also § 1.58 above*.

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)* ; *see also § 1.80 above*.

[3] Futility Exception May Provide Ground for Refusal to Remand

A court may refuse 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. *Deutsch v. Turner Corp., 324 F.3d 692, 718-719, n.22 (9th Cir. 2003)* .

Circuit Split:
The majority of circuit courts reject the futility exception. *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); *but see Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 787 (5th Cir. 1990)* (recognizing futility exception).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.41[1][e][iii][E].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1447(c)* (procedure for remand).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalProceedingsFraudulent Joinder



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1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.24

§ 2.24 Ascertaining Additional Grounds for Remand of Class Action Subject to Modified Diversity Requirements of Class Action Fairness Act of 2005

A district court may decline to exercise jurisdiction over a class action that meets the modified diversity requirements of the Class Action Fairness Act of 2005 in the interests of justice when more than one-third but fewer than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed. *See 28 U.S.C. § 1332(d)(3).*

A district court *must* decline to exercise jurisdiction over a class action that meets the modified diversity requirements of the Class Action Fairness Act of 2005 when two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state where the action was originally filed. *See 28 U.S.C. § 1332(d)(4)(B).*

A district court also *must* decline to exercise jurisdiction over such a class action when:

1. Over two-thirds or more of the members of all proposed plaintiff classes in the aggregate are citizens of the state where the action was originally filed;

2. During the three-year period before the action was filed, no other class action asserting the same or similar factual allegations against any of the defendants on behalf of the same persons has been filed;

3. Principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state where the action was originally filed; and

4. At least one defendant is a citizen of the state where the action was originally filed, is one from whom significant relief is sought by members of the plaintiff class, and is one whose alleged conduct forms a significant basis for the claims asserted.

28 U.S.C. § 1332(d)(4)(A).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 23.63[2][a], 107.41[1][e][i][B].*
- *Bender's Federal Practice Forms* Form Nos. 23:204, 23:205.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.
- *28 U.S.C. § 1332(d)* (minimal diversity jurisdiction required under Class Action Fairness Act).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.25

§ 2.25 Meeting Timing Requirements for Motion to Remand

[1] Motion Based on Jurisdictional Defects May Be Made at Any Time

A motion for remand based on lack of subject matter jurisdiction may be made at any time by either the court or any of the parties. *See 28 U.S.C. § 1447(c).*

A federal district court must remand a case whenever it appears before final judgment that the court lacks subject matter jurisdiction over the case. *28 U.S.C. § 1447(c).*

[2] Motion Based on Procedural Defects Must Be Made Within 30 Days

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. *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, and is not extended if the notice is served by mail. *28 U.S.C. § 1447(c).*

[3] Waiver of Objection

If a motion to remand based on procedural defect 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. *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][d].*
- *Federal Litigation Guide P 1.69[3].*
- *Bender's Federal Practice Forms* Form No. 81:260 et seq.

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.

- *28 U.S.C. § 1447* (procedure after removal).

- *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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsGeneral OverviewCivil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalProceedingsTime Limitations



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Chapter 2 REMOVAL
PART D: MOVING FOR REMAND TO STATE COURT AFTER REMOVAL

1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.26

§ 2.26 Meeting Burden of Proof When Removal Is Contested

Once a plaintiff files a motion for remand, the defendant must prove that the basis for removal was proper. *Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)* (defendant bears burden of proving all grounds necessary to support removal).

Circuit Split:

For cases under the Class Action Fairness Act of 2005, the majority of circuits holds that the burden of proof remains with defendant. *See, e.g., Abrego v. Dow Chem. Co., 443 F.3d 676, 685 (9th Cir. 2006)* (under CAFA burden of establishing removal jurisdiction remains on proponent of federal jurisdiction); *Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447 (7th Cir. 2005)* (whichever side chooses federal court must establish jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.41[1][e].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 4.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsGeneral OverviewCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalProceedingsGeneral Overview



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§ 2.27 Moving for Costs and Attorney's Fees

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. *28 U.S.C. § 1447(c).*

There is no presumption in favor of an award of attorney's fees. Absent unusual circumstances, attorney's fees may be awarded only when the removing party lacked an objectively reasonable basis for seeking removal. *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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.41[3].*
- *28 U.S.C. § 1447(c)* (remand procedure).

Legal Topics:

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



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1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.28

§ 2.28 Effect of Post-Removal Changes in Case

[1] Federal Claims Dismissed, State Claims Remaining

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. *28 U.S.C. § 1367(c)(3)*; *see also § 1.28 above*. If the federal question is eliminated relatively soon after removal, it is ordinarily preferable to remand the case rather than dismiss the case. *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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.41[1][e][iii][F].*
- *28 U.S.C. § 1367(c)(3)* (discretion to hear or remand remaining state law claims).

[2] Only Third-Party Claims Remain

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. *Hill v. Rolleri, 615 F.2d 886, 888-889 (9th Cir. 1980)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.41[1][e][iii][F].*

- *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).

[3] Post-Removal Reduction in Amount in Controversy Cannot Deprive Federal Court of Jurisdiction

If the plaintiff voluntarily reduces the amount in controversy below the jurisdictional minimum after removal, the district court retains jurisdiction. *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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.41[2][c].*

[4] Addition of Parties

If the plaintiff seeks to join nondiverse parties after removal, the district court may either deny joinder or permit joinder and remand. *28 U.S.C. § 1447(c),(e).*

The joinder of a nondiverse party after removal destroys diversity jurisdiction. A district court may retain jurisdiction if the case could have originally been filed in federal court under an independent basis for federal jurisdiction *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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.41.*

- *28 U.S.C. § 1447* (procedure after removal).

Legal Topics:

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



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Chapter 2 REMOVAL
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1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.29

§ 2.29 Remand Shifts 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 has jurisdiction to proceed with the case. *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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.43.*
- *28 U.S.C. § 1447(c)* (remand procedure).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.30

§ 2.30 Seeking Reconsideration After Remand Order

Once a district court certifies a remand order to the state court, the district court is divested of jurisdiction and may take no further action on the case. *28 U.S.C. § 1447(c)*; *Seedman v. United States Dist. Ct., 837 F.2d 413, 414 (9th Cir. 1988)* (second removal petition based on same grounds does not reinstate court jurisdiction). 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. *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.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsGeneral OverviewCivil ProcedureRemovalPostremoval RemandsAppellate Review



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1-2 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 2.31

§ 2.31 Seeking Appellate Review of Remand Order

[1] Orders Denying Remand

The denial of a motion to remand is not a final order and is ordinarily not subject to immediate appellate review. *O'Halloran v. University of Wash., 856 F.2d 1375, 1378-1379 (9th Cir. 1988)* (appellate review is generally deferred until a final judgment or other appealable order is entered).

Exception:

A court of appeals may accept an appeal from a district court order denying remand of a class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005. *See 28 U.S.C. § 1453(c)(1).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 107.43A, 107.44.*
- *28 U.S.C. § 1453(c)* (review of remand orders in actions subject to Class Action Fairness Act).

[2] Orders Granting Remand

[a] Remand Based on Procedural Defect or Lack of Subject Matter Jurisdiction Is Not Reviewable

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. *28 U.S.C. § 1447(d)*; *Powerex Corp. v. Reliant Energy Servs., 551 U.S. 224, 127 S. Ct. 2411, 168 L. Ed. 2d 112, 123 (2007)* (when the district court relied upon a ground that is colorably characterized as subject matter jurisdiction, appellate review is barred by § 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).

Discretionary remands under Section 1367(c) are *not* remands for lack of subject matter jurisdiction for which review would be barred under Section 1447(c) and (d). Whether a court has subject-matter jurisdiction over a claim is distinct from whether a court chooses to exercise that jurisdiction. With respect to supplemental jurisdiction, a federal court has subject-matter jurisdiction over specified state-law claims, which it may, or may not, choose to exercise. A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary. Consequently, the district court's exercise of its discretion under Section 1367(c) is not a jurisdictional matter. *Carlsbad Tech., Inc. v. HIF Bio, Inc., -- U.S. --, 129 S. Ct. 1862, 173 L. Ed. 2d 843, 847-850 (2009)* (resolving circuit split on issue).

The bar against appellate review of remands based on procedural defects applies not only to remands under the general removal statute, but also to remands made in cases removed under any other statute as well. *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:

An order remanding a case to state court pursuant to *28 U.S.C. § 1443* is reviewable on appeal. *28 U.S.C. § 1447(d)*. Section 1443 removal is available in certain types of civil rights cases. *See § 2.10[3] above*.

Exception:

A court of appeals may accept an appeal from a district court order granting remand of a class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005. *28 U.S.C. § 1453(c)(1)*. However, the application for review of orders granting or denying remand must be made not more than 10 days after the entry of the order. *28 U.S.C. § 1453(c)(1)*.

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).

[b] Remand Based on Substantive Decision Apart From Jurisdictional Issue Is Subject to Review if Contained in Separate Order

A remand based on a substantive ruling apart from the jurisdictional issue is subject to review if the substantive decision is contained in a separate order. However, if the ruling is part of a single order that remands for subject-matter jurisdiction, review of the ruling is barred. *Powerex Corp. v. Reliant Energy Servs., 551 U.S. 224, 127 S. Ct. 2411, 168 L. Ed. 2d 112, 124 (2007)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.44*.
- *28 U.S.C. § 1447* (procedure after removal).

[c] Remand Based on Discretionary Decline of Jurisdiction Is Subject to Review

A remand based on a district court's discretionary decline of jurisdiction is not insulated from appellate review.

Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711-712, 116 S. Ct. 1712, 1720, 135 L. Ed. 2d 1 (1996) (only remands based on grounds specified in *28 U.S.C. § 1447(c)* reviewable).

A district court's discretionary decline of jurisdiction over a class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005 is specifically subject to appellate review. *28 U.S.C. § 1453(c)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 107.44*.
- *28 U.S.C. § 1447(c)* (procedure for remand).
- *28 U.S.C. § 1453(c)* (review of remand orders in actions subject to Class Action Fairness Act).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsAppellate Review



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Chapter 3 PARTIES

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Chapter 3 PARTIES
PART A: PROCEDURAL CONTEXT

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.01

§ 3.01 Procedural Context--Determining Parties

A plaintiff's initial selection of the parties to the suit is one of the most critical and often overlooked factors shaping the litigation and its possible result. A plaintiff's initial choices may impact venue as well as subject matter jurisdiction in diversity cases. A decision to include too many unnecessary parties can make the lawsuit cumbersome and delay its resolution.

The Federal Rules encourage plaintiffs to bring all interested parties together in a single action, giving plaintiffs broad discretion to structure their actions as they see fit. *See United Mine Workers v. Gibbs, 383 U.S. 715, 724, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* ("joinder of claims, parties, and remedies is strongly encouraged"); *Fed. R. Civ. P. 20(a)* (persons who may be joined). The Rules nevertheless impose limits on a plaintiff's discretion:

- Each named plaintiff must be the "real party in interest." *Fed. R. Civ. P. 17(a).*
- Each party plaintiff and defendant must have the capacity to sue and be sued. *Fed. R. Civ. P. 17(b).*
- A plaintiff must sue all of the defendants who are liable for and who have the ability to provide the relief sought, as failure to join required parties may result in the dismissal of the action. *See Fed. R. Civ. P. 12(b)(7), 19(b).*

In addition, defendants can bring additional parties into the litigation by moving to compel joinder under *Fed. R. Civ. P. 19(a).* Defendants exposed to multiple claims also may obtain interpleader and bring all potential claimants into the suit under either *Fed. R. Civ. P. 22(a)* or *28 U.S.C. § 1335.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureJoinder of Claims & RemediesGeneral Overview



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Chapter 3 PARTIES
PART B: DETERMINING PROPER PARTIES

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.02

§ 3.02 Checklist for Determining Proper Parties

☐ Assure that action is brought by real party or parties in interest. *See § 3.03 below*.

○ Ensure that person who sues is person who owns claim or property in dispute.

○ If representative signed contract, bring action in name of representative, rather than ultimate beneficiary, if representative may sue in its own name under *Fed. R. Civ. P. 17(a)(1)*.

○ If federal statute authorizes United States to enforce claims, rights, or benefits owning to another, action must be brought in the name of the United States, and complaint must clearly allege statutory right. *Fed. R. Civ. P. 17(a)(2)*.

○ If claim or right has been validly assigned, bring action in name of assignee rather than assignor, making sure that complaint clearly alleges fact of assignment of claim.

○ If party is minor or incompetent person, representative, such as general guardian, committee, conservator, or like fiduciary, may sue or defend on party's behalf. *Fed. R. Civ. P. 17(c)*.

☐ Raise any applicable objections to real party status. *See § 3.04 below* .

○ Assert plaintiff's failure to qualify as real party in interest by pleading affirmative defense in responsive pleadings. *Fed. R. Civ. P. 8(c)*.

○ In addition to, or as alternative to, pleading affirmative defense, move to dismiss an

action for plaintiff's failure to prosecute in name of the real party in interest. *Fed. R. Civ. P. 12(b)(6).*

☐ Determine which state's laws govern capacity to sue and be sued. *Fed. R. Civ. P. 17(b). See § 3.06 below .*

☐ If appropriate, challenge plaintiff's lack of capacity. *See § 3.07 below .*

○ If complaint alleges facts positively asserting plaintiff's capacity, specifically deny those facts. *Fed. R. Civ. P. 8(b), (d).*

○ Regardless of whether complaint positively asserts plaintiff's capacity, allege lack of capacity as an affirmative defense. *Fed. R. Civ. P. 8(c), 12(b).*

○ Consider raising capacity defect by motion, including motion to dismiss for failure to state claim and motion to compel joinder or substitution of proper parties. *Fed. R. Civ. P. 12(b)(6), 19, 21.*

☐ **Search by Topic:**

○ Civil Procedure > Parties > Capacity of Parties

○ Civil Procedure > Parties > Real Parties in Interest

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedurePartiesReal Parties in InterestAssignees



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Chapter 3 PARTIES
PART B: DETERMINING PROPER PARTIES

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.03

§ 3.03 Determining Real Party in Interest

[1] Actions Must Be Prosecuted by Real Party in Interest or the Legal Owner of Claim

Actions must be prosecuted in the name of the real party in interest. *Fed. R. Civ. P. 17(a).*

A real party in interest owns "the right sought to be enforced" under the applicable substantive law. *United Healthcare Corp. v. American Trade Ins. Co., 88 F.3d 563, 569 (8th Cir. 1996)* . In addition, a real party in interest must have standing to assert a claim under the applicable substantive law. *Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15-18, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004)* ; *see also §§ 1.49 -1.52 above.*

If the right sought to be enforced derives from federal law, a court will apply federal law to determine the real party in interest. Otherwise, a court will apply the law of the state in which the federal court sits. *Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984)* (citing **Moore's**).

[2] Representative Parties Who May Sue on Behalf of Others

[a] Executor, Administrator, Guardian, and Statutory Representative May Sue As Real Party in Interest

Fed. R. Civ. P. 17(a)(1) expressly authorizes certain representative parties to sue in their own names. They are:

1. Executors;

2. Administrators;

3. Guardians;

4. Bailees;

5. Trustees of an express trust;

6. Parties with whom or in whose name a contract has been made for the benefit of another; and

7. Parties authorized by statute.

This list is merely illustrative. *Fed. R. Civ. P. 17*, Committee Note of 1966.

Representative parties need not join the ultimate beneficiaries as parties, even though they might ultimately benefit from or be bound by the judgment in the action. *Fed. R. Civ. P. 17(a)(1).*

[b] United States May Litigate As Real Party Representative

Suits arising under some federal statutes must be brought in the name of the United States. *Fed. R. Civ. P. 17(a)(2).* Such statutes include the Miller Act, *40 U.S.C. § 3133(b)(3)(A)*, involving suits brought on behalf of laborers on or materials suppliers to public works projects, and *qui tam* actions arising under the False Claims Act, *31 U.S.C. § 3730(b)(1)*. While the United States would be the proper plaintiff under these statutes and others like it, the United States would not necessarily be the real party in interest. The United States is the real party in interest, regardless of any authorizing statute, as to claims regarding United States properties or interests.

[c] Representative May Sue on Behalf of Minor or Incompetent Person

The following representatives may sue or defend on behalf of a minor or an incompetent person:

1. A general guardian;

2. A committee;

3. A conservator; or

4. A like fiduciary.

Fed. R. Civ. P. 17(c)(1).

A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem, or issue another appropriate order, to protect a minor or incompetent person who is unrepresented in an action. *Fed. R. Civ. P. 17(c)(2).*

[3] Determining Real Party Status in Assigned Claims

[a] Assignee Acquiring Fully Assigned Claim Is Real Party in Interest

The assignee of a claim validly assigned becomes the real party in interest with respect to that claim. The assignee may sue in its own name without joining the assignor who has given up all rights in the claim. *Fed. R. Civ. P. 17(a)*, Committee Note of 1966.

[b] Assignee May Be Real Party in Interest Even When Assignor Receives Some Benefit of Litigation

An assignee may be the real party in interest even if the assignor has retained an interest. In such cases, where both the assignor and assignee are real parties in interest, either party may bring the action subject to the rules on permissive joinder, *Fed. R. Civ. P. 20*, and compulsory joinder, *Fed. R. Civ. P. 19*.

[c] Assignments for Purpose of Creating Diversity Jurisdiction Are Ineffective for That Purpose

As assignment may be effective to change the real party in interest in a case; however, the court may ignore an assignee's citizenship in determining diversity of citizenship if the assignment was collusive and made to establish diversity jurisdiction as such jurisdiction may not be established through assignment of a claim. *28 U.S.C. § 1359*. Courts consider a number of factors in deciding whether an assignment is improper or collusive, including the following:

1. Were there good business reasons for the assignment?

2. Did the assignee have a prior interest in the item or was the assignment timed to coincide with commencement of litigation?

3. Was any consideration given by the assignee?

4. Was the assignment partial or complete?

5. Was there an admission that the motive was to create jurisdiction?

6. Does the assignment involve related corporate entities?

See Attorneys Trust v. Videotape Computer Prods., Inc., 93 F.3d 593, 595-596 (9th Cir. 1996) .

[d] Assigning Claims Against United States Generally Prohibited

The Assignment of Claims Act, *31 U.S.C. § 3727*, generally prohibits assignment of claims against the United States. Only with the consent of the United States may a party to a contract with the United States assign any rights under the contract. *41 U.S.C. § 15*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 17.10 -17.13*.
- *Bender's Federal Practice Forms*, Rule 17.
- *Fed. R. Civ. P. 17(a)* (real party in interest).
- *United Steelworkers of Am. v. Rawson, 495 U.S. 362, 368-369, 110 S. Ct. 1904, 109 L. Ed. 2d 362 (1990)* (labor union may sue and defend on behalf of the employees it represents under Labor Management Relations Act, *29 U.S.C. § 185(b)*).
- *Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 465, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980)* (trustee of an express trust may sue, or be sued, as a real party in interest; trust beneficiaries need not be joined).
- *Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 193-195 (2d Cir. 2003)* (party who retains interest in an assigned claim is a real party in interest for purposes of determining diversity jurisdiction).
- *Wieburg v. GTE Southwest, Inc., 272 F.3d 302, 306-307 (5th Cir. 2001)* (bankruptcy trustee is legal owner of a debtor's claim against employer and thus is real party in interest).
- *United States v. SCS Business & Tech. Inst., Inc., 173 F.3d 870, 883-884 (D.C. Cir. 1999)* (in *qui*

tam action, "the procedural question of in whose name the suit must be brought is distinct from the substantive legal question whether the plaintiff has a cause of action").

- *HB Gen. Corp. v. Manchester Partners, 95 F.3d 1185, 1195-1197 (3d Cir. 1996)* (*Fed. R. Civ. P. 19* might require joinder of all real parties in interest, but *Fed. R. Civ. P. 17* does not).

- *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1282 (9th Cir. 1983)* (assignee-association was real party in interest).

- *Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Management, 620 F.2d 1, 3-4 (1st Cir. 1980)* (bailee as real party in interest).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedurePartiesReal Parties in InterestAssigneesCivil ProcedurePartiesReal Parties in InterestSubrogees

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Chapter 3 PARTIES
PART B: DETERMINING PROPER PARTIES

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.04

§ 3.04 Raising Objections to Real Party Status

[1] Defendant or Court May Raise Objections

Either the defendant or the court may object to real party status. The defendant may object to the plaintiff's failure to prosecute in the name of the real party by asserting an affirmative defense in a responsive pleading. *Fed. R. Civ. P. 8(c)(1)*. Defendant may also raise the issue by motion: a motion to compel the existing plaintiffs to join a real party in interest or a motion to drop an unnecessary party. *See § 3.04[2], [3] below*.

Warning:

Failure to raise a timely objection to a real-party-in-interest violation constitutes a waiver of the objection. *United States v. Callahan, 884 F.2d 1180, 1183 n.4 (9th Cir. 1989)* (defendant/cross-claimant could not raise objection for first time on appeal).

[2] Moving to Compel Joinder of Real Party in Interest

A real party in interest is a person whose absence leaves the defendant "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." *Fed. R. Civ. P. 19(a)(1)(B)(ii)*. A court must order the joinder of such persons whenever it is feasible. *Fed. R. Civ. P. 19(a)*. Therefore, a defendant may move under Rules 19 and 21 to compel the existing plaintiff to join the real party in interest. *Fed. R. Civ. P. 19(a), 21*; *see also §§ 3.16 -3.20 below*.

Strategic Point:

An early motion to compel joinder is preferable to merely pleading the absence of the real party in interest as an affirmative defense. With a motion, a defendant may obtain a ruling on the issue at an early stage in the case. Also, if a defendant waits too long to address the issue, the objection may be waived. *See, e.g., Whelan v. Abell, 953 F.2d 663, 672 (D.C. Cir. 1992)* .

[3] Bringing Motion to Drop Party as Not Real Party in Interest

The presence of a plaintiff who is not a real party in interest adds nothing to the litigation except undue confusion and

complications, and potential delay and expense. If the real party in interest is present, it should be possible to move for an order to drop the unnecessary parties from the action. *See Fed. R. Civ. P. 21.*



Strategic Point:

If the plaintiff is asserting a claim on which he, she, or it is not entitled to relief and thus is not the real party in interest, a defendant may move to dismiss under Rule 12(b)(6) instead of moving to drop a party. *See § 4.32 below*. However, if plaintiff's not-real-party status is not readily discernible from the complaint, a defendant may have to submit affidavits or declarations with the motion to dismiss. That may turn a simple motion to dismiss into a full-blown summary judgment motion. *See Fed. R. Civ. P. 12(b), 56*; *see also §§ 9.21 -9.26 below*. Consequently, a Rule 21 motion might have procedural advantages when facts beyond the pleading must be presented for the court to rule on the question. In either case, filing a motion is preferable to merely pleading a plaintiff's non-real-party status as an affirmative defense. A motion likely will compel a ruling on the issue at an early stage in the proceedings. If the party asserting the non-real-party status of certain plaintiffs waits too long to litigate this issue, the objection to the absence of the real party in interest may be waived. *See, e.g., Whelan v. Abell, 953 F.2d 663, 672 (D.C. Cir. 1992)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 17.12.*
- *Bender's Federal Practice Forms* Form Nos. 17:3, 17:4, 17:20, 17:31, 21:25.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 19* (required joinder of parties).
- *Fed. R. Civ. P. 21* (misjoinder and nonjoinder of parties).
- *Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15-18, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004)* (noncustodial father barred under state law from suing as child's next friend had no standing to challenge school board policy).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedurePartiesReal Parties in InterestGeneral Overview



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Chapter 3 PARTIES
PART B: DETERMINING PROPER PARTIES

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.05

§ 3.05 Curing Real Party Defect

A court will not dismiss an action simply because it is not prosecuted in the name of the real party in interest. Instead, after an "objection" to the absence of the real party in interest, the court will grant the plaintiffs a "reasonable" amount of time. Within the reasonable amount of time allowed, the existing plaintiffs must cure the problem either by securing ratification from the real party in interest of commencement of the action by the current plaintiffs or by joinder or substitution of the real party in interest. *Fed. R. Civ. P. 17(a)(3)*; *see, e.g., U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1040 (9th Cir. 1986)* .



Warning:

When the failure to prosecute in the name of the real party in interest is not an honest mistake, the court may refuse to give an opportunity to cure and dismiss the case altogether. *See United States ex rel. Wulff v. CMA, Inc., 890 F.2d 1070, 1074 (9th Cir. 1989)* .

Rule 17(a)(3)'s admonition to refrain from dismissals until there has been an opportunity to cure does not apply when it is apparent that it is impossible to cure a real party defect. For example, if correcting the real party defect by joining or substituting the real party would destroy diversity jurisdiction, the action should be dismissed immediately for a futile "cure." *See Naartex Consulting Corp. v. Watt, 722 F.2d 779, 794-795 (D.C. Cir. 1983)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 17.12.*
- *Fed. R. Civ. P. 17(a)(3)* (joinder of real party in interest).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsTransfers of Interests



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Chapter 3 PARTIES
PART B: DETERMINING PROPER PARTIES

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.06

§ 3.06 Assessing Capacity

[1] Capacity to Sue and Be Sued in Federal Court Generally Depends on State Law

Capacity to sue or be sued concerns a litigant's legal authority or power to litigate. *See American Nat'l Red Cross v. S.G., 505 U.S. 247, 248, 112 S. Ct. 2465, 120 L. Ed. 2d 201 (1992)* . A party's capacity to sue or be sued is generally determined by applying state law. For example, most states have statutes that require minors and incompetents to sue through a guardian in state court. *See, e.g., Cal. Code Civil Proc. § 372 et seq* . Thus, minors and incompetents would have to sue through a guardian in federal court as well. *See Fed. R. Civ. P. 17(b), (c)(1).*

For an individual who is not acting in a representative capacity, capacity is determined by the law of the individual's domicile. *Fed. R. Civ. P. 17(b)(1).*

For a corporation, capacity is determined by the law under which the corporation was organized. *Fed. R. Civ. P. 17(b)(2)*; *see § 3.06[2] below.*

Exceptions:
Circumstances in which capacity to sue or be sued does *not* depend on state law include:

1. **Partnerships and Associations Suing on Federal Claims.** A partnership or other unincorporated association may sue or be sued in its common name for purposes of enforcing (for or against it) a substantive right existing under the Constitution or laws of the United States. In these cases it is irrelevant that a partnership or association might lack capacity to sue or be sued under state law. *Fed. R. Civ. P. 17(b)(3)(A).*

2. **Receivers Appointed by Federal Courts.** A receiver appointed by a federal court has the capacity to sue or be sued in a court of the United States. *Fed. R. Civ. P. 17(b)(3)(B)*; *see also 28 U.S.C. § 754* (receivers in possession of property located in more than one judicial district); *28 U.S.C. § 959(a)* (receivers sued for their acts or transactions concerning receivership property).

3. **Prisoner Civil Rights Suits.** Prisoners who lack capacity under state laws may still pursue civil rights

suits in federal court. *See, e.g., McCollum v. Mayfield, 130 F. Supp. 112, 116 (N.D. Cal. 1955)* .

4. **FAA Actions.** Cases arising under the Federal Arbitration Act, *9 U.S.C. § 1 et seq.* , may be litigated by persons or entities who lack capacity under state law. *See, e.g., O & Y Landmark Assoc. v. Nordheimer, 725 F. Supp. 578, 581 (D.D.C. 1989)* .

5. **Enemy Aliens.** During wartime, the Trading with the Enemy Act, *50 U.S.C. App § 7(b)*, limits the capacity of nonresident enemies to sue in any state or federal court. This statute applies even if war was declared after the filing of the action. *Ex parte Colonna, 314 U.S. 510, 511, 62 S. Ct. 373, 86 L. Ed. 379 (1942)* . The Act does not limit the capacity to defend suits brought in courts. *50 U.S.C. App § 7(b).*

[2] Determining Capacity of Business and Government Entities

[a] Capacity of Corporation Determined by Law of State Where Organized

A corporation's capacity to sue or be sued generally is determined by the law of the state where the corporation was organized. *Fed. R. Civ. P. 17(b)(2).* However, federal statutes can authorize suits regardless of the capacity of a corporation under state law. *See, e.g., 42 U.S.C. § 9607(a)* (allowing the prosecution of corporations for violations of federal hazardous waste regulations even if corporations lack capacity to be sued under state law).

The rule that the law of the state of organization governs capacity to sue and be sued applies when a corporation is suing to assert its own rights. It does not apply to a corporation suing as a representative of another. When a party, either individual or corporate, sues in a representative capacity, the law of the state in which the federal district court sits determines capacity to sue or be sued. *See Fed. R. Civ. P. 17(b).*

[b] Capacity of Partnerships, Associations, and Sole Proprietorships Determined by Law of State Where District Court Sits

The capacity of partnerships and associations to sue or be sued is determined by the law of the state in which the district court sits. If, under the relevant state law, a partnership or unincorporated association lacks capacity to sue or be sued, it still may sue or be sued in its common name for the purpose of enforcing (for or against it) a substantive right existing under the Constitution or laws of the United States. *Fed. R. Civ. P. 17(b)(3).*

[c] Capacity of Limited Liability Entities Determined by Law of State Where District Court Sits

The capacity of limited liability companies, limited liability partnerships, and limited partnerships to sue or be sued is determined by the law of the state in which the district court sits. *Fed. R. Civ. P. 17(b)(3).*

[d] Capacity of Nationally Chartered Corporations Determined by Law of State Where District Court Sits

The capacity of a corporation created by federal statute or chartered by another federal corporation is governed by the law under which it was organized. *Fed. R. Civ. P. 17(b)(2).* In the absence of a restriction in the charter, capacity of these corporations is presumed in federal court. *Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 394-396, 59 S. Ct. 516, 83 L. Ed. 784 (1939)* (governmental corporation liable for failure to provide adequate food and water to livestock under bailment contract; governmental corporations organized by other federal corporations have capacity absent contrary charter provision); *see also American Nat'l Red Cross v. S.G., 505 U.S. 247, 258-260, 112 S. Ct. 2465, 120 L. Ed. 2d 201 (1992)* (discussing roles of federally chartered corporations).

[e] Capacity of State and Local Public Entities Determined by Law of State Where District Court Sits

The capacity of states and local public entities to sue and be sued depends on the law of the state in which the district

court sits. *Fed. R. Civ. P. 17(b)(3).*

A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added. *Fed. R. Civ. P. 17(d).*

[f] State Public Entities May Be Sued Only to Extent They Have Waived Sovereign Immunity

Each state enjoys sovereign immunity under the *Eleventh Amendment. See U.S. Const. amend. XI*; *Seminole Tribe v. Florida, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252* . States have enacted statutes making political subdivisions and agencies immune from suit. Thus, states and their agencies may be sued only to the extent that they have waived immunity. In addition, state statutes may limit the liability of the state and its political subdivisions and agencies.

A state's capacity to be sued in state court does not effect a waiver of its *Eleventh Amendment* protection from money damage suits in federal courts. The *Eleventh Amendment* limits the judicial power of federal courts over states. *See U.S. Const, amend XI.* Federal courts have consistently interpreted the *Eleventh Amendment* to preclude suits directly against a state in federal court. *Edelman v. Jordan, 415 U.S. 651, 662-663, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)* .

The *Eleventh Amendment* does permit suits against state officers for injunctive relief, but not for damages. *Ex parte Young, 209 U.S. 123, 150-160, 28 S. Ct. 441, 52 L. Ed. 714 (1908)* . Suits against state officers for conduct in the officer's official or representative capacity are deemed to be against the state itself, and are barred by the *Eleventh Amendment* *Ex parte New York, 256 U.S. 490, 500-501, 41 S. Ct. 588, 65 L. Ed. 1057 (1921)* .

Exception:

Congress may enact statutes expressly authorizing a recovery of damages against a state pursuant to its power to enforce the *Fourteenth Amendment*. This is the only exception to *Eleventh Amendment* immunity. *Seminole Tribe v. Florida, 517 U.S. 44, 55, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)* . For example, Congress has authorized federal court damage actions against states for violations of the Family and Medical Leave Act. *Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 725, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003)* .

[g] Capacity of Representatives Litigating State-Law Claims Determined by Law of State Where District Court Sits

The capacity of representative parties litigating a state-law claim on behalf of another is governed by the law of the state in which the district court is held. If the representative party is a corporation, the corporation's capacity is determined by the law of the forum state. If a state representative is litigating a state law claim on behalf of a governmental body, capacity is determined by the law of the state in which the district court sits. *Fed. R. Civ. P. 17(b)*; *see, e.g., Moore v. Mitchell, 281 U.S. 18, 24, 50 S. Ct. 175, 74 L. Ed. 673 (1930)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 17.20 -17.28.*
- *Moore's Federal Practice (3d ed.)* Ch. 123 (*Eleventh Amendment* and state sovereign immunity).
- *U.S. Const. amend. XI* (judicial power of federal courts over states).
- *Fed. R. Civ. P. 17(b)* (capacity to sue or be sued).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesAgentsCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesRepresentatives



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Chapter 3 PARTIES
PART B: DETERMINING PROPER PARTIES

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.07

§ 3.07 Challenging Capacity Defect

[1] Raising Capacity Defect in Responsive Pleadings

A plaintiff generally is not required to plead the capacity of any party to the suit. *Fed. R. Civ. P. 9(a)*. If the plaintiff has affirmatively pleaded the capacity of any party and a responding party disagrees with the facts pleaded, the answer must specifically deny the allegations of capacity, *Fed. R. Civ. P. 8(b)*, *12(b)*, or the allegations will be admitted. *Fed. R. Civ. P. 8(d)*. In addition, a responding party disputing the capacity of another party to sue or be sued should plead lack of capacity as an affirmative defense. *Fed. R. Civ. P. 8(c)*. Affirmative defenses that are not raised in a responsive pleading or in a motion to dismiss may be waived. *Venters v. City of Delphi, 123 F.3d 956, 968 (7th Cir. 1997)* .

A party challenging either the legal existence of a party or the capacity of a party to sue or be sued (or to sue or be sued in a representative capacity) must do so "by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge." *Fed. R. Civ. P. 9(a)(2)*. Thus, a party wishing to object to the capacity of a party must both assert lack of capacity as an affirmative defense in a responsive pleading and plead the objection more specifically than is required for most affirmative defenses. *Cf. Zotos v. Lindbergh Sch. Dist., 121 F.3d 356, 360 (8th Cir. 1997)* (limitations defense may be pleaded generally, without any specific details).

Warning:

Failure to make the required specific denial as to any objections to a party's capacity waives those objections. *See, e.g., Summers v. Interstate Tractor & Equip Co., 466 F.2d 42, 50 (9th Cir. 1972)* .

[2] Raising Capacity Defect in Motion to Dismiss

In lieu of or in addition to pleading capacity defects, defendants may object to plaintiff's lack of capacity in a motion to dismiss for failure to a state claim on which relief may be granted. *Fed. R. Civ. P. 12(b)(6)*; *see Thomas v. Humfield, 916 F.2d 1032, 1033 (5th Cir. 1990)* ; *see also § 4.32 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 9.02*.
- *Bender's Federal Practice Forms* Form Nos. 17:40, 17:41.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Fed. R. Civ. P. 8* (general rules of pleading).
- *Fed. R. Civ. P. 9(a)* (capacity or authority to sue).
- *Fed. R. Civ. P. 12(b)* (presenting defenses).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePartiesCapacity of PartiesGeneral Overview



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Chapter 3 PARTIES
PART C: PERMISSIVE JOINDER OF PARTIES

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.08

§ 3.08 Checklist for Applying Permissive Joinder Rule

☐ Attempt to create most economical and efficient proceeding by joining all possible parties in single proceeding.

☐ If the parties in question are plaintiffs, make sure proposed plaintiffs meet following requirements. *Fed. R. Civ. P. 20(a)*; *see § 3.09[2] below*.

- ○ Assert right to relief jointly, severally, or in the alternative.
- ○ Assert claims that arise out of same transaction, occurrence, or series of transactions or occurrences.
- ○ Have claims that raise question of law or fact common to all proposed plaintiffs.

☐ If the parties in question are defendants, make sure proposed defendants meet following requirements. *Fed. R. Civ. P. 20(b)*; *see § 3.09[3] below*.

- ○ Will be liable jointly, severally, or in the alternative.
- ○ Are responding to claims arising out of the same transaction, occurrence, or series of transactions or occurrences.
- ○ Have liabilities that present question of law or fact common to all proposed defendants.

☐ Consider practical difficulties raised by joining parties to action. *See § 3.10 below*.

- ○ Additional parties will delay resolution of proceedings.
- ○ Additional parties will join additional claims, further expanding suit.
- ○ Scope of suit will include so many claims and parties that it will become confusing to jury.
- ○ Scope of suit will include so many claims and parties that discovery becomes too cumbersome and expensive.
- ○ Court may negate efficiencies of joinder by ordering separate trial.

☐ Consider jurisdictional limitations on joinder of parties, including:

- ○ Joinder of opposing party who is citizen of same state will destroy subject matter jurisdiction in those cases founded on diversity of jurisdiction.
- ○ Governmental defendants may have sovereign immunity or related defenses. *See § 3.11 below*.

☐ Note that party joinder may be challenged by motion. *See § 3.12 below*.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderPermissive Joinder



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Chapter 3 PARTIES
PART C: PERMISSIVE JOINDER OF PARTIES

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.09

§ 3.09 Selecting Initial Parties to Action

[1] Federal Rules Encourage Liberal Joinder of Parties and Claims

Plaintiffs have broad discretion to determine the structure of their actions. Subject to jurisdictional constraints, the federal rules encourage plaintiffs to bring all interested parties together in a single action. *Fed. R. Civ. P. 20(a)*; *United Mine Workers v. Gibbs, 383 U.S. 715, 724, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* ("joinder of claims, parties, and remedies is strongly encouraged").

[2] Three-Part Test for Joinder of Plaintiffs

Multiple plaintiffs may join in a single action if:

- The plaintiffs claim relief against the defendant or defendants jointly, severally, or in the alternative;
- The plaintiffs' claims arise out of the same transaction, occurrence, or series of transactions and occurrences; and
- There is at least one question of fact or law common to all of the plaintiffs that will arise in the action.

Fed. R. Civ. P. 20(a)(1).

Every plaintiff need not be interested in obtaining all requested relief. If joinder is proper under the three-part test, the action may proceed and the court may render judgment for one or more plaintiffs according to each plaintiff's rights to relief. *Fed. R. Civ. P. 20(a)(3).*

[3] Three-Part Test for Joinder of Defendants

Multiple defendants (and, in admiralty actions, any vessels, cargo, or other property subject to *in rem* jurisdiction) may join in a single action if:

- A right to relief is asserted against all defendants jointly, severally, or in the alternative;

- The plaintiffs' claims arise out of the same transaction, occurrence, or series of transactions and occurrences; and

- There is at least one question of fact or law common to all of the defendants that will arise in the action.

Fed. R. Civ. P. 20(a)(2).

Every defendant need not be interested in defending against all requested relief. If joinder is proper under the three-part test, the action may proceed and the court may render judgment against one or more defendants according to each defendant's liabilities. *Fed. R. Civ. P. 20(a)(3).*

[4] Each Party Joined Must be a Real Party in Interest and Have the Capacity to Sue or be Sued

Even if a party's joinder meets the appropriate three-part test, the Federal Rules limit who may and may not be a party. Under the Rules, every party must meet certain minimum qualifications, such as capacity to sue or be sued, and each party bringing an action must be the real party in interest. *Fed. R. Civ. P. 17(a), (b); see §§ 3.02 -3.07 above.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 20.02.*

- *Fed. R. Civ. P. 20(a)* (persons who may joined or be joined).

Legal Topics:

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

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Chapter 3 PARTIES
PART C: PERMISSIVE JOINDER OF PARTIES

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.10

§ 3.10 Considering Practical Limits on Joinder and Alternatives

[1] Practical Considerations May Limit Ability to Join All Parties

The Federal Rules do not limit the number of plaintiffs or defendants that a plaintiff may join in an action, if each joined party meets the appropriate three-part test for permissive joinder. *Fed. R. Civ. P. 20(a)*; *see also § 3.09 above*.



Strategic Point:

A plaintiff's joinder of too many plaintiffs or defendants can become impractical or cost prohibitive, making it impossible, or economically unworkable, to effect service on a multitude of defendants, to depose all of the parties, or even to conduct an effective pretrial conference, let alone a trial. Plaintiffs in such a situation should consider filing their claims as a class action, which allows for an efficient adjudication of numerous claims. *See* Ch. 7 *below*.

[2] Practical Difficulties May Be Compounded by Rule That Each Joined Party May Join All Available Claims Against Opponents

Once properly joined, parties may join as many claims, legal, equitable, or maritime, as they have against a defending party. The Federal Rules impose no restrictions on the number or type of claims a party may assert in a single case. *Fed. R. Civ. P. 18(a)*.

If a claim is valid or cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action. *Fed. R. Civ. P. 18(b)*. For example, a plaintiff may join a claim for money and a claim to set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money. *Fed. R. Civ. P. 18(b)*.



Strategic Point:

It is not only the sheer number of parties that may render joinder legally permissible but impractical.

Each joined party may add additional, unrelated claims to the action, making the action less manageable.

[3] Court May Order Separate Trials to Resolve Problems Created by Excessive Joinder of Parties and Claims

The court may issue orders, including an order for separate trials, to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party. *Fed. R. Civ. P. 20(b)*. There are no fixed standards as to when a separate trial is proper. The matter is left to the discretion of the court. *See, e.g., Hanley v. First Investors Corp., 151 F.R.D. 76, 80 n.6 (E.D. Tex. 1993)* (decision balances convenience and judicial economy with the competing concerns of prejudice and jury confusion).

Courts also have authority to bifurcate a trial "for convenience, to avoid prejudice, or to expedite and economize." *Fed. R. Civ. P. 42(b)*. Bifurcated trials of liability and damages issues are the most common example of bifurcation orders, but virtually any issue or issues may be bifurcated or tried separately. *See, e.g., Davis & Cox v. Summa Corp., 751 F.2d 1507, 1517 (9th Cir. 1985)* (counterclaim for malpractice bifurcated from original claim for attorney's fees). Only if bifurcation would interfere with a party's right to a jury trial is it forbidden. *Fed. R. Civ. P. 42(b)*; *see also § 5.20 below*.

[4] Parties May Opt for Representative Proceeding, Such As Class Action, Rather Than Joining All Parties

The Federal Rules recognize a number of representative actions in which one or more parties litigate on behalf of a larger group. They include:

1. **Class Actions.** A class action allows designated representative plaintiffs or defendants to litigate on behalf of those similarly situated when "the class is so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*; *see also* Ch. 7 *below*.

2. **Shareholder Derivative Suits.** A corporate shareholder asserting a corporation's rights may represent all shareholders, obviating the need for shareholders to sue individually. *Fed. R. Civ. P. 23.1*.

3. **Unincorporated Associations.** Similarly, each member of an unincorporated association need not be joined as a party in a suit brought by or against such an association. *Fed. R. Civ. P. 23.2*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 20.09*.
- *Moore's Federal Practice (3d ed.)* Ch. 23 (class actions).
- *Moore's Federal Practice (3d ed.)* Ch. 23.1 (derivative actions).
- *Moore's Federal Practice (3d ed.)* Ch. 23.2 (actions related to unincorporated associations).
- *Moore's Federal Practice (3d ed.)* Ch. 42 (consolidation and separate trials).
- *Fed. R. Civ. P. 18* (joinder of claims).
- *Fed. R. Civ. P. 20* (permissive joinder of parties).

- *Fed. R. Civ. P. 23* (class actions).
- *Fed. R. Civ. P. 23.1* (derivative actions).
- *Fed. R. Civ. P. 23.2* (actions related to unincorporated associations).
- *Fed. R. Civ. P. 42* (consolidation and separate trials).
- *Cannon v. United States Acoustics Corp., 532 F.2d 1118, 1120 (7th Cir. 1976)* (requiring separate trials to avoid jury confusion).
- *Duke v. Uniroyal Inc., 928 F.2d 1413, 1421 (4th Cir. 1991)* (jury capable of considering separate claims).

Legal Topics:

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



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Chapter 3 PARTIES
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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.11

§ 3.11 Limitations on Joinder of United States As Defendant

[1] Sovereign Immunity Prohibits Claims Against United States Except to Extent United States Waives Immunity

Absent waiver, sovereign immunity protects the United States from being joined as a defendant, even if joinder would satisfy permissive party joinder requirements. *See United States v. Shaw, 309 U.S. 495, 500-501, 60 S. Ct. 659, 84 L. Ed. 888 (1940)* .

[2] United States Has Made Limited, Statutory Waivers of Immunity

[a] Tucker Act Waives Immunity for Monetary Actions Not Sounding in Tort

By enacting the Tucker Act, *28 U.S.C. §§ 1346(a)*, *1491(a)*, the United States waived its sovereign immunity in damage actions not involving torts. District courts have original jurisdiction, concurrent with the United States Court of Federal Claims, of the following types of claims:

> 1. Civil actions against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, any penalty claimed to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
>
> 2. Civil actions or claims against the United States, not exceeding $10,000, under the Constitution, any Act of Congress, or any regulation of an executive department;
>
> 3. Civil actions or claims against the United States based on any express or implied contract with the United States; and
>
> 4. Civil actions or claims against the United States for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1346(a).

Exception:

Under the Contract Disputes Act of 1978, certain claims arising from an express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort are subject to administrative claim resolution procedures. District courts have no jurisdiction over claims subject to those procedures. *28 U.S.C. § 1346(a)(2)*; *see 41 U.S.C. §§ 607(g)(1)*, *609(a)(1)*.

[b] Tort Claims Act Waives Immunity, But Requires Administrative Claims to Precede Suits

The United States has waived sovereign immunity for tort claims. The United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." *28 U.S.C. § 2674*.

Limits on the liability of the United States include:

1. The United States is never liable for punitive damages. Even if the controlling state law allows punitive damages, the United States is liable only for compensatory damages.

2. The United States is never liable in tort for prejudgment interest.

3. If the United States is liable because of the conduct of a United States agent or officer, and if that agent or officer has immunity from liability, the United States is immune to the same extent as its agent or officer. The same is true for employees of the Tennessee Valley Authority: the United States shares any immunity that TVA employees may have.

28 U.S.C. § 2674.

A party must submit an administrative claim to the appropriate federal agency before suing the United States in federal court on a tort claim. If the agency denies the claim, or fails to act on the claim within six months of its filing, the party may sue the United States in federal court. *28 U.S.C. § 2675(a)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 20.06*.
- *United States v. Sherwood, 312 U.S. 584, 588, 61 S. Ct. 767, 85 L. Ed. 1058 (1941)* ("[The Claims Court's] jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States.").

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSovereign ImmunityCivil ProcedurePartiesJoinderGeneral OverviewGovernmentsFederal GovernmentClaims By & AgainstPublic Contracts LawBids & FormationImplied ContractsGeneral OverviewTortsPublic Entity LiabilityLiabilityFederal Tort Claims ActFederal Agencies



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Chapter 3 PARTIES
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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.12

§ 3.12 Motion Procedures for Objecting to Misjoinder of Parties

[1] Party May Object to Party Joinder by Motion; Court May Address Joinder *Sua Sponte*

A party may challenge the joinder of any party or parties by motion. The court also may raise the issue *sua sponte*. Misjoinder can be addressed "at any time." *Fed. R. Civ. P. 21.* A pretrial order that sets a deadline for addressing such matters or for filing motions generally may compel a party to file a misjoinder motion at a time of the court's choosing.

[2] Party May Bring Motion to Drop Party

A party may seek an order dropping or adding parties pursuant to *Fed. R. Civ. P. 21.* If a party needs to be added, it is likely due to a violation of the compulsory joinder rule. *See Fed. R. Civ. P. 19(a).* A violation of the compulsory rule should be addressed in a motion made pursuant to Rule 19(a). Thus, although Rule 21 refers to both dropping and adding parties, it is best suited to address motions to drop improperly joined parties.

[3] Party May Bring Motion to Sever

Instead of seeking an order to drop an improperly joined party, a party may move to sever claims by or against improperly joined parties into a separate action pursuant to Rule 21. A court may sever claims if severance does not prejudice any party's substantial rights. *Fed. R. Civ. P. 21*; *Coughlin v. Rogers, 130 F.3d 1348, 1349 (9th Cir. 1997)* (motion to sever plaintiffs on ground of misjoinder).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 21.
- *Bender's Federal Practice Forms* Form No. 21:31.
- *Federal Litigation Guide PP 4.20 -4.24.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.

- *Fed. R. Civ. P. 21* (misjoinder of parties).

Legal Topics:

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



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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.13

§ 3.13 Remedying Misjoinder of Parties

[1] Misjoinder of Parties Is Not Ground for Dismissal

An action may not be dismissed due to misjoinder of parties. *Fed. R. Civ. P. 21.*

However, if a party has failed to join a required party, that is, a party whose joinder is required by the compulsory joinder rule, the court may dismiss the action. *Fed. R. Civ. P. 12(b)(7), 19*; *see §§ 3.14 -3.21 below.*

[2] Court May Order Severance

If a defendant has been joined improperly, the court may sever the claims by or against that party so that the claims may be prosecuted a separate action. *Fed. R. Civ. P. 21.* If a court severs claims, its order will create an entirely separate action for the severed claim. There will be an appealable final judgment in the original action dealing with the remaining claims, and a separate appealable judgment in the new, severed action. *See, e.g., United States v. O'Neil, 709 F.2d 361, 366-368 (5th Cir. 1983) .*

[3] Court May Drop or Add Parties at Any Stage of Action

Parties may move to drop or add parties, or the court may, "on just terms," drop or add parties on its own motion, at any stage of the action. *Fed. R. Civ. P. 21.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 21.
- *Federal Litigation Guide PP 4.20 -4.24.*
- *Fed. R. Civ. P. 21* (misjoinder of parties).

Legal Topics:

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



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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.14

§ 3.14 Checklist for Applying Compulsory Joinder Rule

☐ Determine whether absent person or entity is required party by applying either of following two tests. *Fed. R. Civ. P. 19(a)(1). See § 3.16[1] below.*

- ○ Does the court have the power or ability to grant complete relief among those already parties, in the absence of the person or entity under consideration?

- ○ Does the absent person or entity claim an interest relating to the subject of the action and, if so (1) is the absent person or entity so situated that the disposition of the action in his, her, or its absence may, a practical matter, impair or impede the person's or entity's ability to protect that interest or (2) is the absent person or entity so situated that the disposition of the action in his, her, or its absence may leave any of the existing parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest?

☐ For each claim asserted in pleadings, include required statements. *Fed. R. Civ. P. 19(c). See § 3.16[4] below.*

- ○ State name of each required person or entity who has not been joined as a party; and

- ○ Allege reasons why required person or entity has not been joined.

☐ Analyze whether court may compel joinder of required party. *See § 3.18[1] below.*

- ○ Consider whether absent person or entity is subject to service of process.

○ Consider whether absent person or entity may be subjected to the personal jurisdiction of the court in which the action is pending;

○ Consider whether joinder of absent person will destroy basis for court's subject matter jurisdiction by, for example, destroying complete diversity of citizenship; and

○ Consider whether absent person or entity will have valid objection to venue of suit that will lead to dismissal, even if joined.

☐ If absent person or entity meets definition of "required party" and if absent person or entity may be joined, party should analyze whether to make motion to amend pleadings, to add parties, or to compel joinder. *Fed. R. Civ. P. 15*, *19(a)*, *21*. *See §§ 3.18*, *3.20 below*.

○ Consider whether judgment will bind absent persons or entities.

○ Consider whether judgment that does not bind absent persons or entities will be prejudicial or force future litigation.

○ Consider whether judgment that does not bind absent persons or parties will actually lead to risk of inconsistent obligations imposed in future litigations.

○ Consider whether separate litigation involving absent persons or entities will actually be preferable and render present suit quicker and less expensive.

○ Consider whether court will raise question of absent persons or entities even if parties fail to make motion to effect joinder.

☐ If absent person or entity meets definition of "required party", but cannot feasibly be joined, consider whether court may proceed with action. *Fed. R. Civ. P. 19(b)*. *See § 3.18[2] below*.

○ Consider extent to which judgment rendered without joinder of absent person or entity will prejudice absent person or entity.

○ Consider extent to which judgment rendered without joinder of absent person or entity will prejudice those already parties.

○ Consider extent to which prejudice to absent person or entity, or to those already parties, might be lessened or avoided by protective provisions in the judgment, shaping of relief, or other protective orders.

○ Consider extent to which judgment rendered without joinder of absent person or entity will be adequate.

- Consider extent to which plaintiff will have adequate remedy if present action is dismissed.

- Analyze whether to make motion to dismiss for failure to join required party by marshaling arguments against possibility that court may proceed with case without joinder of absent persons or entities. *Fed. R. Civ. P. 19(a), 21*; *see § 3.20[2] below*.

- **Search by Topic:**

  - Civil Procedure > Parties > Joinder > Compulsory Joinder

  - Civil Procedure > Parties > Joinder > Indispensable Parties

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory Joinder



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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.15

§ 3.15 Understanding Rationale Behind Compulsory Joinder Rule

To protect the interests of absent persons or entities, Rule 19, the compulsory joinder rule, requires the joinder of all persons or entities with an interest in the subject matter of an action. *See Fed. R. Civ. P. 19(a)*. Rule 19 also assures that any judgment rendered in the action provides complete and effective relief to the parties, meaning a judgment that prevents multiple and repetitive lawsuits. *See Fed. R. Civ. P. 19*, Committee Note of 1966.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 19.
- *Fed. R. Civ. P. 19* (required joinder of parties).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.16

§ 3.16 Determining Who Qualifies as "Required Parties"

[1] Claimant's Pleading Must Address Joinder of All Required Parties

Before asserting a claim for relief a party must analyze who qualifies as a "required party" for the claim under Rule 19(a). Generally, required parties must be joined, if feasible. However, in specified circumstances, an action may proceed without them.

When asserting a claim for relief, a party must state:

1. The name, if known, of any person who is required to be joined if feasible but is not joined; and

2. The reasons for not joining that person.

Fed. R. Civ. P. 19(c).

[2] Definitions of "Required Party"

Rule 19(a)(1) requires the joinder of all "required parties." An absent person or entity is a required party if:

1. The court cannot grant "complete relief" to the existing parties in the absence of the person or entity;

2. The person or entity claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person or entity's absence may prejudice the person's ability to protect that interest; or

3. The person or entity claims an interest relating to the subject of the action and is so situated that disposition of the action in the person or entity's absence may leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1); *see also § 3.16[3] below.*

Because Rule 19 phrases these three definitions of a "required party" in the disjunctive, an absent person or entity is a required party if he, she, or it meets any one of these three definitions.

[3] Person or Entity Whose Absence Will Prevent Complete Relief to Existing Parties as Required Party

"Complete relief" refers to the parties' interest in comprehensive resolution of a controversy and to the desire to avoid multiple lawsuits regarding the same claim. It does not mean all relief that the court might grant if all permissible persons and entities were to be joined. *See, e.g., Ass'n to Protect Hammersley, Eld. & Totten Inlets v. Taylor Resources, 299 F.3d 1007, 1014-1015 (9th Cir. 2002)* (state environmental agency not necessary party in suit under Clean Water Act). Rather, it means that the relief granted by the court to those already parties must be "complete," or "meaningful," and not "hollow." *See Fed. R. Civ. P. 19*, Committee Note of 1966; *Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 879-880 (9th Cir. 2004)* .

The plaintiff's inability to state a direct cause of action against the party sought to be joined does not prevent joinder when joinder is necessary to effect complete relief between the parties. *Orff v. United States, 545 U.S. 596, 601-604, 125 S. Ct. 2606, 162 L. Ed. 2d 544, (2005)* ; *EEOC v. Peabody W. Coal Co., 400 F.3d 774, 781 (9th Cir. 2005)* .

[4] Person or Entity With Interest in Subject Matter of Action as Required Party

A required party is one with an interest relating to the subject of the action and is so situated that the disposition of the action in the person or entity's absence may impair or impede the person or entity's ability to protect that interest. *Fed. R. Civ. P. 19(a)(1)(B)(i)*. The interest must be more than a financial stake and more than speculation about a future event. The rule does not require that the absent person's interest in the subject matter of the action amount to a property right in the due process sense. The rule requires only an "interest" that will be impaired by the litigation "as a practical matter." *See Fed. R. Civ. P. 19(a)(1)(B)(i)*. In determining whether interests of absent parties will be adequately protected or represented by an existing party, courts will consider several factors, including:

- Whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments;
- Whether the existing party is capable of and willing to make such arguments; and
- Whether the absent party would offer any necessary element to the proceedings that the existing party would neglect to offer.

Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992) (setting out factors for determining adequacy of existing party's representation).

In addition, a person or entity is a required party if he, she, or it claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may leave any current party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. *Fed. R. Civ. P. 19(a)(1)(B)(ii)*. "Inconsistent obligations" occur only when a party is unable to comply with one court's order without breaching another court's order concerning the same incident. Only a substantial possibility of inconsistent obligations, not inconsistent adjudications, shows that absent persons are required parties. *See Blumberg v. Gates, 204 F.R.D. 453, 455 (C.D. Cal. 2001)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 19.03.*

- *Bender's Federal Practice Forms* Form No. 21:31.

- *Federal Litigation Guide PP 4.01 -4.07.*

- *Fed. R. Civ. P. 19* (required joinder of parties).

- *Taylor v. Sturgell, 553 U.S. 880, 904, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)* (rejecting use of "virtual representation" as a basis for applying claim preclusion or issue preclusion against a litigant who was not a party to the earlier judgment).

- *Temple v. Synthes Corp., 498 U.S. 5, 7, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990)* (joint tortfeasors are not necessary parties).

- *Shields v. Barrow, 58 U.S. (17 How.) 130, 139, 15 L. Ed. 158 (1855)* ("Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it ... are commonly termed necessary parties.").

- *Ohio Valley Envtl. Coalition v. Bulen, 429 F.3d 493, 504-505 (4th Cir. 2005)* (where absent parties' interests are identical to existing parties' interests and where existing parties are capable of representing those interests, absent parties were not necessary parties).

- *Wilbur v. Locke, 423 F.3d 1101, 1114 (9th Cir. 2005)* (all parties to contract are necessary in litigation challenging contract's validity).

- *Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 997-999 (10th Cir. 2001)* (Indian tribes claiming interest in federal funds necessary parties in case involving distribution of federal funds among Indian tribes).

- *Washington v. Daley, 173 F.3d 1158, 1167-1168 (9th Cir. 1999)* ("As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit when its interest will be adequately represented by existing parties to the suit.").

- *Tell v. Trustees of Dartmouth College, 145 F.3d 417, 419 (1st Cir. 1998)* (unless there is a "perfect identity of interests" between an existing party and an absentee, court must be cautious in concluding current party will represent absentee's interests).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties



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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.17

§ 3.17 Court Will Order Joinder of Any Required Party

If an absent person or entity meets one of the definitions of a "necessary party," and if joinder is feasible, Rule 19 requires the court to order the absent person or entity joined as a party. *Fed. R. Civ. P. 19(a)*. Joinder is required whenever:

- The absent person is subject to service of process; and
- Joinder of the absent person will not deprive the court of subject-matter jurisdiction.

Fed. R. Civ. P. 19(a)(1).

If the absent person or entity should join as a plaintiff but refuses to do so, the person may be made a defendant or, in a proper case, an involuntary plaintiff. *Fed. R. Civ. P. 19(a)*. However, if the absent person or entity joined as a necessary party objects to venue, and if joinder of that necessary party would render the venue of the action improper, the court must then dismiss the otherwise necessary party. *Fed. R. Civ. P. 19(a)*.

The court ordinarily will give the plaintiff an opportunity to join the absent party. If the plaintiff fails to join the absent party or if the absent party refuses to be joined, the court may consider dismissing the action.



Strategic Point:

If the action proceeds in the absence of the dismissed party, the dismissed party will not be bound by results of the suit. *See Martin v. Wilks, 490 U.S. 755, 761-762, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 19.04*.

- *Stanley v. Darlington County Sch. Dist., 84 F.3d 707, 714 (4th Cir. 1996)* ("If the court agrees [that an absentee is necessary], the plaintiff is given the choice of amending its complaint to add the 'indispensable' second defendant or suffering dismissal of its complaint.").

- *Sladek v. Bell Sys. Mgmt. Pension Plan, 880 F.2d 972, 980 (7th Cir. 1989)* ("[B]ut dismissal with prejudice should ordinarily result only after the court has ordered the party joined and plaintiff has failed to do so.").

- *English v. Seaboard Coastline R.R., 465 F.2d 43, 47 (5th Cir. 1972)* ("When the court decides under Rule 19(a) that a person should be joined, the court should direct the plaintiff to amend his complaint to add that party. Failure to comply with such an order may result in dismissal of the plaintiff's action under Rule 41(b).").

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties



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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.18

§ 3.18 Determining Whether Action Can Proceed if Joinder of Required Party Not Feasible

[1] If Joinder of Required Party Is Not Feasible, Court Must Determine if Action May Proceed or Must Be Dismissed

Even if an absent person or entity meets one of the definitions of a necessary party, it may not be feasible to join that absent person or entity as a party. Rule 19(a) lists three reasons why joinder may not be feasible:

1. Because the absent person or entity is beyond the range of process, so that he, she, or it may not be served with service of process. *Fed. R. Civ. P. 19(a)(1)*; *see also Fed. R. Civ. P. 4*;

2. Because the court's subject matter jurisdiction is founded on diversity of citizenship, and the absent person or entity is a citizen of the same state as an opposing party, so that joinder would destroy complete diversity of citizenship between all plaintiffs and all defendants. *Fed. R. Civ. P. 19(a)(1)*; *see also 28 U.S.C. § 1332*; or

3. Because the absent person or entity has a legitimate objection to venue so that the court would, under the terms of Rule 19(a), be required to dismiss the necessary party. *Fed. R. Civ. P. 19(a)(3).*

Whenever it is not feasible to join an absent person or entity that would otherwise be considered required, the court must determine whether the action should proceed among the parties before it or whether the action should be dismissed. *Fed. R. Civ. P. 19(b)*; *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp., 464 F.3d 885, 890-891 (9th Cir. 2006)* .

[2] Factors Considered by Court

[a] Four Factors Listed Under Rule 19(b)

Courts consider a number of factors in determining whether an action must proceed or must be dismissed when a person who is required to be joined if feasible cannot be joined. Rule 19(b) lists four of those factors:

1. The extent to which a judgment rendered in the person's absence might prejudice that person or the

existing parties. *See § 3.18[2][b] below*;

2. The extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, shaping the relief, or other factors. *See § 3.18[2][c] below*;

3. Whether a judgment rendered in the person's absence would be adequate. *See § 3.18[2][d] below*; or

4. Whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. *See § 3.18[2][e] below*.

Fed. R. Civ. P. 19(b).

These factors are not exclusive, and courts may consider all the circumstances surrounding the litigation. *See Fed. R. Civ. P. 19* Committee Note of 1966; *Virginia Surety Co. v. Northrop Grumman Corp., 144 F.3d 1243, 1247 (9th Cir. 1998)* (Rule 19(b) factors not exclusive).

[b] Extent of Prejudice

The first factor that the court will consider is the extent to which any judgment rendered in the person's absence might be prejudicial to the absent person or to those already parties. *Fed. R. Civ. P. 19(b)(1)*. The prejudice that the court considers must be tangible. The court will not dismiss an action based on the mere theoretical possibility of prejudice. *See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 124-125, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* . The prejudice factor largely duplicates the considerations that made the absent person a required party, *i.e.*, a protectable interest in the subject matter of the action that will be impaired or impeded by the party's absence or that may subject an existing party to inconsistent obligations. *See American Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1024-1025 (9th Cir. 2002)* .

[c] Protective Provisions in Judgment

The second factor that the court will consider is the extent to which the court might avoid prejudice to the absentee or the existing parties by protective provisions in the judgment, by the shaping of relief, or other measures. *See Fed. R. Civ. P. 19(b)(2)*; *Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1046 (9th Cir. 1983)* .

[d] Ability to Provide Adequate and Meaningful Relief

The third factor that the court will consider is whether a judgment rendered in the person's absence will be adequate. *Fed. R. Civ. P. 19(b)(3)*. This factor overlaps with the factors considered in determining whether the absentee is a necessary party. *See Fed. R. Civ. P. 19(a)*. It also overlaps with the second factor.

If, to avoid prejudice, the court must so shape and limit its judgment that it may not provide the existing parties any meaningful relief, then the judgment may not resolve any significant aspects of the controversy. Thus, this factor addresses the public stake in settling disputes as a whole, rather than piecemeal, whenever possible. *See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* .

[e] Consequence to Plaintiff of Dismissal

The fourth factor that the court must consider is whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. *Fed. R. Civ. P. 19(b)(4)*. For example, if a state court can join all of the necessary parties, the federal court action should be dismissed in favor of an action in the state court. *Aguilar v. Los Angeles County, 751 F.2d 1089, 1094 (9th Cir. 1985)* .

Warning:

The absence of an alternative forum weighs heavily against dismissal, but an action may be dismissed for failure to join a required party even if the plaintiff lacks any other forum in which to bring the action. *See, e.g., Presidential Comm'n on Good Gov't v. United States Dist. Court, 309 F.3d 1143, 1152-1153 (9th Cir. 2002)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 19.05*.
- *Fed. R. Civ. P. 19(b)* (when joinder is not feasible).
- *Republic of the Philippines v. Pimentel, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008)* (Rule 19(b) required dismissal of interpleader action involving foreign country that had successfully claimed sovereign immunity; foreign country would be prejudiced if case were to proceed in its absence and no alternative remedies or forms of relief available to lessen or eliminate prejudice).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties



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Chapter 3 PARTIES
PART D: APPLYING COMPULSORY JOINDER RULE

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.19

§ 3.19 Understanding Exceptions to and Limits on Compulsory Joinder

[1] Exception for Actions Enforcing Public Rights

Compulsory joinder of parties generally is not required in actions in which private citizens challenge governmental conduct to protect or enforce public rights. *See National Licorice Co. v. NLRB, 309 U.S. 350, 363, 60 S. Ct. 569, 84 L. Ed. 799 (1940)* ; *Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 424 (2d Cir. 1975)* .

[2] Compulsory Joinder Is Subject to Class Action Rule

Because compulsory joinder would be meaningless in class actions in which only a few parties represent the interest of an entire class, Rule 19 explicitly states that its requirements are "subject to" the class action rule, Rule 23. *Fed. R. Civ. P. 19(d)*. Thus, in a class action, a court may order compulsory joinder of parties under Rule 19 only to the extent that it does not conflict with Rule 23. *See Shimkus v. Gersten Cos., 816 F.2d 1318, 1321 (9th Cir. 1987)* ; *see also* Ch. 7 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 19.06[6], 19.08.*
- *Fed. R. Civ. P. 19(d)* (exception to required joinder rule for class actions).

Legal Topics:

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



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Chapter 3 PARTIES
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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.20

§ 3.20 Raising Failure to Join Required Party

[1] Defendant May Plead Joinder Defect as Affirmative Defense

A plaintiff's failure to join a "person required by Rule 19(b)" may be raised as an affirmative defense in the pleadings. *See Fed. R. Civ. P. 12(h)(2)(A)*; *see also §§ 4.31, 4.32 below*.

[2] Parties May Challenge Joinder Defect by Motion

[a] Defendant May Bring Motion to Dismiss If Required Party Is Not Joined

A defendant may move to dismiss an action for a plaintiff's failure to join a party under Rule 19(b). The motion should be timely, as a court could deny even a meritorious motion if it concludes that the defendant brought the motion for defensive purposes rather than to protect the absent party's interests. *See Fed. R. Civ. P. 19*, Committee Note of 1966 ("when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person and is not seeking vicariously to protect the absent person against a prejudicial judgment ... , his undue delay in making the motion can properly be counted against him as a reason for denying the motion").



Strategic Point:

The plaintiff's failure to join a required party is a defense to the claim. However, a party does not waive this defense by failing to plead it or assert it in a motion. The failure to join a required party may be raised at any time, including at trial on the merits or on appeal. It nevertheless is preferable to raise it in a timely fashion, preferably in a pre-answer motion under Rule 12(b). *See § 4.32 below*.

[b] Party May Bring Motion to Compel Joinder

A court will not dismiss an action for a party's failure to join a necessary party. The appropriate remedy in this context is an order compelling the joinder of the absent party. *See Fed. R. Civ. P. 21*. A party seeking to raise an opposing party's failure to join a necessary party should file a motion for an order to compel joinder. *Fed. R. Civ. P. 19(a)* (if person who is "necessary" party has not been joined, "the court shall order that the person be made a party").

[c] Party May Bring Motion to Add Parties

Any party may move to add parties, including required parties. *Fed. R. Civ. P. 21* ("[o]n motion or on its own, the court may at any time, on just terms, add or drop a party.").

[3] Absent Party May Be Joined by Devices Other Than Motion for Joinder

[a] Absentee May Join Voluntarily Through Intervention

The absent party who has an interest in the subject matter of the action that may be prejudiced by a judgment in the action may intervene as of right, if that interest may be impaired and if it will not be adequately protected by the existing parties. *Fed. R. Civ. P. 24(a)*; *see also § 4.59 below*.

[b] Existing Parties May Amend Pleadings

A plaintiff may move to amend a pleading to add a necessary party. Motions to amend are highly favored and will be granted unless the amendment is futile or causes prejudice to an opposing party. *See Fed. R. Civ. P. 15(a)* ("leave shall be freely given when justice so requires"); *see also § 4.36 below*.

[c] Parties Defending Claim May Bring in Required Party Through Impleader

Parties defending a claim to which the absentee is a required party may join an absent party through impleader. Through impleader, a defendant may bring in an absentee who is or may be liable to the defendant for all or part of the defendant's liability on the plaintiff's claim. *See Fed. R. Civ. P. 14(a)*. A plaintiff facing a claim may implead an absentee on similar grounds. *See Fed. R. Civ. P. 14(b)*; *see also § 4.49 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 14 (third-party practice).
- *Moore's Federal Practice (3d ed.)* Ch. 15 (amended and supplemental pleadings).
- *Moore's Federal Practice (3d ed.) § 21.02* (court may add or drop parties).
- *Moore's Federal Practice (3d ed.)* Ch. 24 (intervention).
- *Bender's Federal Practice Forms* Form Nos. 19:1-19:5, 19:20-19:22.
- *Federal Litigation Guide* Ch. 4 (motions as to parties).
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 12(h)* (waiving and preserving certain defenses).
- *Fed. R. Civ. P. 14* (impleader).
- *Fed. R. Civ. P. 15(a)* (amendments before trial).
- *Fed. R. Civ. P. 19* (required joinder of parties).

- *Fed. R. Civ. P. 21* (misjoinder and nonjoinder of parties).
- *Fed. R. Civ. P. 24(a)* (intervention of right).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties



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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.21

§ 3.21 Absentees Not Bound by Judgment

If the action proceeds in the absence of a required party, the absentee is not bound by any judgment in the suit. The absent party will not suffer claim preclusion (*res judicata*) or issue preclusion (collateral estoppel), even if the absentee knew of the suit and could have intervened. *Martin v. Wilks, 490 U.S. 755, 761-762, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989)* ; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp., 464 F.3d 885, 893-894 (9th Cir. 2006)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 19.05[6].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata



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Chapter 3 PARTIES
PART E: USING INTERPLEADER TO RESOLVE CONFLICTING CLAIMS

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.22

§ 3.22 Checklist for Interpleading Conflicting Claims

☐ Determine whether interpleader would be useful and appropriate. *28 U.S.C. § 1335*; *Fed. R. Civ. P. 22(a)*; *see § 3.23 below*.

- ○ Consider whether potential plaintiff (or defendant facing counterclaim or cross-claim) holds money or property; and
- ○ Consider whether more than one person or entity is asserting conflicting claims to money or property held by the potential plaintiff.

☐ Assess the value of money or property held by the potential plaintiff (or defendant facing counterclaim or cross-claim).

☐ Confirm that claims or potential claims against money or property held by potential plaintiff are truly adverse to property rights held by potential plaintiff and truly adverse to each other. *28 U.S.C. § 1335*; *Fed. R. Civ. P. 22(a)*; *see § 3.23 below*.

☐ Analyze whether interpleader of claimants or potential claimants should proceed under interpleader statutes or Rule 22, noting that:

- ○ Statutory interpleader has a minimal amount-in-controversy requirement, while rule interpleader requires traditional jurisdictional basis such as federal question or complete diversity of citizenship and a $75,001 minimum amount in controversy. *28 U.S.C. § 1335*; *Fed. R. Civ. P. 22*; *see § 3.24 below*.
- ○ Statutory interpleader requires diversity of citizenship between any two conflicting

claimants, while rule interpleader requires either federal question or complete diversity of citizenship between all plaintiffs and all defendants. *28 U.S.C. §§ 1331*, *1332*, *1335(a)(1)*; *Fed. R. Civ. P. 22*; *see § 3.24 below*.

○ Statutory interpleader permits nationwide service of process, while rule interpleader requires service of process under Rule 4, which is usually subject to narrow territorial limits; *see § 3.25 below*.

○ Statutory interpleader has special venue rule permitting action where any claimant resides, while venue in rule interpleader is governed by normal venue rules for all civil actions. *28 U.S.C. §§ 1391*, *1397*; *Fed. R. Civ. P. 22*; *see § 3.26 below*.

☐ Draft interpleader complaint and serve process on all potential claimants. *See § 3.23[1] below*.

☐ Consider deposit of money or property in dispute with court, noting that:

○ Deposit with court is mandatory in statutory interpleader cases. *28 U.S.C. § 1335(a)(2)*; *see § 3.27[1][a] below*.

○ Deposit with court is voluntary or subject to court order in rule interpleader cases. *Fed. R. Civ. P. 22*; *see § 3.27[1][b] below*.

☐ Preclude independent actions undertaken or threatened by interpleader claimants by pursuing. *See § 3.27[2] below*:

○ TRO and preliminary injunctions prior to judgment in interpleader case.

○ Permanent injunction as part of relief in interpleader action.

☐ If entire "stake" is deposited with court and liability for entire stake is conceded, consider moving for discharge, leaving adverse claimants to litigate among themselves. *See § 3.27[3] below*.

☐ If stakeholder has deposited entire "stake," makes no claim to any part of "stake," and seeks discharge, consider seeking discretionary award of attorney's fees as well. *See § 3.27[4] below*.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders



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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.23

§ 3.23 Understanding Interpleader Remedy

[1] Resolving Multiple Claims Against Single Fund or Property Through Interpleader

Interpleader is a procedural device allowing a party in possession of disputed money or property to join, or interplead, all competing claimants in a single action, forcing them to determine who and to what extent each claimant has a valid claim to the money or property. *See 28 U.S.C. § 1335*; *Fed. R. Civ. P. 22*.

Interpleader lies only to resolve competing claims against a specific fund or property, claims that may result in conflicting liabilities. *See 28 U.S.C. § 1335(a)(1)* ("adverse claimants ... may claim entitlement to money or property"); *Fed. R. Civ. P. 22(a)* ("claims that may expose a plaintiff to double or multiple liability" for same money or property).

Typically, the stakeholder institutes interpleader as an initial proceeding, by filing a complaint for interpleader. *See, e.g.*, Fed. R. Civ. P. Appendix of Forms, Form 20 (complaint for interpleader and declaratory relief). A plaintiff may initiate an interpleader action to resolve competing claims against a specific, identifiable fund or property. *28 U.S.C. § 1335(a)(1)*; *Fed. R. Civ. P. 22(a)*. Although the claims need not arise from common origin or title, they must be adverse. *See 28 U.S.C. § 1335(b)*; *Fed. R. Civ. P. 22(a)*.

In addition, a defendant may bring an interpleader action either by asserting a counterclaim against the plaintiff or by asserting a crossclaim against another party already in the action. *See, e.g., Washington Elec. Coop., Inc. v. Paterson, Walke & Pratt, P.C., 985 F.2d 677, 679 (2d Cir. 1993)* (counterclaim for interpleader).

[2] Distinguishing "Strict" or "True" Interpleader and Proceedings "In the Nature of Interpleader"

In "true" or "strict" interpleader, the "stakeholder" makes no claim against any part of the money or property in dispute. Rather, the stakeholder brings the competing claimants into court by initiating the suit, deposits the disputed money or property with the court, gets discharged of any further liability to the claimants, and lets the claimants litigate among themselves.

In proceedings "in the nature of" interpleader, the stakeholder may be one of the competing claimants who initiates an interpleader suit against all competing claimants and forces the claims to be resolved in a single action. *See Bradley v. Kochenash, 44 F.3d 166, 168 (2d Cir. 1995)* (differences between "strict" interpleader and bill "in the nature of

interpleader" indicated). The extent to which the stakeholder may be compelled to deposit the disputed money or property with the court (or post a bond in lieu of a deposit) depends, to some extent, on whether the stakeholder initiates "statutory" or "rule" interpleader.

[3] Distinguishing "Statutory" and "Rule" Interpleader

A stakeholder may seek interpleader under two distinct authorizations:

1. "Statutory" interpleader is available pursuant to *28 U.S.C. §§ 1335*, *1397*, *2361*.

2. "Rule" interpleader is available under *Fed. R. Civ. P. 22*.

Neither supersedes or displaces the other. Rather, each supplements the other. A plaintiff must establish the right to interpleader either under *28 U.S.C. § 1335* or under *Fed. R. Civ. P. 22*. Although the purpose and outcome of the two procedures is identical, there are significant differences in the requirements for establishing subject matter jurisdiction, service of process, and venue under each authorization for interpleader proceedings. A party must establish subject matter jurisdiction, serve process, and select venue consistently under one authorization or the other.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 22.02*, *22.04*.
- *28 U.S.C. §§ 1335*, *1397*, *2361* (statutory interpleader).
- *Fed. R. Civ. P. 22* (rule interpleader).
- *Texas v. Florida, 306 U.S. 398, 406-407, 59 S. Ct. 563, 83 L. Ed 817 (1939)* (equity jurisdiction extended to cases in which plaintiffs were not mere stakeholder of res because they faced same risk of multiple suits on single liability as did disinterested stakeholder).
- *Commercial Union Ins. Co. v. United States, 999 F.2d 581, 583-585 (D.C. Cir. 1993)* (main distinction between statutory and rule interpleader is basis for federal court's subject matter jurisdiction).
- *Farmers Irrigating Ditch & Reservoir Co. v. Kane, 845 F.2d 229, 232 (10th Cir. 1988)* (general rule is that party seeking interpleader must be free from blame in causing the controversy, and when party stands as a wrongdoer with respect to the subject matter of suit or any claimants, party cannot have relief by interpleader).
- *Murphy v. Travelers Ins. Co., 534 F.2d 1155, 1159 (5th Cir. 1976)* (claims against general assets of party, rather than specific, identifiable party, as not properly resolved by means of impleader).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.24

§ 3.24 Understanding Subject Matter Jurisdiction Requirements

[1] Statutory Interpleader Actions

Two requirements must be satisfied to establish subject matter jurisdiction in a statutory interpleader action: a minimal amount in controversy requirement and a minimal diversity requirement. The amount in controversy requirement is satisfied if the stakeholder has an interest in the fund or property valued at $500 or more. *28 U.S.C. § 1335(a)*; *see Correspondent Servs. Corp. v. First Equities Corp., 338 F.3d 119, 124 (2d Cir. 2003)* . When determining diversity jurisdiction, the citizenship of the stakeholder is disregarded. *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* . The diversity of citizenship requirement is satisfied if there are two or more adverse claimants to the money or property in dispute that are citizens of different states. *28 U.S.C. § 1335(a)(1)*; see *Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1265 (9th Cir. 1992)* . The citizenship of other claimants may be disregarded if any two claimants are diverse. *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* .

[2] Rule Interpleader Actions

[a] Federal Question Jurisdiction

Rule 22 does not independently confer subject matter jurisdiction. *See Fed. R. Civ. P. 82* (federal rules do not extend or limit jurisdiction of district courts); *see Commercial Nat'l Bank v. Demos, 18 F.3d 485, 488 (7th Cir. 1994)* (*Fed. R. Civ. P. 22* does not confer subject matter jurisdiction). Therefore, the plaintiff must establish one of the traditional, statutory bases for subject matter jurisdiction. These may include federal question jurisdiction, diversity of citizenship, or a special statutory grant of jurisdiction.

Federal question jurisdiction is governed by *28 U.S.C. § 1331*; *see also §§ 1.02 -1.08 above*. The federal question must be apparent on the face of the complaint, and may not depend on a defense that might be asserted by the defendant. *See Rivet v. Regions Bank, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed.2d 912 (1998)* . Federal question jurisdiction also exists in interpleader actions if the stakeholder's right to relief necessarily depends on the resolution of a substantial question of federal law. *See Commercial Nat'l Bank v. Demos, 18 F.3d 485, 488 (7th Cir. 1994)* .

[b] Diversity of Citizenship

District courts have jurisdiction over actions in which there is complete diversity of citizenship between all plaintiffs on the one hand and all defendants on the other, and the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs. *28 U.S.C. § 1332(a)*; *see also Strawbridge v. Curtiss, 7 U.S. 267, 2 L. Ed. 435 (1806)* (complete diversity of citizenship required); *§§ 1.09-1.24 above* . Even if the nominal "plaintiff," the stakeholder, has no interest in the proceedings and is discharged after depositing the disputed money or property with the court, the citizenship of this nominal "plaintiff" controls. Diversity jurisdiction is not lost even when the plaintiff stakeholder is discharged from the litigation. *See, e.g., Leimbach v. Allen, 976 F.2d 912, 917 (4th Cir. 1992)* .

[c] Special Statutory Grant of Jurisdiction

Numerous federal statutes grant district courts exclusive or concurrent subject matter jurisdiction in particular types of cases. Interpleader jurisdiction may be established through application of these jurisdictional statutes. For example, district courts have jurisdiction of actions under ERISA and interpleader is a cognizable action under ERISA. *See, e.g., Aetna Life Ins. Co. v. Bayona, 223 F.3d 1030, 1034 (9th Cir. 2000)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 22.04[2].*
- *28 U.S.C. §§ 1335, 1397, 2361* (statutory interpleader).
- *Fed. R. Civ. P. 22* (rule interpleader).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.25

§ 3.25 Serving Process in Interpleader Actions

[1] Statutory Interpleader Actions

Nationwide service of process is authorized for statutory interpleader actions. *28 U.S.C. § 2361*; *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* (statutory interpleader enables plaintiff to employ nationwide service of process).

Service of process under this statute establishes the court's personal jurisdiction over the claimants even if they do not have minimum contacts with the forum where the action is proceeding. However, nationwide service of process establishes personal jurisdiction only for claims concerning the money or property interpleaded. *See Knoll v. Socony Mobil Oil Co., 369 F.2d 425, 429 (10th Cir. 1966)* . Courts will not exercise personal jurisdiction over claimants on related claims that might be asserted by way of crossclaim. *Gaines v. Sunray Oil Co., 539 F.2d 1136, 1142 (8th Cir. 1976)* .

[2] Rule Interpleader Actions

Rule 22 does not provide for nationwide service of process. *See Fed. R. Civ. P. 22*. Thus, rule interpleader actions are limited by the standard personal jurisdiction and service of process rules. *See Fed. R. Civ. P. 4*; *see also § 1.46 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 22.04[3].*
- *28 U.S.C. §§ 1335*, *1397*, *2361* (statutory interpleader).
- *Fed. R. Civ. P. 22* (rule interpleader).
- *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* (establishing the governing due process standard for *in personam* jurisdiction).

- *Perkins State Bank v. Connolly, 632 F.2d 1306, 1310-1311 (5th Cir. 1980)* (important aspect of interpleader statute is nationwide service, because it allows interpleader in federal courts in situations when no interpleader suit could be brought in state court).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders



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1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.26

§ 3.26 Assuring Proper Venue in Interpleader Actions

[1] Special Venue Provisions for Statutory Interpleader Actions

Venue for a statutory interpleader action lies in the judicial district in which one or more of the claimants reside. *28 U.S.C. § 1397*; *see Perkins State Bank v. Connolly, 632 F.2d 1306, 1310 (5th Cir. 1980)* .

The statutory interpleader venue provision does not provide any alternative venues, such as venue in the district where the claim arose or where the property in dispute is located. Such alternatives are available under the normal venue rules. *See 28 U.S.C. § 1391(a), (b).*

[2] Normal Venue Provisions for Rule Interpleader Actions

Rule 22 does not provide special venue rules for interpleader actions. *See Fed. R. Civ. P. 22*. Venue in rule interpleader cases is governed by the general venue statute, *28 U.S.C. § 1391. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 529 n.3, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* (venue based exclusively on *28 U.S.C. § 1391* for rule interpleader actions).

Venue therefore lies in:

1. A judicial district in which any defendant resides, if all defendants reside in the same state;

2. A judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or where a substantial part of the property in dispute is located; or

3. A judicial district in which any defendant is subject to personal jurisdiction, or in which any defendant "may be found" for non-diversity cases, if, but only if, neither of the first two venue alternatives is available.

28 U.S.C. § 1391.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 22.04[4].*
- *28 U.S.C. §§ 1335, 1397, 2361* (statutory interpleader).
- *28 U.S.C. § 1391* (general venue provisions).
- *Fed. R. Civ. P. 22* (rule interpleader).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueSpecial VenueCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders



Moore's AnswerGuide: Federal Pretrial Civil Litigation

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Chapter 3 PARTIES
PART E: USING INTERPLEADER TO RESOLVE CONFLICTING CLAIMS

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.27

§ 3.27 Obtaining Ruling on Propriety of Interpleader

[1] Depositing Disputed Property with Court

[a] Deposit Mandatory in Statutory Interpleader Actions

To invoke the statutory interpleader jurisdiction, the plaintiff must either deposit the disputed money or property into the registry of the court or post a bond, payable to the clerk of the court, in the amount and with whatever sureties that the court or judge may deem proper. *28 U.S.C. § 1335(a)(2)*. The amount of the required deposit or bond generally is the amount in dispute. The bond must be conditioned on the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy. *28 U.S.C. 1335(a)(2)*. The court may not waive this requirement or proceed with statutory interpleader in the absence of the required deposit or bond. *See, e.g., Gardes Directional Drilling v. United States Turnkey Exploration, 815 F. Supp. 956, 961 (W.D. La. 1993)* (court never had subject matter jurisdiction over statutory interpleader action in which plaintiffs did not post bond for largest amount in controversy).

[b] Deposit Optional in Rule Interpleader Actions

Rule interpleader does not require the plaintiff to deposit the stake with the court. *See Fed. R. Civ. P. 22*. Nonetheless, the stakeholder or any claimant may file a noticed motion requesting an order authorizing such a deposit. *See Fed. R. Civ. P. 67*. A deposit made in a rule interpleader action is usually equal to the amount in controversy, as determined by the stakeholder.

[2] Enjoining Independent Actions Seeking Share of Stake

[a] Statute Authorizes Injunction in Statutory Interpleader Cases

Even if a district court has jurisdiction over an interpleader proceeding, it may abstain from exercising that jurisdiction by staying the proceeding when an already existing action obviates the need for the interpleader proceeding. *See, e.g., United States Fire Ins. Co. v. Asbestospray, Inc., 182 F.3d 201, 211 (3d Cir. 1999)* ("federal courts should defer to parallel state proceedings that pre-date the interpleader, especially where, as here, the proceedings have resulted in judgments (or settlements in principle)"). However, the court may enjoin a party from filing or proceeding with any

other state or federal court case affecting the money or property in dispute.

A district court hearing a statutory interpleader action may restrain the claimants from filing or proceeding with any other state or federal court case affecting the money or property in dispute in the interpleader action. *28 U.S.C. § 2361*. The "Anti-Injunction Act," *28 U.S.C. § 2283*, which precludes federal courts from enjoining state court proceedings, does not bar injunctions in statutory interpleader actions because such injunctions are expressly authorized by the interpleader statutes. *See 28 U.S.C. § 2283*; *see also General Ry. Signal Co. v. Corcoran, 921 F.2d 700, 703 (7th Cir. 1991)* (*28 U.S.C. § 2361* allows plaintiff who meets requirements for statutory interpleader to obtain injunction against actions without following procedures required by *Fed. R. Civ. P. 65*).

[b] General Equitable Authorization for Injunction in Rule Interpleader Cases

Rule 22 provides no express authorization for an injunction of other proceedings. *See Fed. R. Civ. P. 22*. Nevertheless, courts have concluded that, even in rule interpleader actions, they have general equitable powers to enjoin other proceedings seeking control of the disputed money or property. *See General Ry. Signal Co. v. Corcoran, 921 F.2d 700, 707 (7th Cir. 1991)* (Anti-Injunction Act does not bar injunctions in rule interpleader context because such injunctions are needed to preserve federal court jurisdiction).

[c] Injunction Limited to Claims Against Stake

The court's power to enjoin other proceedings is limited to claims asserted against the money or property in dispute (the "stake"). An injunction may not be asserted against a claim addressed at some other right or property. *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 533, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967)* ; *Illinois Employers Ins. v. Mihalcik, 801 F.2d 949, 951 (7th Cir. 1986)* .

[d] Injunction Is Discretionary; Court May Defer to State Court Proceedings

Injunctions are equitable remedies and are always a matter of discretion, rather than of right. Even in statutory interpleader, where there is a statutory authorization for an injunction, the grant of an injunction is discretionary. *See 28 U.S.C. § 2361* ("district court *may* ... enter its order") (emphasis added).

[3] Seeking Discharge for Stakeholder

[a] Disinterested Stakeholder Normally Entitled to Discharge

If a truly disinterested stakeholder deposits the disputed money or property with the court, the court should dismiss the stakeholder from the action and discharge the stakeholder from liability before the court adjudicates the merits of the disputed claims to the money or property. *See Commercial Nat'l Bank v. Demos, 18 F.3d 485, 487 (7th Cir. 1994)* . Only if the court concludes that the stakeholder has acted in bad faith in some way, including failing to bring the interpleader action in a timely manner, should the court consider denying or delaying dismissal and discharge to a truly disinterested stakeholder. *See Mendez v. Teachers Ins. & Annuity Ass'n & Coll. Ret. Equities Fund, 982 F.2d 783, 787 (2d Cir. 1992)* .

[b] Stakeholder Who Claims Interest or Denies Liability Must Not Be Discharged

In interpleader proceedings other than "true" or "strict" liability proceedings, the stakeholder claims an interest in the money or property in dispute, or denies liability to pay all or a part of the stake to one of more of the claimants. In these proceedings, the stakeholder must remain to litigate the merits of the claims to the money or property that constitute the stake, and should not be dismissed or discharged, even if the stakeholder has deposited the entire stake with the court. *See, e.g., Texas v. Florida, 306 U.S. 398, 406-407, 59 S. Ct. 563, 83 L. Ed. 817 (1939)* .

[4] Seeking Costs and Attorney's Fees on Discharge of Stakeholder

[a] Court Has Discretion to Award Fees

Neither the interpleader statutes nor the interpleader rule authorize an award of fees to a stakeholder who has been discharged. *See 28 U.S.C. §§ 1335*, *1397*, *2361*; *Fed. R. Civ. P. 22*. Nevertheless, traditional equity practice and modern federal practice permits such an award in both statutory and rule interpleader actions if the stakeholder qualifies for discharge because the stakeholder claims no interest in the stake and has deposited it promptly with the court. The grant of an award of attorney's fees is completely discretionary. *See, e.g., Chase Manhattan Bank v. Mandalay Shores Coop. Hous. Ass'n, 21 F.3d 380, 382-383 (11th Cir. 1994)* .

[b] Award Appropriate Only for Stakeholder Who Has Acted Equitably and Promptly

An award of attorney's fees is appropriate only if the discharged stakeholder has acted equitably and promptly. Any suggestion of bad faith on the part of the stakeholder is sufficient grounds to deny an award. *See, e.g., Emcasco Ins. Co. v. Davis, 753 F. Supp. 1458, 1464-1465 (W.D. Ark. 1990)* (insurer improperly resorted to interpleader in attempt to avoid duty to defend insured).

[c] Amount of Fee Award Should Be Modest

Because a fee award would be made, if at all, after the stakeholder has done little more than file and serve a pleading, deposited the disputed money or property with the court, and made a motion for discharge, the costs and fees awarded to a disinterested stakeholder should not be substantial. There is rarely justification for a substantial fee award because the stakeholder should not have been required to conduct complex legal research, participate in discovery, or prepare for trial in any way. *See, e.g., Johnson v. Electrolux Corp., 763 F. Supp. 1181, 1189 (D. Conn. 1991)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 22.03*, *22.06*.
- *Bender's Federal Practice Forms* Form Nos. 22:40, 22:42, 22:50.
- *28 U.S.C. §§ 1335*, *1397*, *2361* (statutory interpleader).
- *Fed. R. Civ. P. 22* (rule interpleader).
- *Fed. R. Civ. P. 67* (procedural provisions governing deposits in court).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders



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Chapter 3 PARTIES
PART E: USING INTERPLEADER TO RESOLVE CONFLICTING CLAIMS

1-3 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 3.28

§ 3.28 Adjudicating Conflicting Claims

After a court determines, in the first stage of litigation, that interpleader is proper and, if appropriate, discharges the stakeholder, interpleader proceedings reach a second stage that is similar to any other civil litigation in federal court. The goal of the second stage is adjudication or settlement of the merits of the conflicting claims to the stake and the distribution of the stake to the competing claimants. *See, e.g., Truck-a-Tune v. Re, 856 F. Supp. 77, 79 (D. Conn. 1993)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 22.03.*
- *Commercial Union Ins. Co. v. United States, 999 F.2d 581, 588-589 (D.C. Cir. 1993)* (court may award proportional shares when appropriate).
- *Hyde Props. v. McCoy, 507 F.2d 301, 305 (6th Cir. 1974)* (claimant may assert a right to a jury trial, if a jury trial is permitted for the types of claims being asserted).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesInterpleadersStatutory Interpleaders



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Chapter 4 PLEADING STAGE

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation 4.syn

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§ 4.01 Procedural Context--Pleading Stage

§ 4.02 Checklist for Drafting Summons and Complaint

§ 4.03 Drafting Complaint in Compliance With Notice Pleading Requirements

§ 4.04 Drafting Heading and Caption of Complaint

§ 4.05 Using Fictitious Party Names

[1] Using Fictitious Name for Plaintiff

[2] Using Fictitious Name for Defendant

[a] Using "Doe" Pleading Permitted if Defendant's Identity Unknown

[b] Considering Effect of "Doe" Defendants on Diversity Jurisdiction

[c] Using "Doe" Pleading to Avoid Statute of Limitations Bar on State-Law Claim

[d] Using "Doe" Pleading to Avoid Statute of Limitations Bar on Federal Claim

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[3] Pleading Diversity Jurisdiction

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§ 4.07 Drafting Allegations of Party Status

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[d] Adopting Allegations by Reference

[2] Dividing Statement of Claim Into Paragraphs

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§ 4.13 Joining Claims and Parties

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[b] Pleading Substantive Elements of Fraud

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[1] Considering Whether Civil Cover Sheet Required

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[3] Preparing Notice of Related Cases

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[8] Preparing Notice of Claim of Unconstitutionality

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[10] Preparing Additional Documents in Class Action Subject to PSLRA

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§ 4.19 Serving Summons and Complaint

[1] Considering Basic 120-Day Deadline for Service of Summons and Complaint

[2] Considering Consequences of Failure to Meet Service Deadline

[a] Showing Good Cause Requires Extension of Service Time

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[c] Considering Court's Discretion to Extend Deadline

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[1] Determining Which Defendants May Waive Service

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[4] Serving United States, Its Agencies, Corporations, Officers, or Employees

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[3] Serving Corporations, Partnerships, and Associations in Foreign Countries

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[5] Considering That 120-Day Deadline Does Not Apply to Service in Foreign Country

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[a] Avoiding Waiver by Including Every Available Rule 12 Defense or Objection

[b] Avoiding Waiver of Omitted Defenses by Filing Amended Motion or Pleading

[c] Complying with Rules Governing Motion Practice

[d] Responding to Motion to Dismiss

[e] Replying to Opposition Papers

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[b] Challenging Subject Matter Jurisdiction on Face of Pleading

[c] Challenging Subject Matter Jurisdiction Based on Facts

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[e] Challenging Subject Matter Jurisdiction Based on Lack of Federal Question

[f] Examining Court's Determination of Motion

[3] Filing Motion to Dismiss for Lack of Personal Jurisdiction

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[b] Avoiding Waiver of Defense of Personal Jurisdiction

[c] Relying on Evidence Outside Pleadings

[d] Examining Court's Determination of Motion

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[5] Filing Motion to Dismiss for Insufficient Process or Service of Process

[6] Filing Motion to Dismiss for Failure to State Claim

[a] Examining Purpose of Motion for Failure to State Claim

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[d] Examining Court's Determination of Motion

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[a] Bringing Rule 19 Motion

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[1] Bringing Motion for More Definite Statement

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[4] Substituting Party Because of Transfer of Interest During Pendency of Litigation

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[1] Distinguishing Counterclaims from Affirmative Defenses

[2] Distinguishing Between Compulsory and Permissive Counterclaims

[a] Examining Which Counterclaims are Compulsory

[b] Considering Effect of Omitted Compulsory Counterclaim

[c] Considering When Compulsory Counterclaim Properly May Be Omitted

[3] Considering That Statute of Limitations Applies to Counterclaims

[4] Considering Subject Matter Jurisdiction Over Counterclaims

[a] Examining Supplemental Jurisdiction

[b] Satisfying Amount in Controversy by Compulsory Counterclaim

[c] Considering That Removal May Not Be Based on Federal-Question Counterclaim

[5] Considering Personal Jurisdiction Over Counter-Defendant

[6] Considering Application of Erie Doctrine to Counterclaims

[7] Preserving Jurisdiction and Venue Objections When Asserting Counterclaim

[8] Examining Relief Available Through Counterclaims

[9] Determining Parties to Counterclaim

[a] Bringing Counterclaim Against Opposing Party Only

[b] Bringing Counterclaim Against Third Parties

[c] Bringing Counterclaim Against Joined Parties

[d] Bringing Counterclaim Against Governmental Entity

[10] Examining Pleading Standards for Counterclaim

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[b] Properly Pleading Counterclaim

[c] Properly and Timely Serving Counterclaim

[d] Serving Demand for Jury Trial

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[a] Making Crossclaim Against Existing Coparty

[b] Joining Parties to Crossclaim

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[a] Raising Crossclaims in Pleading

[b] Considering Pleading Requirements for Crossclaims

[c] Considering that Crossclaims Must Be Properly and Timely Served

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[e] Considering Crossclaim May Be Severed for Separate Trial

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[1] Determining Who May Be Impleaded

[2] Determining Whether Third-Party Claim Is Derivative

[3] Considering Discretionary Nature of Impleader

[4] Examining Procedural Issues in Bringing Third-Party Complaint

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[2] Responding to Particulars of Third-Party Claim

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[b] Asserting Crossclaims Related to Impleader Claims Against Other Parties

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[2] Considering Jurisdiction and Venue

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[2] Determining Right to Jury Trial in Statutorily Created Actions and Proceedings

[3] Considering That Admiralty Proceedings Generally Not Triable by Jury

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[2] Examining Scope of Review



Moore's AnswerGuide: Federal Pretrial Civil Litigation

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Chapter 4 PLEADING STAGE
PART A: PROCEDURAL CONTEXT

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.01

§ 4.01 Procedural Context--Pleading Stage

The complaint is the pleading by which a party who initiates a civil action seeks affirmative relief. It puts the defendant on notice of the plaintiff's claim so as to enable the defendant to answer and prepare for trial. *Fed. R. Civ. P. 8(a)*. Filing a complaint with the court commences the action. *Fed. R. Civ. P. 3*.

A complaint can be used strategically before filing an action. Informally mailing a factually rich complaint, based on a strong claim, to the prospective defendant may precipitate settlement. However, there can be great risk in providing a copy of a complaint to a defendant before it is filed. If the claims asserted by the plaintiff are not particularly strong, the weaknesses in the plaintiff's position may become more apparent and have a negative effect on reaching a pre-litigation settlement. Additionally, the defendant may attempt to preempt the filing of the complaint by initiating an action beforehand in a different jurisdiction. Moreover, providing a copy of the complaint before it is filed gives the defendant substantially more time to prepare a defense and possible counterclaims.

Once a plaintiff commences an action in federal district court by filing a complaint, unless an exception applies, the defendant generally must file an answer or pre-answer Rule 12 motion within 21 days of service of the complaint. *Fed. R. Civ. P. 12(a)(1)(A)(i)*. If a defendant fails to timely respond to the complaint, the court may enter default judgment on behalf of the plaintiff. *See Fed. R. Civ. P. 55(a)*. An answer may contain admissions or denials of the allegations in the plaintiff's complaint and any available defenses to the plaintiff's suit. *See Fed. R. Civ. P. 8(a), (b), (d)*. In responding to the complaint, the defendant should determine any defenses it must raise in either its answer or pre-answer motion to avoid waiver. *See Fed. R. Civ. P. 8(c), 12(h)(1)*.

A party may amend a pleading for many reasons, for example: to correct errors; to add facts discovered during the litigation; to add claims or defenses; or to add, substitute, or drop parties. *See Fed. R. Civ. P. 15(a)(1), (2)*. If amendment is prior to the filing of a responsive pleading, the party does not need leave of court or grounds for the amendment. A party may also amend its pleading after trial to conform the pleading to the evidence. Supplementation of a pleading, as opposed to amendment, is appropriate when a party wishes to plead events that have taken place after the date of the original pleading.

Substitution of a party occurs when the party is unable to continue in a pending civil action for one of the reasons enumerated in Rule 25. A motion for substitution may be made if the party dies, becomes incompetent, or transfers its

interest in litigation. *Fed. R. Civ. P. 25(a)-(c)*. Automatic substitution occurs when a government official in an official capacity suit dies or otherwise leaves office. *Fed. R. Civ. P. 25(d)*.

The use of counterclaims and crossclaims is an important aspect of the overall strategy of any case. Counterclaims are affirmative claims for relief against an opposing party, and must be made in a responsive pleading such as an answer. *Fed. R. Civ. P. 13(a), (b)*. Crossclaims state affirmative claims for relief by a party against a coparty. *Fed. R. Civ. P. 13(g)*.

A third-party action, or impleader, is a procedural device that promotes judicial efficiency by eliminating additional, related suits against a third party who is or might be liable to the defendant. Impleader is available to bring nonparties into the action if the requirements of Rule 14 are met. *Fed. R. Civ. P. 14(a)(1)*.

For cases in which the right to trial by jury is guaranteed, counsel may elect to demand a jury trial or have the action heard by the court. *See Fed. R. Civ. P. 38, 39, 71.1*.

Intervention is a procedural device that authorizes a nonparty to an existing lawsuit to become a party to it. Unless intervention is for a limited purpose, as a general rule, once admitted to a suit, an intervenor may litigate fully, to the same extent as an original party. *See League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1304 (9th Cir. 1997)* (intervenors permitted to fully litigate). Intervention may be as of right or permissive. *See Fed. R. Civ. P. 24(a), (b)*.

Legal Topics:

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



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Chapter 4 PLEADING STAGE
PART B: DRAFTING SUMMONS AND COMPLAINT

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.02

§ 4.02 Checklist for Drafting Summons and Complaint

☐ Draft complaint complying with "notice pleading" requirements. *Fed. R. Civ. P. 3, 8(a). See § 4.03 below.*

☐ Draft heading and caption. *Fed. R. Civ. P. 7(a)(1), 10(a). See § 4.04 below.*

☐ Determine if use of fictitious names is appropriate. *Fed. R. Civ. P. 10(a), 17(a)(1). See § 4.05 below.*

☐ Plead jurisdictional allegations. *Fed. R. Civ. P. 8(a)(1). See § 4.06 below.*

☐ Draft party allegations as appropriate. *Fed. R. Civ. P. 9(a)(1). See § 4.07 below.*

☐ Draft statement of claim or claims. *Fed. R. Civ. P. 8(a)(2), 10(b). See § 4.08 below.*

☐ Include jury demand, if appropriate. *Fed. R. Civ. P. 38(b). See § 4.09 below.*

☐ Include demand for relief. *Fed. R. Civ. P. 8(a)(3). See § 4.10 below.*

☐ Comply with signature requirements. *Fed. R. Civ. P. 11(a), (b). See § 4.11 below.*

☐ Prepare verification of complaint if required by rule or statute. *See § 4.12 below.*

☐ Determine whether to join claims and/or parties. *Fed. R. Civ. P. 18, 19, 20. See § 4.13 below.*

☐ Determine if special pleading requirements are imposed by statute or rule. *See § 4.14 below*.

☐ Attach exhibits, if any, to complaint. *Fed. R. Civ. P. 10(c). See § 4.15 below*.

☐ Determine if waiver of service procedure will be used. *Fed. R. Civ. P. 4(d)(1). See § 4.16[1] below*.

☐ If service of summons not waived, draft summons and other documents necessary at commencement of action. *Fed. R. Civ. P. 4(a)(1), (b). See §§ 4.16, 4.17 below*.

☐ Determine if other documents should be prepared for filing with complaint. See *4.17 below* .

☐ **Search by Topic:**

- ○ Civil Procedure > Pleading and Practice > Complaints
- ○ Civil Procedure > Pleading and Practice > Service of Process

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 4 PLEADING STAGE
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.03

§ 4.03 Drafting Complaint in Compliance With Notice Pleading Requirements

A civil action is commenced in federal district court by filing a complaint that conforms to the notice pleading requirements of the Federal Rules. *Fed. R. Civ. P. 3*. In general the complaint contains the following:

1. A heading. *See § 4.04 below*;

2. A properly formatted caption. *Fed. R. Civ. P. 7(a)(1)*, *10(a)*; *see § 4.04 below*;

3. A short and plain statement of the grounds on which the court's jurisdiction depends. *Fed. R. Civ. P. 8(a)(1)*; *see § 4.06 below*;

4. A short and plain statement of each claim, showing that the plaintiff is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*; *see § 4.08 below*;

5. A demand for judgment for the relief sought. *Fed. R. Civ. P. 8(a)(3)*; and

6. The attorney's signature. *Fed. R. Civ. P. 11(a)*; *see § 4.11 below*.

If a complaint fails to comply with the pleading requirements, the court may order a more definite statement; strike redundant, immaterial, impertinent, or scandalous matter; or dismiss the complaint. *Fed. R. Civ. P. 12(e)*, *(f)*, *41(b)*; *see also § 4.33 below*. A dismissal for failure to comply with pleading requirements will usually be without prejudice, giving the plaintiff an opportunity to amend the complaint. *See, e.g., McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996)* (dismissal with prejudice harsh but appropriate where court had allowed plaintiff to replead twice). *See Fed. R. Civ. P. 15(a)*; *see also § 4.36 below*.

Under notice pleading, the complaint need only give the court and the defendant fair notice of the claims asserted. No technical forms of pleading are required. *Fed. R. Civ. P. 8(d)(1)*. However, the Supreme Court has interpreted "notice pleading" to require a pleader to set forth enough facts to state a claim for relief that is plausible assuming all factual allegations are true. *See Bell Atlantic v. Twombly, 550 U.S. 544, 555-556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (addressing Rule 8 pleading requirements in context of antitrust action under Sherman Act). Mere recitals of the

elements of the cause of action, supported by conclusory statements do not suffice. *See Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* (reinterpreting pleading standards set out in *Twombly*); *see also § 4.08[1][a].*

Depending on the particular claim asserted, the general pleading rules may be supplemented by "special pleading" requirements imposed by federal statutes, the Federal Rules (*e.g., Fed. R. Civ. P. 9*), applicable state law, local rules, and standing orders. *See § 4.14 below.*

District courts may provide optional or mandatory complaint forms for use in certain actions, which may be downloaded from the courts' websites.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 3.01 -3.02, 8.01 -8.10.*
- *Bender's Federal Practice Forms* Form No. 3:1.
- *Bender's Federal Practice Forms* Rule 8.
- *Federal Litigation Guide* Ch. 1.
- *Fed. R. Civ. P. 3* (commencement of action).
- *Fed. R. Civ. P. 8* (general rules of pleading).
- *Fed. R. Civ. P. 84* (forms).
- *Bell Atlantic v. Twombly, 550 U.S. 544, 555-556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (notice pleading requirements under Rule 8).
- *Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* (reinterpreting pleading standards set out in *Twombly*, and holding that only well-pleaded factual allegations are entitled to assumption of veracity in deciding motion to dismiss).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 4 PLEADING STAGE
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.04

§ 4.04 Drafting Heading and Caption of Complaint

The complaint must contain a heading identifying the attorney representing the plaintiff and a caption that includes the court's name, the title of the action, a file number, and a designation of the document as a "complaint." *Fed. R. Civ. P. 10(a)*. Local rules should be consulted for specific formatting requirements.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 7.02 -7.04, 10.01 -10.05.*
- *Bender's Federal Practice Forms* Form Nos. 7:100, 7:101, 7:151, 10:1, 10:9, 10:30, 10:31.
- *Fed. R. Civ. P. 10* (form of pleadings).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 4 PLEADING STAGE
PART B: DRAFTING SUMMONS AND COMPLAINT

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.05

§ 4.05 Using Fictitious Party Names

[1] Using Fictitious Name for Plaintiff

A plaintiff seeking to proceed under a fictitious name must request permission from the court. If the court grants permission, it will usually require that the plaintiff's true name be kept under seal, disclosed only to the defendant and the court. *W.N.J. v. Yocom, 257 F.3d 1171, 1172 (10th Cir. 2001)* (absent permission, court lacks jurisdiction over fictitiously-named plaintiff).

The use of fictitious names by plaintiffs is generally disfavored unless necessary to protect the plaintiff from harassment, injury, ridicule or personal embarrassment. *Doe v. Advanced Textile Corp., 214 F.3d 1058, 1067-1068 (9th Cir. 2000)* (compelling reason required); *see Fed. R. Civ. P. 10(a), 17(a)(1).*

[2] Using Fictitious Name for Defendant

[a] Using "Doe" Pleading Permitted if Defendant's Identity Unknown

In general, the use of fictitious names for defendants is disfavored, but the complaint may use "John Doe" or another descriptive term if the defendant's identity is not known before filing the complaint. *Gillespie v. Civiletti, 629 F.2d 637, 642-643 (9th Cir. 1980)* ("Doe" designation proper for unknown defendant unless clear that discovery would not uncover true identity).



Strategic Point:

Use of a fictitious name for a defendant in the caption can be supported in the body of the complaint by stating: "The plaintiff is using a fictitious name for the defendant because the plaintiff has been unable to ascertain the defendant's true identity. The plaintiff will amend the complaint to add the defendant's true name once the defendant's identity is discovered." *See Fed. R. Civ. P. 15(a)(1), (2)*; *see also § 4.36 below.*

[b] Considering Effect of "Doe" Defendants on Diversity Jurisdiction

The removal statute, *28 U.S.C. § 1441(a)* provides that fictitious defendants should be disregarded in determining whether removal is proper based on diversity of citizenship. The general diversity statute does not address the issue. *28 U.S.C. § 1332*; *see also § 4.06[3] below*.

[c] Using "Doe" Pleading to Avoid Statute of Limitations Bar on State-Law Claim

A plaintiff that sues a "Doe" defendant may amend the complaint to add the defendant's true name once it is determined. *See Fed. R. Civ. P. 15(a)(1), (2)*. If amendment is after the expiration of the statute of limitations, the claim against the defendant will be barred unless the amendment "relates back" to the time of filing the original complaint. An amendment to a state law claim relates back only if permitted by the state law that provides the applicable statute of limitations. *Fed. R. Civ. P. 15(c)(1)(A)*; *see also §§ 4.36, 4.37 below*.

[d] Using "Doe" Pleading to Avoid Statute of Limitations Bar on Federal Claim

If the complaint uses a "Doe" pleading to prevent the running of the statute of limitations on a federal claim, a subsequent amendment to add the defendant's true name will relate back only if all of the following circumstances exist:

1. The claim asserted in the amended complaint arose out of the conduct, transaction, or occurrence described in the original complaint;

2. Within 120 days after filing the amendment, the defendant named in the amendment has received notice of the action so as not to be prejudiced in maintaining a defense on the merits. *See Fed. R. Civ. P. 4(m)*; *see also § 4.19 below*; and

3. Within 120 days after filing the amendment, the defendant named in the amendment knew or should have known that he or she would have been named in the complaint earlier but for a mistake concerning identification. *Fed. R. Civ. P. 15(c)(1)(C)*. *See Fed. R. Civ. P. 4(m)*; *see also § 4.37 below*.

Circuit Split:

Circuits are split on whether an amended federal claim that otherwise meets the foregoing requirements relates back if the identity of the defendant was unknown to the claimant at the time of the initial filing. Most courts hold that the relation back doctrine applies only if there was a mistaken identification of the defendant by the plaintiff. *See, e.g., Wayne v. Jarvis, 197 F.3d 1098, 1102-1104 (11th Cir. 1999)* (lack of knowledge is not a "mistake" under Rule 15). The Third Circuit, however, permits lack of knowledge to be a "mistake" under Rule 15(c) if notice of the claim can be imputed to the substituted defendant. *See Arthur v. Maersk, Inc., 434 F.3d 196, 207-209 (3rd Cir. 2006)* (irrelevant that mistake arose from lack of knowledge).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 10.02, 15.19, 17.12*.
- *Bender's Federal Practice Forms* Form Nos. 10:30, 10:31.
- *Fed. R. Civ. P. 10* (form of pleadings).
- *Fed. R. Civ. P. 15* (amended and supplemental pleadings).
- *Fed. R. Civ. P. 17(a)* (real party in interest).

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Chapter 4 PLEADING STAGE
PART B: DRAFTING SUMMONS AND COMPLAINT

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.06

§ 4.06 Pleading Jurisdictional Allegations

[1] Alleging Subject Matter Jurisdiction

A complaint must contain a short and plain statement of the grounds for the court's jurisdiction. *Fed. R. Civ. P. 8(a)(1).* The statement must set forth the basis for federal question jurisdiction or diversity jurisdiction. *See 28 U.S.C. § 1330 et seq.*; *see also § 4.06[2], [3] below.*



Warning:

Unlike personal jurisdiction and other pleading defects, subject matter jurisdiction may not be waived. *See Fed. R. Civ. P. 12(h)(1).* The court will *sua sponte* dismiss an action whenever it appears that subject matter jurisdiction is lacking. *Fed. R. Civ. P. 12(h)(3)*; *see also § 4.32[2] below.*

[2] Pleading Federal Question Jurisdiction

To establish that the district court has federal question jurisdiction over a claim, the well-pleaded facts of the complaint must establish that the claim itself is grounded in federal law. *Pan Am. Corp. v. Superior Court, 366 U.S. 656, 663, 81 S. Ct. 1303, 6 L. Ed. 2d 584 (1961)* (federal question must be set forth from allegations of complaint); *see 28 U.S.C. § 1331.*



Warning:

Allegations that an anticipated *defense* is grounded in federal law are not adequate to establish federal question jurisdiction. *Rivet v. Regions Bank, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)* (a defense cannot confer federal question jurisdiction even if it presents central issue in case).

Failure to cite the federal law on which the plaintiff's claim is based is not fatal to the complaint, so long as the facts alleged sufficiently demonstrate the basis for jurisdiction. *Schlesinger v. Councilman, 420 U.S. 738, 742-745 n.5 &* n.9, *95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975)* (nature of claim and relief sought invoked jurisdiction). The court may allow an amendment to the complaint to add the necessary allegations. *28 U.S.C. § 1653*; *see also §§ 4.32[2], 4.36 below.*



Strategic Point:

It is good practice to include a specific reference to the section of the Constitution, federal statute, or treaty that supplies the basis for the claim. If federal common law is pleaded as the basis, a reference to the relevant case and a description of its holding should be included.

If jurisdiction is founded on a special jurisdictional statute, reference to the statute should be made in the first paragraph of the complaint and specific factual averments should be made in the body of the complaint demonstrating that the statute applies. *See* Fed. R. Civ. P. Appendix of Forms, Form 7. Some specific statutes that confer federal question jurisdiction are *28 U.S.C. § 1336* (actions to enforce orders of the Surface Transportation Board (formerly the Interstate Commerce Commission); *28 U.S.C. § 1337* (actions arising under antitrust statutes); *28 U.S.C. § 1338* (actions arising under patent, copyright, and trademark law); *28 U.S.C. § 1339* (postal matters); *28 U.S.C. § 1340* (Federal tax matters); *28 U.S.C. § 1343* (civil rights actions); *28 U.S.C. § 1346* (actions against the United States); *29 U.S.C. § 1132(e)* (claims under Employee Retirement Income Security Act (ERISA); *18 U.S.C. § 1965(a)* (actions under the Racketeer Influenced and Corrupt Organization Act (RICO)) and *15 U.S.C. § 78aa* (actions under the Securities Exchange Act of 1934). For discussion of federal question jurisdiction, see *§§ 1.02 -1.08 above*.

[3] Pleading Diversity Jurisdiction

[a] Determining Whether General Diversity Jurisdiction Is Available

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

1. The matter in controversy is between citizens of different states;

2. The matter in controversy is between citizens of a state and citizens or subjects of a foreign state;

3. The matter in controversy is between citizens of different states and in which citizens or subjects of a foreign state are additional parties; or

4. The matter in controversy is between a foreign state as plaintiff and citizens of a state or of different states.

28 U.S.C. § 1332(a); *see also §§ 1.09 -1.24 above*.

[b] Determining if Minimal Diversity Jurisdiction Requirements Apply Under Multiparty Multiforum Trial Jurisdiction Act

A district court has original jurisdiction of a civil action involving minimal diversity between any two adverse parties where at least 75 natural persons died in a single accident at a discrete location, if any of the following apply:

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

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

3. Substantial parts of the accident took place in different states.

28 U.S.C. § 1369(a); *see also § 1.23 above*.

Exception:

The court must abstain from hearing the action if the substantial majority of all plaintiffs are citizens of the same state as the primary defendants and the claims asserted will be governed primarily by the laws of that state. *28 U.S.C. § 1369(b)*.

[c] Determining if Minimal Diversity Jurisdiction Requirements Apply Under Class Action Fairness Act of 2005

Under the Class Action Fairness Act of 2005, a district court also has original jurisdiction of certain class actions in which the matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs, and in which diversity of citizenship exists between any member of a plaintiff class and any defendant. *28 U.S.C. § 1332(d)(2)*; *see also § 1.23 above*.

[d] Alleging Citizenship and Amount in Controversy

Because complete diversity of citizenship is required to establish general diversity jurisdiction, the complaint must aver that each plaintiff is of diverse citizenship from each defendant. *Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978)* (requirements for complete diversity).

An individual is a citizen of a specified state, of the District of Columbia, of the Commonwealth of Puerto Rico, or of a specified United States territory. *See 28 U.S.C. § 1332(e)*. An alien admitted to the United States for permanent residence is deemed a citizen of the state where domiciled. *28 U.S.C. § 1332(a)*. For diversity purposes, a corporation is deemed a citizen of both the state where it is incorporated and the state where it has its principal place of business. *28 U.S.C. § 1332(c)(1)*.

Exception:

In a direct action against a liability insurer, if the insured is not joined as a defendant, the insurer is deemed a citizen of the state where the insured is a citizen, as well as any state where the insurer is incorporated and the state where it has its principal place of business. *28 U.S.C. § 1332(c)(1)*.

The citizenship of a partnership or unincorporated association is alleged by specifying the particular states of citizenship of each partner or member. *Carden v. Arkoma Assoc., 494 U.S. 185, 195-196, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990)* (citizenship of a partnership or unincorporated association is dependent on the citizenship of each individual member).

Exception:

In certain multistate class actions, an unincorporated association is deemed to be a citizen of the state where it has its principal place of business and the state under whose laws it is organized. *28 U.S.C. § 1332(d)(10)*.

A municipal corporation, a county, or other political subdivision of a state is a citizen of the state in which it is located, unless it is simply an arm or the alter ego of the state. However, a state (including an arm or alter ego of the state) is not a "citizen" for purposes of general diversity jurisdiction. *See Moor v. County of Alameda, 411 U.S. 693, 717, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973)* (discussing distinctions).

Exceptions:

Note that several types of actions only require minimal diversity:

1. Actions subject to the Multiparty Multiforum Trial Jurisdiction Act. *See § 4.06[3][b] above*;

2. Actions subject to the Class Actions Fairness Act. *See § 4.06[3][c] above*; and

3. Interpleader actions. An interpleader action requires only minimal diversity. The plaintiff may establish diversity of citizenship by alleging that two or more defendants are of diverse citizenship from one another. *28 U.S.C. § 1335(a)*; *see also §§ 3.22 -3.28 above*.

The complaint also must allege that, exclusive of interest and costs, the amount in controversy exceeds the sum specified by *28 U.S.C. § 1332*. *See* Fed. R. Civ. P. Appendix of Forms, Form 7. In general, all that is required is a good-faith allegation. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* (no dismissal unless it appears "to a legal certainty" that the claim is for less than the jurisdictional amount); *see also § 4.45[4][b] below*.

[4] Pleading Admiralty or Maritime Jurisdiction

In pleading a claim under admiralty and maritime jurisdiction, the complaint must allege facts demonstrating the applicability of admiralty or maritime authority. *See 28 U.S.C. § 1333*; *Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995)* (setting forth jurisdictional tests for admiralty jurisdiction); *see also § 4.14[9] below*.

[5] Pleading Supplemental Jurisdiction

Generally, if a district court has original jurisdiction, it may also exercise supplemental jurisdiction over other claims that are so related to the claims within the court's original jurisdiction that they form part of the same case or controversy under Article III of the Constitution. *28 U.S.C. § 1367(a)*.

Exception:
If the court's original jurisdiction is based on diversity, supplemental jurisdiction is not available for claims that would bring in defendants whose joinder would be inconsistent with the requirements for diversity jurisdiction. *28 U.S.C. § 1367(b)*; *see 28 U.S.C. § 1332*; *see also § 4.06[3] above*; *§ 4.41[2] below*.

Although the district court has supplemental jurisdiction over a claim, it may decline to exercise that jurisdiction if any of the following conditions exists:

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 court has original jurisdiction;

3. The court has dismissed all claims over which it has original jurisdiction; or

4. In exceptional circumstances, there are other compelling reasons to decline jurisdiction.

28 U.S.C. § 1367(c); *see also § 4.45[4][a] below*.

[6] Satisfying Justiciability Requirements

The federal courts' subject matter jurisdiction is limited by the "case or controversy" and standing requirements imposed

by Article III of the Constitution. Allegations of actual injury suffered by the plaintiff are sufficient to satisfy the Article III requirements. *Lewis v. Continental Bank Corp., 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)* (discussing Article III requirements); *see* U.S. Const., art. III; *see also §§ 1.49 -1.52 above*.

In a declaratory relief action, the plaintiff must plead and prove all of the following:

1. An actual injury, or an imminent danger that the plaintiff will suffer a distinct and palpable injury that is real and not conjectural;

2. The injury is the result of the defendant's conduct; and

3. The injury is likely to be addressed by a declaration of the parties' rights and liabilities.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (declaratory relief actions); *Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)* (standing requirements).

[7] Pleading Personal Jurisdiction and Venue

A complaint need not include allegations of personal jurisdiction or venue. A defense based on lack of personal jurisdiction or improper venue will be waived unless the defendant makes a timely objection by motion or in a responsive pleading. *Fed. R. Civ. P. 12(h)(1)*; *see § 4.32[3] below*; *see also* Ch. 1 *above*.



Strategic Point:

Although not required, most attorneys will include the grounds for venue, along with descriptions of the citizenship and residence of all parties.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 8.03, 57.09*.
- *Bender's Federal Practice Forms* Form Nos. 8:1-8:11.
- *28 U.S.C. § 1331* (federal question jurisdiction).
- *28 U.S.C. § 1332* (diversity jurisdiction).
- *28 U.S.C. § 1333* (admiralty or maritime jurisdiction).
- *28 U.S.C. § 1367* (supplemental jurisdiction).
- *Fed. R. Civ. P. 8* (general rules of pleading).

Legal Topics:

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



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Chapter 4 PLEADING STAGE
PART B: DRAFTING SUMMONS AND COMPLAINT

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.07

§ 4.07 Drafting Allegations of Party Status

[1] Alleging Parties' Capacity, Authority, or Legal Existence

Allegations of a party's capacity to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party are not necessary except to the extent required to show the jurisdiction of the court or as required by other rules. *Fed. R. Civ. P. 9(a)(1).*

[2] Alleging Capacity to Establish Diversity Jurisdiction

The complaint may need to allege capacity, authority, or legal existence to establish diversity jurisdiction. In such cases, the citizenship of nominal or formal parties, such as the legal representative of a decedent's estate, a minor, or an incompetent, generally is deemed to be the same as that of the decedent, minor, or incompetent. *28 U.S.C. § 1332(c).* However, if a party is a trustee of an active trust, the trustee will be considered the real party in interest for diversity purposes. *Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 464-465, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980)* (diverse citizenship of individual trustees is not defeated though the parties whom they represent may be disqualified).

[3] Alleging Capacity to Establish Federal Question Jurisdiction

An allegation of capacity, authority, or legal existence might be necessary to establish federal question jurisdiction, if required by the federal statute under which the claim for relief arises. *See, e.g., 29 U.S.C. § 1132(e)(1)* (ERISA); *see Grand Union Co. v. Food Employers Labor Relations Ass'n, 808 F.2d 66, 71 (D.C. Cir. 1987)* (discussing jurisdiction under ERISA statute); *see also § 4.32[2][f] below.*

[4] Alleging Individual Capacity of State Officer in Civil Rights Action

Under the *Eleventh Amendment*, a state's sovereign immunity protects a state officer sued for damages in an official capacity, but not if the official is sued in an individual capacity.

Circuit Split:

Circuits are split on whether a complaint against a state official must allege capacity. *See, e.g., Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990) , aff'd on other grounds, 502 U.S. 21 (1991)* (capacity determined

from proceedings below); *Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1990)* (capacity inferred from context of complaint); *but see Johnson v. Outboard Marine Corp., 172 F.3d 531, 535 (8th Cir. 1999)* (presumption is official capacity suit unless complaint expressly states otherwise); *Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989)* (plaintiff must specifically plead that suit for damages is brought against state official in individual capacity). The Supreme Court has not decided the issue, but has stated that it is preferable for a plaintiff to be specific to avoid ambiguity. *Hafer v. Melo (1991) 502 U.S. 21, 24* n.*, *112 S. Ct. 358, 116 L. Ed. 2d 301* (dicta); *see also §§ 4.45[9][d], 4.46[1][c] below.*

[5] Challenging Capacity by Negative Averment

A party may challenge the legal existence of any party, or the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity by specific negative averment. Such allegations must include any supporting facts peculiarly within the party's knowledge. *Fed. R. Civ. P. 9(a)(2).*

[6] Determining Capacity, Authority, or Legal Existence

Capacity, authority to sue or be sued in federal civil actions and questions of a party's legal existence are usually determined by state law. An individual's capacity, other than one acting in a representative capacity, is determined by the law of the person's domicile. *Fed. R. Civ. P. 17(b)(1).* A corporation's capacity is determined by the law under which it was organized. *Fed. R. Civ. P. 17(b)(2).* For all other parties, the law of the state where the court is located governs. *Fed. R. Civ. P. 17(b)(3)*; *see also § 3.06 above.*

Exception:

A partnership or other unincorporated association with no capacity to sue or be sued under state law may sue or be sued in its common name for the purpose of enforcing a substantive right under federal law. *Fed. R. Civ. P. 17(b)(3)(A).* The capacity of a receiver appointed to sue or be sued in United States court is governed by *28 U.S.C. § 754* and *§ 959(a). Fed. R. Civ. P. 17(b)(3)(B).*

[7] Alleging Plaintiff's Status in Shareholder Derivative Action

In a shareholder derivative suit, the complaint must contain specific allegations, including that the plaintiff was a shareholder or member at the time of the transaction on which the complaint is based, or that the plaintiff's shares thereafter devolved by operation of law. *Fed. R. Civ. P. 23.1(b)(1)*; *see also § 4.14[11] below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 9.02, 17.20 -17.28, 23.1.06.*
- *Bender's Federal Practice Forms* Form Nos. 9:1-9:9, 23.1:1.
- *Fed. R. Civ. P. 9* (pleading special matters).
- *Fed. R. Civ. P. 17* (parties plaintiff and defendant; capacity).
- *Fed. R. Civ. P. 23.1* (derivative actions by shareholders).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedurePleading &

PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements



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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.08

§ 4.08 Drafting Claims in Complaint

[1] Drafting Short, Plain Statement of Claim

[a] Considering Sufficiency of Allegations

A complaint must include a short and plain statement of each claim showing that the plaintiff is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. Each averment in support of the claim must be simple, concise, and direct. *Fed. R. Civ. P. 8(d)(1)*.

While a complaint will not be dismissed under Rule 12(b)(6) for failure to set forth a detailed pleading, the Supreme Court has ruled that the mere use of labels, conclusions, and a formulaic recitation of the elements of the claim does not satisfy Rule 8. A blanket assertion of entitlement to relief is insufficient to satisfy the fair notice requirement of Rule 8. Rather, the Court held that taking the allegations in the complaint as true, the "factual allegations must be enough to raise a right to relief above the speculative level." *See Bell Atlantic v. Twombly, 550 U.S. 544, 555-556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (pleading requirements under Rule 8). Mere recitals of the elements of the cause of action, supported by conclusory statements do not suffice. Only well-pleaded factual allegations are entitled to an assumption of veracity. *See Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* (reinterpreting pleading standards set out in *Twombly*).

On the other hand, over-elaborate and argumentative pleadings may be dismissed for violation of the Rule, usually with leave to amend. *See Magluta v. Samples, 256 F.3d 1282, 1284-1285 (11th Cir. 2001)* (proper remedy is to order plaintiff to replead in compliance with Rule); *see also Fed. R. Civ. P. 12(b)(6), 15(a)*.

Warning:

A complaint that contains only conclusory allegations or bare legal conclusions is insufficient to survive a motion to dismiss for failure to state a claim. *See Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* (court need not accept as true assertions that are no more than recitals of elements of the cause of action, supported by mere conclusory statements); *Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998)* (dismissal proper as complaint set forth no factual detail).

The complaint ordinarily need not allege facts to negate an anticipated affirmative defense that the defendant might

assert in the answer. Such affirmative defenses are automatically taken as denied. *Fed. R. Civ. P. 8(b)(6)*. However, if the complaint pleads facts that tend to establish an affirmative defense, it should allege additional facts to negate it, so as to avoid dismissal. *See Tregenza v. Great Am. Communications Co., 12 F.3d 717, 718 (7th Cir. 1993)* (noting that plaintiff can plead himself or herself out of court).



Strategic Point:

Even if detailed pleading is not required, in some cases there may be advantages to describing fully the factual basis for the allegations. For example detailed pleading in the original complaint may avert a dispute over whether a subsequent amendment relates to the same transaction for purposes of the statute of limitations. *See Fed. R. Civ. P. 15(c)(1)(B)*; *see also § 4.37 below*. Detailed pleading also may facilitate discovery. Generally, unsupervised discovery is restricted to matters that are relevant to any party's "claim or defense," although for good cause, the court may order discovery of any matter relevant to the "subject matter" of the action. *Fed. R. Civ. P. 26(b)(1)*. Because the pleadings define the scope of discovery that is available without advance court approval, a plaintiff may decide that detailed allegations are more advantageous.



Warning:

One potential danger in pleading unnecessary material is that it provides more of a basis for a motion to dismiss the complaint.

[b] Alleging Facts on Information and Belief

After making reasonable inquiry, a plaintiff may allege facts believed to be true, but that lack evidentiary support at the time the complaint is filed. Such allegations must be specifically identified in the complaint as likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. *Fed. R. Civ. P. 11(b)(3)*; *see also § 4.11 below*. Generally, however, such allegations are allowed only if the facts that would support them are within the defendant's knowledge or control. *Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994)* (facts must be peculiarly within the opposing party's knowledge).

[c] Including Legal Theories

The complaint need not specify the law under which the claim arises or any legal theory justifying the relief sought, as long as it gives proper notice of the claim. *See Ryan v. Illinois Dep't of Children & Family Servs., 185 F.3d 751, 764 (7th Cir. 1999)* (complaint sufficient even though identified wrong statutory basis for claim).

The plaintiff may plead several alternative and inconsistent theories of recovery on a claim. *Fed. R. Civ. P. 8(d)(3)*, *18(a)*; *see Adler v. Pataki, 185 F.3d 35, 41 (2d Cir. 1999)* (pleading inconsistent theories of wrongful termination).

If a complaint does state a legal theory, any relief ultimately granted by the court usually is not limited strictly to that theory. Except for a default judgment, a final judgment must grant the relief a party is entitled to, regardless of the relief demanded in the party's pleading. *See Fed. R. Civ. P. 54(c)*; *see also § 4.10 below*.

[d] Adopting Allegations by Reference

A statement in a complaint may be adopted by reference elsewhere in the complaint or in any subsequent pleading or motion. Statements in an exhibit also may be adopted by reference in the body of the complaint. *Fed. R. Civ. P. 10(c)*.

Even if a written instrument is not attached to the complaint, the instrument may be treated as incorporated by the

complaint if there is a clear and definite reference to the instrument in the complaint. *See Parrino v. FHP, Inc., 146 F.3d 699, 705-706 (9th Cir. 1998)* (referenced and essential to claim); *Cortec Indus., Inc. v. Sum Holding, L.P., 949 F.2d 42, 47 (2d Cir. 1991)* (relied on by plaintiff); *see also § 4.15 below*.

[2] Dividing Statement of Claim Into Paragraphs

Claims must be stated in numbered paragraphs, each limited as far as practicable to a statement of a single set of circumstances. *Fed. R. Civ. P. 10(b)*.

Separate paragraphs may be useful even for a single claim, if many facts or more than a single ground to support the claim are stated in the complaint. *O'Donnell v. Elgin, J. & E. Ry., 338 U.S. 384, 392, 70 S. Ct. 200, 94 L. Ed. 187 (1949)* (numerous grounds for claim) (quoting Moore's).

When pleading injuries, the varying harms to both person and business caused by a single act or series of related acts can be combined in a single paragraph. Similarly, when pleading the bases for a defendant's liability, varying wrongs, even if inconsistent, can be combined by the plaintiff in a single paragraph.

[3] Pleading Separate Counts

Each claim founded on a separate transaction or occurrence must be stated in a separate count, if to do so facilitates clarity. *Fed. R. Civ. P. 10(b)*.

Separate counts are required if they enable the defendant to frame a responsive pleading or enable the court and other parties to understand the claims. Separate counts also may be required if multiple defendants or multiple plaintiffs are asserting various claims, to indicate which claims are asserted by and against which parties. *See Bautista v. Los Angeles County, 216 F.3d 837, 840-841 (9th Cir. 2000)* (citing **Moore's**) (51 plaintiffs).

If all plaintiffs plead an identical claim that would impose joint liability on all defendants, separate counts may not be required, regardless of the number of parties. In such a case, there may be only one transaction or occurrence or one claim involved. *See Fed. R. Civ. P. 10(b)*.

Warning:

Failure to comply with the separate-count requirement will generally result in dismissal of the complaint with leave to amend to comply with the Rule. *See Magluta v. Samples, 256 F.3d 1282, 1284-1285 (11th Cir. 2001)* ("shotgun" complaint dismissed with leave to replead separate counts).

[4] Drafting Class Action Allegations

For a class action to proceed, the class must be numerous, members of the class must have legal and factual issues in common, the claims and defenses of the class representatives must be typical, and the class representatives must adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*. For discussion of elements of class actions, see Ch. 7 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 8.02 -8.09, 10.03 -10.05, 23.20 -23.25, 54.70 -54.72*.
- *Bender's Federal Practice Forms* Form Nos. 10:50-10:53, 10:70, 23:1.

- *Fed. R. Civ. P. 8* (general rules of pleading).

- *Fed. R. Civ. P. 10* (form of pleadings).

- *Fed. R. Civ. P. 23* (class actions).

- *Bell Atlantic v. Twombly, 550 U.S. 544, 555-556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (notice pleading requirements under Rule 8).

- *Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* (reinterpreting pleading standards set out in *Twombly*, and holding that only well-pleaded factual allegations are entitled to assumption of veracity in deciding motion to dismiss).

- *Limestone Dev. Corp. v. Village of Lemont, 520 F.3d 797, 804-805 (7th Cir. 2008)* (*Bell Atlantic Corp. v. Twombly* requires that, in complex cases, defendant should not be forced to undergo costly discovery unless complaint contains enough detail, factual or argumentative, to indicate that plaintiff has substantial case).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.09

§ 4.09 Including Jury Demand

The complaint may include a demand for a jury trial of any issue triable of right by a jury. *Fed. R. Civ. P. 38(b)*; *see Tull v. United States, 481 U.S. 412, 417, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987)* (no right to jury trial on equitable issues). The demand may be endorsed on the complaint. *Fed. R. Civ. P. 38(b)(2)*; *see Gargiulo v. Delsole, 769 F.2d 77, 78-79 (2d Cir. 1985)* (usual method is notation on first page of complaint). Local rules may require a separate demand in the body of the complaint, in addition to the endorsement. *See §§ 4.52 -4.57 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 38.01 -38.03*.
- *Fed. R. Civ. P. 38* (right to jury trial).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.10

§ 4.10 Including Demand for Relief

A complaint must contain a prayer, that is, a demand for judgment for the relief the plaintiff seeks. The demand for judgment may be stated in general terms and may demand alternative and multiple forms of relief. *Fed. R. Civ. P. 8(a)(3)*. Although special damages must be specifically stated in the body of the complaint under *Fed. R. Civ. P. 9(g)*, the demand for judgment need not distinguish or itemize special damages. *See § 4.14[8] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 8.05*.
- *Fed. R. Civ. P. 8* (general rules of pleading).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.11

§ 4.11 Complying With Signature Requirement

[1] All Pleadings Must Be Signed Under Rule 11

The filed complaint must be signed, and it must include the signer's address, e-mail address, and telephone number. *Fed. R. Civ. P. 11(a)*. Local rules may permit or require papers to be filed, signed, or verified by electronic means. *Fed. R. Civ. P. 5(d)(3)*.

[2] Signing Complaint Makes Implicit Certifications to Court

An attorney or unrepresented plaintiff who signs a complaint certifies, to the best of their knowledge, information, and belief, formed after reasonable inquiry, the following:

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

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

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

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

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

Warning:

To comply with the Rule 11(b) certification requirement, the attorney or unrepresented plaintiff must make a reasonable investigation of the facts and the law before signing and submitting the complaint. Failure to do so may result in monetary and nonmonetary sanctions under Rule 11. *See Fed. R. Civ. P.*

11(c)(1); *see also § 11.03 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 11.10* -11.12, *11.20 -11.24*.
- *Fed. R. Civ. P. 11* (signing pleadings, motions, and other papers).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.12

§ 4.12 Determining if Verification of Complaint Is Required

Unless specifically required by rule or statute, a complaint need not be verified or accompanied by an affidavit. *Fed. R. Civ. P. 11(a)*. If a verification is required, it must be signed by a plaintiff in accordance with *Fed. R. Civ. P. 11*; *see also § 4.11 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 11.10 -11.11, 11.20 -11.24*.
- *Bender's Federal Practice Forms* Form No. 11:20.
- *Federal Litigation Guide*, Ch. 8A.
- *Fed. R. Civ. P. 11* (signing pleadings, motions, and other papers).

Legal Topics:

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



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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.13

§ 4.13 Joining Claims and Parties

[1] Joining Claims Against Defendant

[a] Joining All of Plaintiff's Claims

A plaintiff may join as many claims as the plaintiff has against any defendant. *Fed. R. Civ. P. 18(a)*. This includes alternative and inconsistent claims. *Fed. R. Civ. P. 8(d)(3)*. The complaint may include two or more statements of a claim alternatively or hypothetically, either in one count or in separate counts. If statements are made in the alternative, the pleading is sufficient if any one of them is sufficient. *Fed. R. Civ. P. 8(d)(2)*; *see McDonald v. Household Int'l Inc., 425 F.3d 424, 427-430 (7th Cir. 2005)* (complaint sufficient if it supports recovery under any legal theory).

Exception:
Limitations on federal subject matter jurisdiction and other doctrines may preclude joinder. *See § 4.06 above*; *§ 4.13[1][b] below*.

The plaintiff may join principal and contingent claims in a single complaint, even though technically the contingent claim does not accrue until resolution of the principal claim. *Fed. R. Civ. P. 18(b)*.

In general, multiple plaintiffs may join in one complaint all transactionally related claims that any plaintiff has against any defendant, if there is a common question of law or fact. *See Fed. R. Civ. P. 20(a)(1)*.

[b] Determining Whether to Omit Claims

The joinder of claims is permissive, not compulsory. *Fed. R. Civ. P. 18(a)*. Nothing in the procedural rules requires a plaintiff to assert all claims against a defendant in one action. *See Headley v. Bacon, 828 F.2d 1272, 1275 (8th Cir. 1987)* (joinder is at pleader's option).

Warning:
The doctrine of claim preclusion, or res judicata, may effectively require a plaintiff to join all transactionally related claims in a single case. Claim preclusion generally precludes a plaintiff from

suing the same defendant twice on the same claim. Therefore, a plaintiff must be careful to assert all transactionally related claims in a single case. *See Lytle v. Household Mfg., Inc., 494 U.S. 545, 552, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990)* (prior adjudication bars claim that arose out of the same transaction and that could have been brought in prior suit).

[c] Verifying that Court's Jurisdiction and Venue Are Proper

Although the procedural rules permit unrestricted joinder of claims as a matter of pleading, the court must have a basis of subject matter jurisdiction for each joined claim, and venue must be proper. *See Fed. R. Civ. P. 18(a), 82*; *28 U.S.C. § 1391(a)(1), (2), (b)(1), (2)*; *Frantz v. United States Powerlifting Fed'n, 836 F.2d 1063, 1067 (7th Cir. 1987)* (court must have jurisdiction over each joined claim).

[d] Joining Defendants Under Joinder Provisions

The plaintiff may not join claims against a person who has not properly been brought into the case under the various party joinder provisions. *See Fed. R. Civ. P. 19(a)(1), 20(a)*; *see also Fed. R. Civ. P. 13(h), 14, 22, 24.*

[2] Joining Claims Involving United States

[a] Determining Issues of Sovereign Immunity

A claim against the United States is permitted only if the government has expressly waived its sovereign immunity. The joinder provisions of the Federal Rules cannot change this requirement. *United States v. Shaw, 309 U.S. 495, 500-501, 60 S. Ct. 659, 84 L. Ed. 888 (1940)* (specific statutory consent required); *see also § 4.49[5] below.*

For example, the United States has waived its sovereign immunity in monetary actions based on torts,and in monetary actions not sounding in tort. *See 28 U.S.C. §§ 1346(a), 1491* (Tucker Act); *28 U.S.C. § 1346(b)* (Federal Tort Claims Act).

When the United States is the plaintiff, there is no issue of sovereign immunity because no one is asserting liability against the government. Like other plaintiffs, the United States may take advantage of unrestricted joinder of claims. *See Fed. R. Civ. P. 18(a).* Suit by a sovereign does not effect a waiver as to counterclaims against that sovereign. *See, e.g., Nassau Smelting & Refining Works, Ltd. v. United States, 266 U.S. 101, 106-107, 45 S. Ct. 25, 69 L. Ed. 190 (1924)* (specific congressional authority required).

Exception:

Despite the doctrine of sovereign immunity, and even in the absence of express statutory authority, a defendant may recover on a counterclaim (or setoff) to the amount of the underlying claim, but affirmative relief is not available absent consent. *United States v. Forma, 42 F.3d 759, 764-765 (2d Cir. 1994)* (recoupment-counterclaim exception); *see also § 4.45[9][d] below.*

[b] Determining Joinder Issues Under Tucker Act

Although the Tucker Act contains no express restrictions on joinder of claims, its limits on the district court's jurisdiction may effectively restrict joinder. The Tucker Act provides that district courts have original jurisdiction, concurrent with that of the Court of Federal Claims, over any civil non-tort action against the United States, not exceeding $10,000, that has its basis in federal law or any express or implied contract with the United States. The Court of Federal Claims has exclusive jurisdiction over such claims exceeding $10,000. *28 U.S.C. §§ 1346(a), 1491.* Thus, a plaintiff cannot join a tort claim with a Tucker Act claim in excess of $10,000, because the district court has exclusive jurisdiction of the tort claim, while the Court of Federal Claims has exclusive jurisdiction of the Tucker Act claim. *28 U.S.C. § 1346(b)(1)*; *see 28 U.S.C. §§ 1346(a), 1491(a).*

[3] Considering Whether Joined Claims May Be Segregated, Severed, or Dismissed

The court has discretion to order separate trials of claims or issues that have been properly joined in the same complaint. *Fed. R. Civ. P. 42(b).*

If a claim is asserted against a party that cannot be joined in the case under the party joinder provisions, the court may dismiss the misjoined party without dismissing the remainder of the action. Alternatively, the court may order that the claim against the misjoined party be severed from the case and pursued in a separate action. *Fed. R. Civ. P. 21*; *see also § 4.42 below.*

[4] Identifying Necessary Parties Who Have Not Been Joined

If known to the plaintiff, the complaint must state the names of persons who are required to be joined but who have not been joined. The complaint must also state the reasons such persons have not been joined. *Fed. R. Civ. P. 19(a), (c)*; *see also § 4.41[2] below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 18.02, 19.02, 20.02, 131.20 -131.22.*
- *Bender's Federal Practice Forms* Form Nos. 19:30, 19:31, 20:1, 20:2.
- *28 U.S.C. § 1346(b)* (Federal Tort Claims Act).
- *28 U.S.C. §§ 1346(a), 1491* (Tucker Act).
- *Fed. R. Civ. P. 18* (joinder of claims).
- *Fed. R. Civ. P. 19* (required joinder of parties).
- *Fed. R. Civ. P. 20* (permissive joinder of parties).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaims



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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.14

§ 4.14 Determining Matters that Must Be Specially Pleaded

[1] Pleading Fraud or Mistake

[a] Alleging Fraud or Mistake with Particularity

In pleading fraud or mistake, the circumstances constituting the 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 no details of fraudulent statement).

Exception:
The element of scienter--the defendant's intent to defraud--usually may be pleaded generally. *Fed. R. Civ. P. 9(b)*; *but see § 4.14[3][c] below*.

If the facts constituting fraud are solely within the defendant's knowledge or are otherwise inaccessible to the plaintiff, the particularity requirement may be satisfied by pleading fraud on information and belief, if the supporting facts are pleaded specifically. *Weiner v. Quaker Oats Co., 129 F.3d 310, 319-320 (3d Cir. 1997)* (plaintiff must state belief in the existence of the information and facts supporting that belief).

The defendant may raise a failure to plead fraud or mistake with sufficient particularity by a motion to dismiss or a motion for a more definite statement. *See Fed. R. Civ. P. 12(b)(6), (e)*; *see also §§ 4.32[6], 4.33 below*. If the complaint fails to satisfy the particularity requirement, the court will usually grant leave to amend unless an amendment would be futile. *See Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995)* (leave to amend even when not requested); *see also § 4.36 below*.

Timing:
Objections to a pleading on Rule 9(b) grounds must be raised within the same period as Rule 12 motions. *See Independent Energy Corp. v. Trigen Energy Corp., 944 F. Supp. 1184, 1199 (S.D.N.Y. 1996)* (untimely objection constitutes waiver even if complaint fails particularity requirement).

[b] Pleading Substantive Elements of Fraud

The particular elements that must be pleaded in a fraud case depend on the applicable substantive law governing the claim. Rule 9(b) is procedural. Thus, even if state law provides the elements of fraud, the plaintiff must plead the circumstances constituting the fraud with particularity. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104-1105 (9th Cir. 2003)* (Rule 9(b) applies to state claims in diversity action).

If fraud is an essential element of a claim, the pleading of the claim as a whole must satisfy the particularity requirement. If a claim combines an allegation of fraud with an allegation of nonfraudulent wrongdoing, only the fraud is subject to the particularity requirement. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104-1105 (9th Cir. 2003)* (fraudulent allegations contained in nonfraud claim must be pleaded with particularity).

[2] Pleading Conditions of Mind

The particularity requirement for pleading fraud applies only to the specific conduct constituting the fraud and not to scienter, the defendant's specific intent to defraud, which may be averred generally. *Fed. R. Civ. P. 9(b)*; *see Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1477 (2d Cir. 1995)* (plaintiff required to state with particularity only specific statements or conduct giving rise to fraud claim, not defendant's specific intent to defraud).

Exception:

In a securities fraud class action, the complaint must state with particularity the facts giving rise to a strong inference that the defendant acted with an intent to defraud. *15 U.S.C. § 78u-4(b)(2)*; *see § 4.14[3][c] below*

[3] Alleging Fraud Under Private Securities Litigation Reform Act of 1995

[a] Pleading Securities Fraud Is Subject to Special Statutory Requirements

The Private Securities Litigation Reform Act of 1995 (PSLRA) adds special pleading requirements for a private claim of securities fraud under Section 10(b) of the Securities Exchange Act of 1934 and its accompanying rules and regulations, most notably Securities Exchange Act *Rule 10b-5*. *See 15 U.S.C. § 78j*; *17 C.F.R. § 240.10b-5*.

Under the PSLRA, a complaint must contain all of the following:

1. A specification of each statement alleged to be misleading and the reasons why;

2. If an allegation is made on information and belief, a statement that identifies with particularity all the facts on which that belief is formed;

3. A scienter allegation that identifies with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind; and

4. A "loss causation" allegation that provides the defendant with notice of the relevant loss and of the causal connection might be between that loss and the alleged misrepresentation.

15 U.S.C. § 78u-4(b)(1), (2); *see also § 4.17[10] below*.

[b] Pleading Allegations on Information and Belief

Under the PSLRA, an allegation made on information and belief must include a statement that identifies with particularity all facts on which that belief is formed. *15 U.S.C. § 78u-4(b)(1)*.

[c] Alleging Scienter with Particularity

The PSLRA requires that in pleading that a defendant acted with a particular state of mind, the complaint must state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind. *15 U.S.C. § 78u-4(b)(2).*

In order to plead a "strong inference" of scienter, a complaint must include allegations that give rise to an inference of fraudulent intent that is not merely plausible or reasonable, but is "cogent and at least as compelling as any opposing inference of nonfraudulent intent". *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)* .

[d] Alleging "Loss Causation"

The plaintiff must plead and prove that the alleged misleading statements caused the loss for which the plaintiff seeks to recover. *15 U.S.C. § 78u-4(b)(4).* This requirement is not satisfied by merely alleging, and subsequently establishing, that the price of the security was inflated on the date of purchase because of the misrepresentation. The complaint must provide the defendant with an indication of the loss and the causal connection between the misrepresentation and that loss. *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342-343, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)* (inflated purchase price does not in itself constitute or proximately cause relevant economic loss).

[4] Pleading Conditions Precedent

In pleading conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. A denial of the performance or occurrence of a condition precedent must be made with particularity. *Fed. R. Civ. P. 9(c).*

[5] Pleading Official Document or Act

In pleading an official document or official act it is sufficient to allege that the document was legally issued or the act legally done. *Fed. R. Civ. P. 9(d).*

[6] Pleading Judgment

In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it is sufficient to plead the judgment or decision without setting forth any matter showing jurisdiction to render it. *Fed. R. Civ. P. 9(e).*

[7] Alleging Time and Place

An allegation of time and place is material and must be made with precision. *Fed. R. Civ. P. 9(f).* Not all complaints must contain averments of time and place. Whether time and place must be alleged depends on the substantive law that provides the elements of the plaintiff's claim and on any other applicable pleading rules.

Warning:

Because it is deemed a material allegation, a date used by a plaintiff in pleading a claim may trigger a dismissal if the face of the complaint shows that the statute of limitations has run. *See Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd., 185 F.2d 196, 204 (9th Cir. 1950)* (allegations on face of complaint affirmatively showed time bar).

[8] Pleading Special Damages

"Special damages" are damages that, although resulting from the commission of the wrong, are unusual for the claim in question and not normally associated with it. If the plaintiff claims special damages, they must be specifically stated in the complaint. *Fed. R. Civ. P. 9(g)*; *see Avitia v. Metropolitan Club, Inc., 49 F.3d 1219, 1226 (7th Cir. 1995)* (complaint must plead special damages). Failure to do so may result in denial of recovery. However, leave to amend the complaint usually will be granted unless allowing the amendment would result in prejudice to the defendant. *See Fed. R. Civ. P. 15(b)(1)*; *see also § 4.36 below*.

[9] Pleading Admiralty and Maritime Claims

If a claim is cognizable both in admiralty jurisdiction and also under some other ground of federal jurisdiction, the plaintiff may elect to have the claim treated as an admiralty for the purposes of *Fed. R. Civ. P. 14(c)* (impleading third parties), *Fed. R. Civ. P. 38(e)* (jury trial), *Fed. R. Civ. P. 82* (venue), and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. *Fed. R. Civ. P. 9(h)(1)*.

If a claim is cognizable only in admiralty, it will be treated as an admiralty or maritime claim for those purposes whether the complaint identifies it as such. *Fed. R. Civ. P. 9(h)(1)*; *Carey v. Bahama Cruise Lines, 864 F.2d 201, 206 (1st Cir. 1988)* (Rule 9(h) is procedural; it does not authorize plaintiff to choose the substantive law applicable to its claim); *see also § 4.06[4] above* (admiralty jurisdiction requirements); *§ 4.49[6] below* (admiralty and third party claims); *§ 4.53[3] below* (admiralty and jury trials).

[10] Pleading Copyright Infringement

To prevail on a claim of copyright infringement, the plaintiff must establish the plaintiff's ownership of the copyright and the defendant's infringement of that copyright. A complaint may allege infringement either by alleging specific acts of copying or by alleging (1) the defendant's access to the copyrighted work and (2) substantial similarity between the copyrighted work and the defendant's work. *See Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120-121 (8th Cir. 1987)* (plaintiff must show similarity in idea and expression).

[11] Pleading Necessary Allegations in Shareholder Derivative Action

A "derivative action" is one brought by one or more shareholders or members of a corporation or of an unincorporated association to enforce a right that the corporation or association could assert but has failed to assert. *Fed. R. Civ. P. 23.1(a)*.



Warning:

The action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. *Fed. R. Civ. P. 23.1(a)*.

In addition to the allegations necessary to establish the corporation or association's substantive right to relief, the complaint must include all of the following:

1. 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;

2. An allegation that the action is not a collusive one to confer jurisdiction that the court would not otherwise have; and

3. 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.

Fed. R. Civ. P. 23.1(b).

If the pleading requirements of *Fed. R. Civ. P. 23.1(b)* are not satisfied, the complaint may be dismissed under *Fed. R. Civ. P. 12(b)(6)*; *see, e.g., 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); *see also § 4.32[6] below*.

[12] Alleging Facts in Support of Request for Ex Parte Temporary Restraining Order

A complaint that requests an ex parte TRO must be verified and must allege specific facts sufficient to prove that the plaintiff will suffer immediate and irreparable injury, loss, or damage before the defendant can be heard in opposition to the request. *Fed. R. Civ. P. 65(b)(1)(A)*; *see also § 6.07 below*. Local rules should be consulted for specific pleading and filing requirements.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 9.03 -9.10, 23.1.02 -23.1.09, 65.32 -65.34.*
- *Bender's Federal Practice Forms* Form Nos. 9:20, 9:40, 9:50, 9:51, 9:60, 9:61, 9:70, 9:80, 9:90, 9:100, 23.1:20-23.1:23, 65:10.
- *Federal Litigation Guide P 11.03* (temporary injunctions).
- *Fed. R. Civ. P. 9* (pleading special matters).
- *Fed. R. Civ. P. 23.1* (derivative actions).
- *Fed. R. Civ. P. 65* (injunctions).
- Fed. R. Civ. P., Supplemental Rules for Admiralty and Maritime Claims, Rules A-F.
- *15 U.S.C. § 78u-4* (Private Securities Litigation Reform Act of 1995).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsFraud ClaimsCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsMistakeTortsBusiness TortsFraud & MisrepresentationGeneral Overview



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Chapter 4 PLEADING STAGE
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.15

§ 4.15 Attaching Exhibits

If a written instrument is material to the allegations of the complaint, the plaintiff may attach it as an exhibit to the complaint. *Fed. R. Civ. P. 10(c)*. While the exhibit becomes a part of the complaint "for all purposes," the plaintiff does not necessarily adopt as true the full contents of the exhibit. *See, e.g., Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 674-675 (2d Cir. 1995)* (allegedly libelous document attached to complaint not taken as true).

Exception:

If a written instrument contradicts material allegations in the complaint to which it is attached, the exhibit usually controls. *Ott v. Home Sav. & Loan Ass'n, 265 F.2d 643, 646, n.1 (9th Cir. 1958)* (terms of document prevail over inconsistent pleading allegations).

The attachment of exhibits to a complaint is permissive, not mandatory. *See Fed. R. Civ. P. 10(c)*. The plaintiff may include an allegation identifying the document and setting forth its relevant contents without attaching it.

Warning:

The plaintiff may not avoid the consequences of an entire document by quoting from it selectively in the complaint and not attaching it as an exhibit. *I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991)* (plaintiff cannot evade motion to dismiss by using "limited quotations").

Strategic Point:

It is important to keep in mind when deciding whether to attach an agreement or other document to a complaint that it can be used against the plaintiff. A plaintiff may characterize an agreement in a favorable manner, but if the actual words of the agreement do not support that characterization or if other terms preclude relief, a motion to dismiss for failure to state a claim may be granted. In addition, even if a plaintiff does not attach the document relied on, a defendant may request judicial notice of the document if it is specifically mentioned in the complaint and relied on for relief. Defendants frequently seek judicial notice of written documents to contradict the allegations of the complaint or to show that

there are other provisions of the document that demonstrate the plaintiff has no claim. Although there are advantages to attaching an important document, if the document contains any information that could be destructive to the plaintiff's claim, it is risky to attach it.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 10.04 -10.05.*
- *Bender's Federal Practice Forms* Form Nos. 10:70-10:72.
- *Fed. R. Civ. P. 10* (form of pleadings).

Legal Topics:

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



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Chapter 4 PLEADING STAGE
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.16

§ 4.16 Preparing Summons and Other Preliminary Documents

[1] Obtaining Waiver of Service of Summons

To avoid the cost of service, the plaintiff may notify the defendant of the commencement of the action and request waiver of service. *Fed. R. Civ. P. 4(d)(1)*; *see § 4.21 below*.

Waiver of service is not available for the following:

1. A minor or incompetent person. *Fed. R. Civ. P. 4(g)*.

2. The United States. *Fed. R. Civ. P. 4(i)(1)*.

3. A federal agency or corporation. *Fed. R. Civ. P. 4(i)(2)*.

4. A federal officer or employee in connection with federal duties. *Fed. R. Civ. P. 4(i)(2), (3)*.

5. A foreign state. *Fed. R. Civ. P. 4(j)(1)*.

6. A state or local government. *Fed. R. Civ. P. 4(j)(2)*.

If a defendant located in the United States refuses to waive service, without good cause, the court will impose the costs of service on the defendant. *Fed. R. Civ. P. 4(d)(2)(A)*. An award of costs will include costs and attorney's fees incurred in making a motion to collect the costs of service. *Fed. R. Civ. P. 4(d)(2)(B)*. *See* Fed. R. Civ. P. Appendix of Forms, Form 5 (Notice of a Lawsuit and Request to Waive Service of Summons) and Form 6 (Waiver of the Service of Summons).

[2] Drafting Summons

A summons ordinarily must be served on the defendant with the complaint. *Fed. R. Civ. P. 4(c)(1)*. Service of a summons is the usual manner in which the court obtains personal jurisdiction over the defendant. *See Fed. R. Civ. P. 4(k)(1)*; *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987)*

(service of summons and personal jurisdiction). In addition to the original file copy, counsel should prepare additional copies of the complaint for service on the defendants as well as for office use and distribution to the client. *See Fed. R. Civ. P. 4(c)(1)*; *see also § 4.20 below*.

The summons must contain the following: the name and address of the plaintiff's attorney or of the plaintiff if unrepresented; a caption identifying the court and the parties; a statement of the time within which the defendant must appear and defend; notification that failure to do so will result in a default judgment for the relief demanded in the complaint; and the court clerk's signature and the seal of the court. *Fed. R. Civ. P. 4(a)(1), (b)*; *see* Fed. R. Civ. P. Appendix of Forms, Form 3 (Summons).

Even if the summons fails to name all of the defendants, or specifies the incorrect time for filing of the answer, dismissal is generally not justified unless the defect is prejudicial to the defendant. *See UFCW, Locals 197 & 373 v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984)* (technical errors do not justify dismissal); *see also Great Plains Crop Mgmt., Inc. v. Tryco Mfg. Co., 554 F. Supp. 1025, 1028 (D. Mont. 1983)* (absent prejudice, plaintiff will be granted permission to amend and re-serve corrected summons).

In general, a defendant must file an answer or other responsive pleading within 21 days after service of the summons. *Fed. R. Civ. P. 12(a)(1)(A)(i)*. If the defendant is the United States, an agency of the United States, or an officer or employee of the United States that is served in an official capacity: 60 days after service on the United States Attorney. *Fed. R. Civ. P. 12(a)(2)*. If the defendant is a United States officer or employee who is sued in an individual capacity for conduct in connection with official duties: 60 days after service on the officer or employee, or service on the United States Attorney, whichever is later. *Fed. R. Civ. P. 12(a)(3)*; *see also § 4.31[7] below*.

Exception:

If service of the summons is timely waived, the defendant will have 60 days to respond after the request for waiver was sent or 90 days if the defendant was outside any judicial district of the United States. *Fed. R. Civ. P. 12(a)(1)(A)(ii)*; *see also § 4.21[3][c] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 4.12 -4.13, 4.30 -4.31.*
- *Bender's Federal Practice Forms* Form Nos. 4:1, 4:200-4:202.
- *Fed. R. Civ. P. 4* (summons).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessWaiversGeneral Overview



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Chapter 4 PLEADING STAGE
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.17

§ 4.17 Determining Whether Other Documents Should Accompany Complaint

[1] Considering Whether Civil Cover Sheet Required

Local rules may require the plaintiff to complete and submit a civil cover sheet with the complaint. The cover sheet is for administrative use only. *See Wall v. National R.R. Passenger Corp., 718 F.2d 906, 909 (9th Cir. 1983)* (cover sheet is not part of complaint and is not served on opposing party); *see also § 4.54[2] below*.

[2] Preparing Corporate Disclosure Statement

Any nongovernmental corporate party to a civil action in a federal district court must file a statement that either (1) identifies any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock or (2) states that there is no such corporation. *Fed. R. Civ. P. 7.1(a)*. Local rules should be consulted regarding other requirements in identifying interested parties.

[3] Preparing Notice of Related Cases

Local rules should be consulted to determine any filing requirements as to related cases.

[4] Establishing or Securing Representation of Minor or Incompetent

If the action is brought on behalf of a minor or incompetent person, counsel should either prepare documentation of the appointment of a representative for the person under state law or prepare a motion for the appointment of a guardian ad litem. *Fed. R. Civ. P. 17(c)*.

[5] Applying for Leave to Proceed *in Forma Pauperis*

If the plaintiff cannot afford to pay the filing fee, an application for *in forma pauperis* status should be prepared and submitted with the complaint. *See 28 U.S.C. § 1915*. The application must be accompanied by an affidavit that documents the plaintiff's financial condition, sets forth the nature of the action and the plaintiff's belief of entitlement to relief. *28 U.S.C. § 1915(a)(1)*. If the plaintiff is a prisoner, a copy of the prisoner's trust fund account statement for the 6-month period immediately preceding the filing of the complaint must be included. *28 U.S.C. § 1915(a)(1)*.

[6] Preparing Motion to File Complaint Under Seal

Local rules should be consulted for specific requirements to file complaint under seal.

[7] Preparing Application for Temporary Restraining Order

If the plaintiff seeks a TRO, the complaint must be accompanied by an application for a TRO, supported by an affidavit or verified allegations of the complaint. *Fed. R. Civ. P. 65(b)(1)(A)*. If the TRO is sought ex parte, the plaintiff's attorney is required to certify to the court in writing the efforts, if any, that have been made to notify the defendant of the application and the reasons that notice should not be required. *Fed. R. Civ. P. 65(b)(1)(B)*; *see also § 6.07 below*.

[8] Preparing Notice of Claim of Unconstitutionality

If the complaint challenges the constitutionality of a federal or a state statute, and neither the government nor any of its officers, agencies, or employees is a party to the action, the plaintiff must notify the appropriate federal or state authority, who may then intervene in the action. *28 U.S.C. § 2403*; *Fed. R. Civ. P. 5.1(a)*; *see also § 4.59[6] below*.

[9] Preparing Notice of Three-Judge Court

If the action is required to be heard and determined by a three-judge court, local rules may require plaintiff to file a notice to that effect with the clerk. A three-judge court is required when specified by an act of Congress, such as when the action challenges the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body. *28 U.S.C. § 2284(a)*.

[10] Preparing Additional Documents in Class Action Subject to PSLRA

In a private plaintiff class action brought under the Securities Exchange Act of 1934 (*15 U.S.C. § 78a et seq.*), the PSLRA (*15 U.S.C. §§ 77z-1*, *78u-4*) requires each plaintiff seeking to serve as a representative party on behalf of a class to provide a sworn certification for filing with the complaint.

The certification must be signed by the plaintiff, and must contain all of the following statements:

1. The plaintiff has reviewed the complaint and authorized its filing;

2. The plaintiff did not purchase the security that is the subject of the complaint at the direction of the plaintiff's counsel or to participate in any private action arising under the Securities Exchange Act of 1934;

3. The plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

4. All of the transactions of the plaintiff in the security that is the subject of the complaint took place during the class period specified in the complaint;

5. An identification of any other action under the Securities Exchange Act of 1934, filed during the three-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff sought to serve as a representative party on behalf of a class; and

6. The plaintiff will not accept any payment for serving as a representative party beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court.

15 U.S.C. § 78u-4(a)(2)(A).

The certification will not be construed as a waiver of the plaintiff's attorney-client privilege. *15 U.S.C. § 78u-4(a)(2)(B).* The PSLRA requires that the potential lead plaintiff's certification be filed. *15 U.S.C. § 78u-4(a)(2).* It does not require service of the certification, but local rules may require service.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 5.1.03, 7.1.01 -7.1.03, 17.25, 65.32 -65.34.*
- *Bender's Federal Practice Forms* Form Nos. 5.1:1, 5.1:10, 7.1:1-7.1:3, 17:50-17:53, 65:10.
- *15 U.S.C. § 78u-4* (Private Securities Litigation Reform Act of 1995).
- *28 U.S.C. § 1915* (proceedings *in forma pauperis*).
- *28 U.S.C. § 2284* (three judge courts).
- *Fed. R. Civ. P. 5.1* (constitutional challenge to a statute).
- *Fed. R. Civ. P. 7.1* (disclosure statement by nongovernmental corporate party).
- *Fed. R. Civ. P. 65* (injunctions).

Legal Topics:

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



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Chapter 4 PLEADING STAGE
PART C: SERVICE OF SUMMONS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.18

§ 4.18 Checklist for Service of Summons

☐ Determine when summons and complaint must be served. *Fed. R. Civ. P. 4(m). See § 4.19 below.*

- ○ Usual period for service is 120 days after complaint filed.
- ○ Note exceptions to 120 period for service in foreign country. *Fed. R. Civ. P. 4(m). See § 4.24[5] below.*
- ○ Determine if exception or good cause exists for extension. *Fed. R. Civ. P. 4(m), 6(b)(1).*

☐ Determine if additional time to cure defects applies because service is on United States or federal officer. *Fed. R. Civ. P. 4(i)(4)(A), (B). See § 4.22[4][d] below.*

☐ Determine whether court will extend time in absence of good cause. *Fed. R. Civ. P. 4(m).*

☐ Determine who will serve process and supply with sufficient copies of complaint and summons. *Fed. R. Civ. P. 4(c)(2), (3). See § 4.20 below.*

☐ Determine if defendant subject to waiver of service and, if so, prepare and send necessary documents in accordance with Federal Rules. *Fed. R. Civ. P. 4(d)(1). See §§ 4.21, 4.24[6] below.*

☐ If formal service not waived, determine method of service within United States. *See § 4.22 below.*

- ○ Choose method for adult, competent individual. *Fed. R. Civ. P. 4(e)(1), (2).*

- ○ Serve minor or incompetent in manner prescribed by state law. *Fed. R. Civ. P. 4(g).*
- ○ Choose method for corporation, partnership, or association. *Fed. R. Civ. P. 4(h)(1)(A), (B).*
- ○ Choose method for United States. *Fed. R. Civ. P. 4(i)(1)(A)-(C).*
- ○ Choose method for federal agency, corporation, officer, or employee in official capacity. *Fed. R. Civ. P. 4(i)(2).*
- ○ Choose method for federal agency, corporation, officer, or employee in individual capacity. *Fed. R. Civ. P. 4(i)(3).*

☐ If service must be on state or local government, determine method. *Fed. R. Civ. P. 4(j)(2)(A),(B). See § 4.23 below.*

☐ If international service is necessary, determine method. *See § 4.24 below.*

☐ Ensure service is complete. *Fed. R. Civ. P. 4(c)(1). See § 4.25 below.*

☐ Determine constitutional and territorial limits on service. *Fed. R. Civ. P. 4(k). See § 4.26 below.*

☐ Follow appropriate procedures for in rem jurisdiction. *Fed. R. Civ. P. 4(n). See § 4.27 below.*

☐ File proof of service or waiver of service with court. *Fed. R. Civ. P. 4(d)(4), (l). See § 4.28 below.*

☐ **Search by Topic:** Civil Procedure > Pleading and Practice > Service of Process

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview



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Chapter 4 PLEADING STAGE
PART C: SERVICE OF SUMMONS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.19

§ 4.19 Serving Summons and Complaint

[1] Considering Basic 120-Day Deadline for Service of Summons and Complaint

A plaintiff has 120 days from the filing of the complaint to effect service of the summons and complaint on each defendant. *Fed. R. Civ. P. 4(m)*. As to a defendant added later by amendment to the complaint, the 120-day period runs from the date of the amendment. *See Bolden v. City of Topeka, 441 F.3d 1129, 1146-1149 (10th Cir. 2006)* (120-day period is not restarted by filing an amended complaint except as to newly added defendants).

Exceptions:
There are two exceptions to the 120-day time limit:

1. Extension of time. Prior to its expiration, the court may extend the time limit, by motion, on an ex parte request, to the extent local rules permit or *sua sponte*. *See Fed. R. Civ. P. 6(b)(1)(A)*.

2. Service in foreign countries. The 120-day time limit does not apply to service of a defendant that is made pursuant either to Rule 4(f) (service on individuals in foreign countries) or Rule 4(j)(1) (service on foreign governments or government instrumentalities). *Fed. R. Civ. P. 4(m)*. It is not clear whether this exception applies to service on foreign corporations, partnerships, or associations. *See § 4.24 below*.

[2] Considering Consequences of Failure to Meet Service Deadline

[a] Showing Good Cause Requires Extension of Service Time

If the plaintiff fails to effect service within the 120-day time period but shows good cause for the failure, the court must extend the time. *Fed. R. Civ. P. 4(m). See Panaras v. Liquid Carbonic Indus. Corp., 94 F.3d 338, 340 (7th Cir. 1996)* (good cause mandates extension). Absent good cause the court has the discretion either to extend the time or to dismiss without prejudice. *Fed. R. Civ. P. 4(m)*.

[b] Considering What Constitutes "Good Cause"

There is no "bright-line" test for what constitutes "good cause." At a minimum, a finding of good cause requires the "excusable neglect" necessary for an extension of time under *Fed. R. Civ. P. 6(b)(1)(B)*; *see Electrical Specialty Co. v. Road & Ranch Supply, Inc., 967 F.2d 309, 312 (9th Cir. 1992)* ("excusable neglect").

Under Rule 6(b)(1)(B), "excusable neglect" is a discretionary determination, in which the court considers whether the party seeking the extension of time has demonstrated both good faith and a reasonable basis for noncompliance with the time limit. *See, e.g., Habib v. GMC, 15 F.3d 72, 74 (6th Cir. 1994)* (reasonable and diligent efforts).

Mere neglect or ignorance is not enough to establish good cause. *See Gabriel v. United States, 30 F.3d 75, 77 (7th Cir. 1994)* (reliance on erroneous advice of court clerk); *McGinnis v. Shalala, 2 F.3d 548, 550-551 (5th Cir. 1993)* (secretary error); *Hamilton v. Endell, 981 F.2d 1062, 1065 (9th Cir. 1992)* (attorney ignorance); *Putnam v. Morris, 833 F.2d 903, 905 (10th Cir. 1987)* (reliance on process server).

Good cause may be shown if the defendant evades service or conceals a defect in earlier attempts at service. *See Fed. R. Civ. P. 4*, Committee Note of 1993; *see, e.g., Williams-Guice v. Board of Educ., 45 F.3d 161, 164 (7th Cir. 1995)* (evasion); *Benjamin v. Grosnick, 999 F.2d 590, 591-593 (1st Cir. 1993)* (concealment). If the United States Marshal fails in the official duty to make service, good cause is established. *See Puett v. Blandford, 912 F.2d 270, 275-276 (9th Cir. 1990)* (failure of U.S. Marshal).

[c] Considering Court's Discretion to Extend Deadline

A district court has substantial discretion to extend the time for service even absent good cause. *See Zapata v. City of New York, 502 F.3d 192, 196 (2d Cir. 2007)* (Second Circuit joined other circuits in ruling that district courts have discretion to grant extension of time for service even without good cause showing, and clarified that earlier case law should not be read to categorically require good cause showing in every case); *Panaras v. Liquid Carbonic Indus. Corp., 94 F.3d 338, 340 (7th Cir. 1996)* (permissible extension warranted under facts of case).

In exercising its discretion, the court should consider whether the claim would be barred by the statute of limitations if dismissed. A bar weighs heavily in favor of granting an extension. *Fed. R. Civ. P. 4*, Committee Note of 1993; *see Mann v. American Airlines, 324 F.3d 1088, 1090-1091 (9th Cir. 2003)* (statute of limitations appropriate factor in determining extension).

However, it is not a per se abuse of discretion for the court to decline to extend the time even if the claim will be barred. *See Peters v. United States, 9 F.3d 344, 345-346 (5th Cir. 1993)* (claim dismissed despite statute of limitations bar).

Warning:

Given the calendar pressure that virtually all federal courts face, a plaintiff should not rely on a court's willingness to enlarge the time for service without a showing of good cause.

[d] Considering Court May Dismiss Action

Upon motion or its own initiative, with notice to the plaintiff, a court may dismiss an action, without prejudice, as to a defendant who has not been served in a timely manner. *Fed. R. Civ. P. 4(m)*; *see Johnson v. Meltzer, 134 F.3d 1393, 1396 (9th Cir. 1998)* (dismissal must be without prejudice). If the statute of limitations has not expired, the plaintiff is free to file a new suit and start another 120-day period for service. *United States v. McLaughlin, 470 F.3d 698, 701 (7th Cir. 2006)* (suit can be refiled if statute of limitations has not run).

Failure to effect service within the 120-day period does not affect the tolling of the statute of limitations caused by the initial filing of the complaint. *Mann v. American Airlines, 324 F.3d 1088, 1091 (9th Cir. 2003)* ("Once a complaint is filed, the statute of limitations is tolled unless and until the district court dismisses the action."). If, however, the court

dismisses the case and the statute of limitations has run at the time of the dismissal, refiling is barred. *See United States v. McLaughlin, 470 F.3d 698, 701 (7th Cir. 2006)* (statute ran five days after complaint filed). If the court extends the 120-day time limit, process may be served within the court's extension without raising the statute of limitations issue. *See United States v. McLaughlin, 470 F.3d 698, 701 (7th Cir. 2006)* (no bar if court extends time for service).

[e] Considering Defendant May Waive Untimely Service by Failure to Object

The 120-day time limit for service of process is not jurisdictional. If the plaintiff serves a defendant after the 120-day time limit has expired, and the defendant fails to object to the untimely service either in a responsive pleading or a Rule 12 motion, the objection is waived. *McCurdy v. American Bd. of Plastic Surgery, 157 F.3d 191, 194 (3d Cir. 1998)* (objection waived if not raised); *see also §§ 4.31[3][b], 4.32[1][b], [c], [5] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 4.80 -4.84*.
- *Fed. R. Civ. P. 4* (summons).

Legal Topics:

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



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Chapter 4 PLEADING STAGE
PART C: SERVICE OF SUMMONS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.20

§ 4.20 Selecting Person to Serve Summons and Complaint

The plaintiff is responsible for service of the summons and complaint on each defendant. *Fed. R. Civ. P. 4(c)(1)*. The plaintiff is also responsible for furnishing the process server with the necessary copies of the summons and complaint. *Fed. R. Civ. P. 4(c)(1)*; *see also § 4.16[2] above*.

Service of a summons may be effected by any person who is 18 years old and not a party. *Fed. R. Civ. P. 4(c)(2)*. If the plaintiff selects an unauthorized person to serve a summons, the service is invalid and will not support a default judgment or a judgment against any defendant who has appeared but preserved his or her objection to the faulty service. *See Veeck v. Commodity Enters., Inc., 487 F.2d 423, 425 (9th Cir. 1973)* (person not authorized under Rule 4 cannot effect valid service); *see also § 4.32[5] below*.

If the plaintiff requests, the court may direct that a U.S. Marshal, or some other court-appointed person, serve process in the case. *Fed. R. Civ. P. 4(c)(3)*. In practice, however, a court will do so only if there are unique circumstances that justify the appointment, such as a law enforcement presence would be necessary or advisable to keep the peace. *See Fed. R. Civ. P. 4*, Committee Note of 1993. A plaintiff proceeding *in forma pauperis* or as a seaman is entitled to have service made by the U.S. Marshal. *See Fed. R. Civ. P. 4(c)(3)*; *28 U.S.C. §§ 1915(d), 1916*.

Circuit Split:

Federal courts disagree as to whether a plaintiff proceeding *in forma pauperis* is required to specifically request that service be made by the U.S. Marshal. *See Nagy v. Dwyer, 507 F.3d 161, 164 (2d Cir. 2007)* (absent request from plaintiff proceeding *in forma pauperis*, Rule 4 does not require district court to appoint Marshal to effect service); *but see Olsen v. Mapes, 333 F.3d 1199, 1204 n.4 (10th Cir. 2003)* (request unnecessary).



Warning:

As a general rule, an attorney should not serve process on behalf of a client. If the defendant later contests service, the attorney may face the ethical dilemma of testifying as a witness as well as acting as an advocate.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 4.70 -4.72*.
- *Bender's Federal Practice Forms* Form Nos. 4:1, 4:100, 4:101.
- *Fed. R. Civ. P. 4* (summons).

Legal Topics:

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



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Chapter 4 PLEADING STAGE
PART C: SERVICE OF SUMMONS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.21

§ 4.21 Obtaining Waiver of Service of Summons

[1] Determining Which Defendants May Waive Service

A plaintiff may seek a waiver from any of the following defendants:

1. An individual defendant subject to service under Rule 4(e);

2. An individual defendant subject to service under Rule 4(f); and

3. Any corporation, or association subject to service under Rule 4(h).

See Fed. R. Civ. P. 4(d)(1); *see also § 4.16[1] above*.



Warning:

In some states, a plaintiff must serve a defendant with process in order to satisfy a statute of limitations. *See, e.g., Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 532-533, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949)* (Kansas law). In diversity cases in these states, the need to have service completed within the limitations period may rule out seeking a waiver. *See also § 4.06[3] above*.

[2] Considering Consequences of Refusing to Waive Service

A defendant that receives a proper request for waiver, "has a duty to avoid unnecessary costs of serving the summons." *Fed. R. Civ. P. 4(d)(1)*. If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff also located within the United States, the court must impose costs on the defendant, unless good cause is shown for the failure *Fed. R. Civ. P. 4(d)(2)(A), (B)*. The court must award costs even if the defendant is a prevailing party entitled to recover other costs under *Fed. R. Civ. P. 54(d)(1)*. *See Estate of Darulis v. Garate, 401 F.3d 1060, 1063 (9th Cir. 2005)* (Rule 4(d)(2) is a free standing costs provision that should be enforced irrespective of the outcome of the action). The costs include the following:

1. All costs subsequently incurred in effecting service under *Fed. R. Civ. P. 4(e), (f)*, or *(h)*;

2. All costs incurred in connection with any motion seeking to collect the costs of service; and

3. Reasonable attorney's fees incurred in connection with any motion to collect the costs of service.

Fed. R. Civ. P. 4(d)(2)(A), (B).



Strategic Point:

The plaintiff must actually send the request for waiver to the defendant to be eligible for an award of costs under *Fed. R. Civ. P. 4(d)(2). See Hy Cite Corp. v. Badbusinessbureau, 418 F. Supp. 2d 1142, 1153-1154 (D. Ariz. 2005)* (alleged futility of sending request is not grounds for costs).

[3] Determining Form of Request for Waiver of Service

[a] Determining Contents of Notice and Request

The request for a waiver of service of process consists of a notice of commencement of the action and request for waiver of service of summons. *See § 4.16[1] above*. While Rule 4(d) requires that the notice and request be in writing, it does not explicitly require use of an official form. *See Fed. R. Civ. P. 4(d)(1)(A), 84*. Nonetheless, the official form is almost always used. Fed. R. Civ. P. Appendix of Forms, Form 6.

Along with the notice and request, Rule 4(d) requires that the plaintiff provide the defendant with two copies of a waiver form, a copy of the complaint, and a prepaid means for returning the form. *Fed. R. Civ. P. 4(d)(1)(C). See* Fed. R. Civ. P. Appendix of Forms, Form 6. Additionally, the plaintiff must send the defendant a warning informing of the consequences of waiving and not waiving service. Rule 4(d) explicitly requires that the warning use "text prescribed in Form 5." *Fed. R. Civ. P. 4(d)(1)(D).*

The notice and request must contain the following:

1. **Name of Defendant to Whom Request Is Addressed:** The notice and request must be addressed an individual defendant. *Fed. R. Civ. P. 4(d)*(1(A)(i). If the defendant is a corporation or association, subject to service under Rule 4(h), the plaintiff must specify the officer or managing or general agent (or other agent authorized by law to receive process) to whom the request is addressed. *Fed. R. Civ. P. 4(d)(1)(A)(ii)*;

2. **Date on Which Request Sent:** The defendant's time to respond to the request runs from the date on which it is sent to the defendant. *See Fed. R. Civ. P. 4(d)(1)(F)*. Therefore, the notice and request must explicitly identify the date on which the request was sent. *Fed. R. Civ. P. 4(d)(1)(E)*; and

3. **Time Limit for Responding to the Request:** The plaintiff must allow the defendant a "reasonable" time to return the waiver: at least 30 days from the date on which the request was sent, or at least 60 days if the request is sent to a defendant outside the United States. *Fed. R. Civ. P. 4(d)(1)(F).*

Fed. R. Civ. P. 4(d)(1).



Warning:

A plaintiff that requests a waiver does not receive additional time to serve the summons if the defendant fails to execute the waiver. The 120 day time limit for making service imposed under Rule 4(m) begins

to run when the complaint is filed. That period is not suspended or extended by seeking a waiver of service. *See Fed. R. Civ. P. 4(m).*

[b] Determining Requirements for Sending Request for Waiver

The request for waiver of service of summons must include a copy of the complaint, two copies of a waiver form, and "a prepaid means of returning the form." *Fed. R. Civ. P. 4(d)(1)(C).* Usually, this will mean including a prepaid, self-addressed envelope. These materials must be sent to the defendant by first-class mail or other "reliable" means. *Fed. R. Civ. P. 4(d)(1)(G).* Private messenger services and electronic means of delivery may be as reliable as first class mail. Particularly in foreign countries, these means may be more reliable than the mails. *See Fed. R. Civ. P. 4*, Committee Note of 1993.



Warning:

Mere notice of the action provided by the request for waiver of service is not sufficient to effect service. *See Woodruff v. Mueller, 2004 U.S. Dist. LEXIS 5218, at *10 (N.D. Cal. 2004)* (defendant must sign and return the waiver).

[c] Considering Effect of Waiver of Service

By waiving service, the defendant receives additional time to answer or otherwise respond to the complaint. *See Fed. R. Civ. P. 4(d)(3), 12(a)(1)(A)(ii).* Instead of 20 days, the defendant has 60 days from the date that the request for waiver of service was sent or 90 days if the defendant is outside the United States. *Fed. R. Civ. P. 4(d)(3), 12(a)(1)(A)(ii); see also § 4.30[1] below.*

A defendant who waives service of a summons does not waive any objection to personal jurisdiction or venue. *Fed. R. Civ. P. 4(d)(5).*



Strategic Point:

Because the waiver eliminates service of process, a waiver of service eliminates a defendant's right to make a Rule 12 motion objecting to "the sufficiency of the summons or the sufficiency of the method by which it is served." *Fed. R. Civ. P. 4*, Committee Note of 1993; *see § 4.32[5] below.* A defendant should not reject a request for a waiver merely to preserve a technical objection to the form of the summons or some technical defect in the waiver. If the defendant is otherwise inclined to waive formal service of process, little is to be gained by preserving a technical objection.

Apart from the defendant's extension of time to respond to the complaint, an action in which a defendant waives service of summons is treated the same as an action in which the plaintiff serves the defendant with a summons and complaint. Instead of filing a proof of service of the summons, the plaintiff files the waiver of service of summons and the action is treated as if the defendant was served as of the date of the filing of the waiver. *Fed. R. Civ. P. 4(d)(4).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 4.10 -4.16.*
- *Bender's Federal Practice Forms* Form Nos. 4:200-4:203.
- *Fed. R. Civ. P. 4* (summons).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessWaiversGeneral Overview



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Chapter 4 PLEADING STAGE
PART C: SERVICE OF SUMMONS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.22

§ 4.22 Examining Methods for Service Within United States

[1] Serving Individuals

Unless federal law provides otherwise, service may be made on an adult, competent individual defendant within any judicial district in the United States, regardless of where the case is pending, as follows:

1. By delivering a copy of the summons and of the complaint to the individual personally;

2. By leaving a copy of each at the individual's dwelling house or usual place of abode with some person of suitable age and discretion residing there; or

3. Delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process for the individual in question.

Fed. R. Civ. P. 4(e)(2).

Rule 4 also permits service by any means authorized by the law of the state in which the district court is located, or in which service is effected, for the service of a summons on the defendant in an action brought in the courts of general jurisdiction of the state. *Fed. R. Civ. P. 4(e)(1)*; *see, e.g., Burrows v. League City, 985 F. Supp. 704, 706 (S.D. Tex. 1997)* (service by certified mail to defendant's private post office box valid under state law and therefore effective under Rule 4(e)(1)). The state-law methods of service are not available, however, if a federal statute requires a particular type of service for a particular individual or a particular type of claim. *See Fed. R. Civ. P. 4(e)(1).*

[2] Serving Minors and Incompetent Persons

The only method by which a plaintiff may effect service on a minor or an incompetent person in a judicial district of the United States is the manner prescribed by the law of the state in which the service is made. *Fed. R. Civ. P. 4(g).*

[3] Serving Corporations, Partnerships, and Associations

Unless federal law provides otherwise, service may be made on any corporation, partnership, or other association,

within any judicial district in the United States by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. *See, e.g., Bridgeport Music, Inc. v. Rhyme Syndicate Music, 376 F.3d 615, 624 (6th Cir. 2004)* (service agent for limited purpose did not satisfy the Rule). If the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. *Fed. R. Civ. P. 4(h)(1)(B)*. As with individual defendants, unless a federal statute provides otherwise, service also may be made in accordance with state law. *Fed. R. Civ. P. 4(h)(1)(A)*.

[4] Serving United States, Its Agencies, Corporations, Officers, or Employees

[a] Serving United States

Service on the United States must be made by delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought. The delivery may be to the United States Attorney, or an assistant United States attorney or clerical employee designated by the United States Attorney in a writing filed with the clerk of the court. *Fed. R. Civ. P. 4(i)(1)(A)(ii)*. Alternatively, the plaintiff may send a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States Attorney. *Fed. R. Civ. P. 4(i)(1)(A)(ii)*.

In addition to serving the United States Attorney in the district where the action is brought, the plaintiff must also send a copy of the summons and the complaint by registered or certified mail to the Attorney General of the United States in Washington, D.C. *Fed. R. Civ. P. 4(i)(1)(B)*.

If the plaintiff's action attacks the validity of an order of an officer or agency of the United States and that officer or agency is not a party to the action, the service on the United States is not complete until a copy of the summons and of the complaint is sent by registered or certified mail to the officer or agency. *Fed. R. Civ. P. 4(i)(1)(C)*.

[b] Serving Federal Agency, Corporation, Officer or Employee in Official Capacity

To effect service on a governmental agency or corporation, or on a federal officer or employee sued only in an official capacity, the plaintiff must first serve the United States as required by *Fed. R. Civ. P. 4(i)(1)(A)*. *See § 4.22[4][a] above*. A copy of the summons and complaint must also be sent by registered or certified mail to the agency, corporation, officer, or employee. *Fed. R. Civ. P. 4(i)(2)*.

[c] Serving Federal Officer or Employee in Individual Capacity

If a federal officer or employee is sued in an individual capacity for conduct in connection with the performance of official duties, the plaintiff must first serve the United States as required by *Fed. R. Civ. P. 4(i)(1)(A)*. *See § 4.22[4][a] above*. The plaintiff also must serve the officer or employee as any other individual defendant. *Fed. R. Civ. P. 4(i)(3), 4(e), (f), (g)*; *see also §§ 4.22[1] -[2] above*.



Warning:

Rule 4 applies to actions against a former officer or employee of the United States. Termination of the relationship between the individual defendant and the United States does not eliminate the need to serve the United States. *See Fed. R. Civ. P. 4*, Committee Note of 2000.

[d] Considering Time to Cure Defects in Service

If the plaintiff has timely served either the United States Attorney or the Attorney General of the United States, the court must allow a reasonable time to cure a failure to serve a governmental agency or corporation. *Fed. R. Civ. P. 4(i)(4)(A)*. Similarly, if the plaintiff has timely served an officer or employee under Rule 4(i)(3), the court must allow a

reasonable time to serve the United States. *Fed. R. Civ. P. 4(i)(4)(B)*; *see Flory v. United States, 79 F.3d 24, 25-26* (5th Cir. 1996 (per curiam) (when plaintiff has served one officer, Rule 4 guarantees reasonable time to serve others).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 4.53 -4.56, 4.90 -4.94.*
- *Fed. R. Civ. P. 4(i)* (serving United States and its agencies, corporations, officers, or employees).

Legal Topics:

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



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Chapter 4 PLEADING STAGE
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.23

§ 4.23 Serving State or Local Governments

Regardless of the judicial district in which the case is pending or the defendant is located, a plaintiff may serve a state, a municipal corporation, or other governmental organization by delivering a copy of the summons and of the complaint to its chief executive officer, or by any method provided for by the law of the state in which they are located. *Fed. R. Civ. P. 4(j)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 4.58.*
- *Fed. R. Civ. P. 4(j)(2)* (serving state, or local governments).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 4 PLEADING STAGE
PART C: SERVICE OF SUMMONS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.24

§ 4.24 Choosing Methods for International Service of Process

[1] Serving Individuals in Foreign Countries

[a] Effecting Service Under Hague Convention

Unless a federal statute provides otherwise, a plaintiff may serve an adult, competent individual located in a foreign country by any internationally agreed means reasonably calculated to give notice. In practice, this almost always means the methods authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. *Fed. R. Civ. P. 4(f)(1).*

The Hague Convention requires each signatory country to establish a "Central Authority" to receive requests for service of documents. It is contemplated that service of process will be made under the Hague Convention by delivering the process to the Central Authority which then forwards it to the individual or company. Service is not complete, however, until actually received by the foreign defendant. *See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698-708, 108 S. Ct. 2104, 100 L. Ed. 2d 722 (1988)* (describing service under Hague Convention and function of Central Authority).

The Hague Convention does not specify a time within which the Central Authority of a foreign country must effect service, but Article 15 does provide that alternate methods may be used if a Central Authority does not respond within six months. Generally, a Central Authority can be expected to respond much more quickly than that limit might permit, but there have been occasions when the signatory state was dilatory or refused to cooperate for substantive reasons. In such cases, the server may resort to the court and secure an order directing an alternate means of service. *See Fed. R. Civ. P. 4*, Committee Note of 1993.

The Department of State has gathered information concerning service of legal documents in foreign countries. Much of this is in publication or on the Department's web site. *See* http://travel.state.gov/law/info/judicial/judicial_680.html.

[b] Determining When Service May Be Made Pursuant to Law of Foreign Country

The Hague Convention applies only when both the originating and receiving countries are signatories. *See, e.g., Perfumer's Workshop, Ltd. v. Roure Bertrand du Pont, Inc., 737 F. Supp. 785, 789-790 (S.D.N.Y. 1990)* (both countries

must be signatories).

If there is no internationally agreed means of service (or the applicable international agreement allows other means of service), plaintiff must serve an individual in a foreign country pursuant to and in the manner prescribed by the law of the foreign country for service of process in an action in any of its courts of general jurisdiction. *Fed. R. Civ. P. 4(f)(2)(A)*. The method selected must be "reasonably calculated to give notice" to the individual served. *Fed. R. Civ. P. 4(f)(2)*.

Service by ordinary first class international mail is not permitted without court approval. *See Brockmeyer v. May, 383 F.3d 798, 808-809 (9th Cir. 2004)* (international service by mail must be specifically directed by the district court).

[c] Determining When Service May Be Made as Directed by Foreign Authority

The court may issue a formal inquiry to the relevant authorities in the foreign country to determine what the proper or acceptable means for service of process is or should be in a particular case. A plaintiff may serve an individual defendant in a foreign country as directed by the foreign authority in response to a letter rogatory or letter of request. *Fed. R. Civ. P. 4(f)(2)(B)*. The method selected must, however, be "reasonably calculated to give notice" to the individual so served. *Fed. R. Civ. P. 4(f)(2)*.

Warning:

This provision in Rule 4 should not be interpreted to authorize use of a letter of request when there is no treaty obligation on the receiving country to honor such a request from the United States or when the United States does not extend diplomatic recognition to the foreign nation. *See Fed. R. Civ. P. 4*, Committee Note of 1993.

[d] Determining When Service May Be Made by Personal Delivery or by Mail

If there is no internationally agreed means of service (or if the applicable international agreement allows other means of service), a plaintiff may serve an individual defendant in a foreign country by the following methods:

1. Personal delivery of a copy of the summons and the complaint to the individual defendant; or

2. Having the clerk of the court mail a copy of the summons and complaint to the individual defendant by any form of mail requiring a signed receipt.

Fed. R. Civ. P. 4(f)(2)(C).

Warning:

There are two substantial limitations on service either by mail or by personal delivery. First, the method selected must be "reasonably calculated to give notice" to the person served; and the method selected may not be prohibited by the law of the country in which the defendant is served. *Fed. R. Civ. P. 4(f)(2)(C)*.

[e] Determining When Service May Be Made as Ordered by Court

A plaintiff may apply to the court and receive an order authorizing service on an individual defendant in a foreign country by any means not prohibited by international agreement. *Fed. R. Civ. P. 4(f)(3)*. Alternate service of process under Rule 4(f)(3) is available without first attempting service by other means. *See Rio Props, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014-1019 (9th Cir. 2002)* (service under this rule is not extraordinary relief nor is it a rule of

last resort).

[2] Serving Minors and Incompetent Persons in Foreign Countries

Service on an minor or incompetent person in a foreign country may be effected in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B) or (f)(3). *Fed. R. Civ. P. 4(g)*; *see also § 4.24[1][b]*, *[c]*, and *[e] above*.

[3] Serving Corporations, Partnerships, and Associations in Foreign Countries

Unless federal law requires otherwise, a plaintiff may serve a corporation, partnership, or association that is located in a foreign country by any of the methods authorized for service of individuals located in foreign countries, except personal service. *Fed. R. Civ. P. 4(h)(2)*; *see § 4.24[1] above*.

[4] Serving Foreign States, Political Subdivisions, Agencies, or Instrumentalities

[a] Serving Foreign State or Its Political Subdivision

Service on a foreign state or a political subdivision must be made as provided in the Foreign Sovereign Immunities Act, *28 U.S.C. § 1608*. *Fed. R. Civ. P. 4(j)(1)*.

The methods provided in the Act must be applied in the following order:

1. By delivery of a copy of the summons and complaint in accordance with any special arrangement; or

2. If no special arrangement exists, then by delivery of a copy of the summons and complaint pursuant to any applicable international convention, such as the Hague Convention; or

3. If the first two methods are inapplicable, by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state. "Notice of suit" means a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

4. If service cannot be made within 30 days under Option 3, by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services. The Secretary is to transmit one copy of the papers through diplomatic channels to the foreign state and send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

28 U.S.C. § 1608(a).

Service on a foreign state of political subdivision is deemed complete as follows:

1. On the date of the proof of service for whatever means of service were used by special arrangement or that were authorized by treaty; or

2. On the date of the signed postal receipt in the case of the first attempt to serve the defendant by mail; or

3. On the date of transmittal of the diplomatic note sent to the clerk of the court by the Secretary of State.

28 U.S.C. § 1608(c).

[b] Serving Foreign State Agency or Instrumentality

As with a foreign state, there is a hierarchy of stages for serving a foreign state agency or instrumentality, but they are less formal and less regimented, as follows:

1. Pursuant to any special arrangement; or

2. If no special arrangement exists, to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or

3. If no special arrangement or agent exists, in accordance with an applicable international convention on service of judicial documents.

4. If service is not possible by the above methods, delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state (a) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request; or (b) having the court clerk address and dispatch the package to the agency or instrumentality by any form of mail requiring a signed receipt; or (c) making the delivery as ordered by the by court order in a manner consistent with the law of the place where service is to be made.

28 U.S.C. § 1608(b).

Service on an agency or instrumentality of a foreign state is deemed complete as follows:

1. On the date of the proof of service for whatever means of service were used by special arrangement, by court order, that were authorized by treaty, or any other means of delivery other than mail; or

2. On the date of the signed postal receipt in the case of an attempt to serve the defendant by mail.

28 U.S.C. § 1608(c).

[5] Considering That 120-Day Deadline Does Not Apply to Service in Foreign Country

The 120-day time period for service of process does not apply to service made pursuant to Rule 4(f) or Rule 4(j)(1). *Fed. R. Civ. P. 4(m).* It is not clear whether this exception includes service on foreign corporations, partnerships and associations. While Rule 4(h)(2) is not expressly referenced in Rule 4(m), the Rule requires service on foreign corporations, partnerships and associations to be made using the same methods as for individuals under Rule 4(f). This provision arguably brings a foreign corporation, partnership, or association within the exception to the 120-day time limit. However, the argument is far from certain.

[6] Understanding That Waiver Rules Apply to Service in Foreign Country

A waiver may be requested from an individual, a corporation, a partnership or association located in a foreign country. *Fed. R. Civ. P. 4(d)(1).* A foreign defendant who declines to waive service of summons is not subject to the cost provisions of Rule 4. *See Fed. R. Civ. P. 4(d)(2)*; *see also §§ 4.16[1], 4.21[2] above.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 4.52, 4.57.*
- *Fed. R. Civ. P. 4* (summons).
- *28 U.S.C. § 1608* (Foreign Sovereign Immunities Act).

Legal Topics:

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



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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.25

§ 4.25 Ensuring Service Is Complete

For service of process to be complete and effective, the plaintiff must serve both the summons and the complaint. *Fed. R. Civ. P. 4(c)(1)*; *see West Coast Theater Corp. v. City of Portland, 897 F.2d 1519, 1521 (9th Cir. 1990)* (service of incomplete draft complaint inadequate); *see also §§ 4.16[2], 4.20 above*. Local rules may require the parties to serve additional papers. A non-willful failure to comply should not negate the validity of service, but can lead to a number of other consequences, including appropriate sanctions. *See Fed. R. Civ. P. 83(a)(2)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 4.50*.
- *Fed. R. Civ. P. 4* (summons).
- *Fed. R. Civ. P. 83* (judge's directives and local rules).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.26

§ 4.26 Examining Constitutional and Territorial Limits on Service of Process

[1] Establishing Personal Jurisdiction

The ultimate purpose of service (or a waiver) is to invoke the court's personal jurisdiction over the defendant. *Fed. R. Civ. P. 4(k)(1)*. But, even if all of the mechanical steps for service are completed, a defendant may still object to personal jurisdiction by asserting the constitutional limitations imposed by the *Due Process Clause of the Fifth Amendment* or the territorial limits for service of process set out Rule 4(k). *See § 4.32[3] below*.

[2] Examining Territorial Limits Under Rule 4(k)

Service of a summons or filing a waiver of service is effective to establish the court's personal jurisdiction over a defendant under the following circumstances:

1. The defendant is subject to the jurisdiction of a court of general jurisdiction in the state in which the district court is located;

2. The defendant is a party joined under *Fed. R. Civ. P. 14* (third-party practice) or 19 (required joinder of parties) and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues; or

3. When jurisdiction over the defendant is authorized by a statute of the United States.

Fed. R. Civ. P. 4(k)(1); *see also §§ 4.41[2], 4.49 below*.

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, service (or waiver) is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over a defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state. *Fed. R. Civ. P. 4(k)(2)*.

[3] Examining Constitutional Limits on Establishing Personal Jurisdiction

In general, the power of the federal court to exercise personal jurisdiction is co-extensive with the power available to the

state courts of general jurisdiction in the forum state. If the state court can constitutionally exercise jurisdiction over a defendant, so can the federal courts located in that state. *See Fed. R. Civ. P. 4(k)(1)(A)*. The constitutional principles that permit a court to exercise personal jurisdiction over a defendant constitute a large and complex field of law, but the general principles are as follows:

1. A defendant not present in the forum must have sufficient minimum contacts to justify the exercise of jurisdiction by the courts of the forum. *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* ("minimum contacts" with forum); *see also Burnham v. Superior Court, 495 U.S. 604, 622, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* (mere presence is sufficient).

2. Contacts that are continuous or systematic may justify "general" personal jurisdiction over the defendant on a wide variety of matters. *See, e.g., Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-449, 72 S. Ct. 413, 96 L. Ed. 485, 47 Ohio Op. 216 (1952)* (claim unrelated to activities in forum state).

3. Limited contacts with the forum directly related to the claim may justify "specific" personal jurisdiction over the defendant. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (nature and extent of the defendant's contacts must be such that it would be "fair" for the court to exercise personal jurisdiction over the defendant).

4. The defendants contacts with the forum must constitute "purposeful availment" of the laws and protections of the forum. *Hanson v. Denckla, 357 U.S. 235, 254, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)* (accidental or unintended contacts insufficient).

[4] Examining Enhanced Service Under Federal Statute or Rule

Although Rule 4(k)(1)(A) generally ties the power of a federal district court to exercise personal jurisdiction to the ability of state courts to do the same, due process does not require that the power of the federal court be so limited. As applied to federal courts, the "forum" that the defendant must have contacts with is the United States as a whole, rather than the territorial limits of any one particular state. *See Mississippi Publ'g Corp. v. Murphree, 326 U.S. 438, 441-442, 66 S. Ct. 242, 90 L. Ed. 185 (1946)* (Congress may provide for nationwide service of process).

Rule 4 authorizes nationwide service of process whenever a federal statute provides for it. *Fed. R. Civ. P. 4(k)(1)(C)*. Such statutes include: securities fraud cases (*15 U.S.C. § 78aa*), ERISA cases (*29 U.S.C. § 1132(e)*), and RICO cases (*18 U.S.C. § 1965*). In such cases, it is the defendant's contacts with the United States as a whole that is the constitutional limit on personal jurisdiction. *See, e.g., Board of Trustees v. Elite Erectors, Inc., 212 F.3d 1031, 1034-1037 (7th Cir. 2000)* (inquiry is minimum contacts with United States and not any particular state).

In most cases, however, Rule 4 makes state court jurisdiction and federal court jurisdiction parallel with two exceptions: (1) "bulge" service and (2) the federal long-arm statute. *Fed. R. Civ. P. 4(k)*. So-called "bulge" service expands the availability of service beyond that permitted by a state court in the following limited situation:

1. The defendant is a party joined under Rule 14 or Rule 19; and

2. The place of service is within 100 miles of the federal courthouse that issued the summons.

Fed. R. Civ. P. 4(k)(1)(B).

For valid "bulge" service, the federal court may exercise personal jurisdiction if there is any constitutional basis for exercising jurisdiction over the defendant in either the "bulge" state where service took place or the forum state where

the action is proceeding. *Sprow v. Hartford Ins. Co., 594 F.2d 412, 416 (5th Cir. 1979)* (the test is the connection between the non-resident and the geographical area included within the court's jurisdiction); *see also §§ 4.41[2], 4.49 below*.

Rule 4(k)(2) is essentially a federal long-arm statute that permits extraterritorial service if a defendant is not subject to the jurisdiction of the courts of any particular state. In such instances, any valid service will create personal jurisdiction over the defendant if the defendant has contacts with the United States as a whole sufficient to justify the exercise of the personal jurisdiction of the federal court consistent with the Constitution and the laws of the United States. *Fed. R. Civ. P. 4(k)(2)*; *see Mwani v. bin Laden, 417 F.3d 1, 11 (D.C. Cir. 2005)* (so long as a defendant does not concede personal jurisdiction in any one state, court can employ federal long-arm statute as basis for personal jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* §§ 4.06, 4.07.
- *Moore's Federal Practice (3d ed.)* Ch. 108.
- *Fed. R. Civ. P. 4* (summons).
- *Fed. R. Civ. P. 83* (judge's directives and local rules).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional Limits



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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.27

§ 4.27 Examining Requirements for In Rem Jurisdiction

[1] Asserting Jurisdiction Over Property

If a federal statute provides, the court may assert in-rem or quasi in-rem jurisdiction, which is "jurisdiction over property." *Fed. R. Civ. P. 4(n)(1)*. The jurisdiction does not permit the court to render a judgment that imposes any personal obligation on the property owner. *See Porsche Cars N. Am., Inc. v. Porsche.net, 302 F.3d 248, 260-262 (4th Cir. 2002)* (in-rem judgment limited to transferring domain name to plaintiff).

Prejudgment notice of the action must be given in the manner specified in the federal statute that authorizes the court to exercise jurisdiction over the property, or by summons under Rule 4. *Fed. R. Civ. P. 4(n)(1). See §§ 4.16[2], 4.22 above*.

[2] Seizing Defendant's Assets

If a defendant has real or personal property within the judicial district of the court, and the defendant cannot be served with reasonable effort, the court may assert jurisdiction over the defendant's property by seizing it pursuant to state law. *Fed. R. Civ. P. 4(n)(2)*.

The seizure of the property authorizes the court to render a judgment concerning defendant's interests the property, but the court lacks jurisdiction to render a judgment against the defendant personally, a judgment on claims unrelated to the property or, even if related to the property, a judgment that will bind the defendant apart from the defendant's interest in the seized property. *Shaffer v. Heitner, 433 U.S. 186, 212, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)* (judgment against the property only); *see also § 1.45 above*.



Strategic Point:

Given the liberal availability of long-arm jurisdiction, the exercise of in rem or quasi-in-rem jurisdiction has become almost an anachronism. If a defendant's contacts with the forum as so slight that no form of Rule 4 service will establish personal jurisdiction, chances are that the circumstances are also inadequate to support seizure of the defendant's assets fortuitously found within the state. *See Shaffer v. Heitner,*

433 U.S. 186, 207-212, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (minimum contacts required for due process apply to exercise of in-rem and quasi in-rem jurisdiction); *see also § 4.26[3] above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 4.120 -4.121, 108.70 -108.81.*
- *Fed. R. Civ. P. 4* (summons).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.28

§ 4.28 Filing Proof of Service

If service is not waived, the person effecting service must file proof of service with the court establishing that service was proper and timely. *Fed. R. Civ. P. 4(l)*. An affidavit is required unless service was by the U.S. Marshal. *Fed. R. Civ. P. 4(l)(1)*. Failure to make proof of service does not effect the validity of service. *Fed. R. Civ. P. 4(l)(3)*. If service of summons was waived, the waiver is filed with the court instead of proof of service. *Fed. R. Civ. P. 4(d)(4)*; *see also §§ 4.16[1], 4.21 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 4.100*.
- *Bender's Federal Practice Forms* Form Nos. 4:600-4:603, 4:700, 4:701, 4:800, 4:801, 4:900, 4:901, 4:910, 4:911, 4:1000, 4:1001, 4:1100, 4:1200.
- *Fed. R. Civ. P. 4* (summons).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral Overview



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Chapter 4 PLEADING STAGE
PART D: ANSWERS AND RESPONSIVE MOTIONS UNDER RULE 12

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.29

§ 4.29 Checklist for Answers and Responsive Motions Under Rule 12

☐ Determine appropriate deadline for time to respond to complaint or other plaintiff's pleading and compute time to respond. *Fed. R. Civ. P. 6(a)(1), 12(a)(1). See § 4.30 below.*

☐ Determine whether initial response to complaint will be by answer or Rule 12 motion. *See §§ 4.30 -4.34 below.*

☐ If initial response will be by answer, prepare answer in compliance with pleading, formatting, filing, and service requirements. *Fed. R. Civ. P. 5(b), (d), 8(a)-(d), 11, See § 4.31 below.*

- ○ Plead any affirmative defenses set forth in Rule 8(c). *Fed. R. Civ. P. 8(c).*
- ○ Include any Rule 12 defenses subject to waiver. *Fed. R. Civ. P. 12(b)(1)-(7), (h)(1).*
- ○ Include any counterclaims pleader has against plaintiff. *Fed. R. Civ. P. 13(a), (b).*

☐ If initial response will be Rule 12(b) motion to dismiss, prepare motion in compliance with rules governing motion practice. *Fed. R. Civ. P. 7(b), 10, 11, 12(b). See § 4.32 below.*

- ○ Avoid waiver by including every available Rule 12 defense. *Fed. R. Civ. P. 12(g), (h)(1).*
- ○ Avoid waiver by amending motion or pleading, if available. *Fed. R. Civ. P. 12(h)(1)(B)(ii), 15(a)(1), (2).*

○ File motion to dismiss on applicable grounds under Rule 12(b).

○ Consider opponent's various options in responding to motion to dismiss, including filing amended complaint, if allowed, or voluntary dismissal. *Fed. R. Civ. P. 15(a)(1)(A), 41(a)(1)(A). See § 4.32[1][e] below.*

○ Determine if local rules allow reply to opposition to motion to dismiss. *See § 4.32[1][f] below.*

☐ Determine whether motion to clarify pleadings is necessary. *See § 4.33 below.*

○ File motion for more definite statement if complaint vague or ambiguous or plaintiff fails to plead required matters with specificity, but note that such motions are disfavored. *Fed. R. Civ. P. 12(e).*

○ File motion to strike redundant, immaterial, impertinent, or scandalous matter, but note that such motions are disfavored. *Fed. R. Civ. P. 12(f).*

☐ Determine if motion for judgment on pleadings is appropriate. *Fed. R. Civ. P. 12(c). See § 4.34 below.*

☐ **Search by Topic:**

- Civil Procedure > Pleading and Practice > Pleadings > Answers
- Civil Procedure > Pleading and Practice > Defenses, Demurrers, & Objections

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers



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Chapter 4 PLEADING STAGE
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.30

§ 4.30 Timing Response to Complaint

[1] Determining Time to Respond

A defendant served with a summons and complaint typically has 21 days to serve and file either an answer or a motion to dismiss. *Fed. R. Civ. P. 12(a)(1)(A)(i)*. A party served with a pleading containing a crossclaim against that party must serve an answer to the crossclaim within 21 days after being served. *Fed. R. Civ. P. 12(a)(1)(B)*; *see also §§ 4.45*, *4.46 below*.

Exceptions:
The following may extend the time to file an answer to the complaint:

1. **Pre-answer Rule 12 motion filed.** If the court denies the Rule 12 motion or postpones disposition until trial on the merits, the defendant must serve a responsive pleading within 14 days after notice of the court's action. *Fed. R. Civ. P. 12(a)(4)(A)*. If the court grants a defendant's motion for a more definite statement under Rule 12(e), the defendant must serve a responsive pleading within 14 days after the opposing party serves the more definite statement. *Fed. R. Civ. P. 12(a)(4)(B)*. In either case, the court may set a different time for response. *Fed. R. Civ. P. 12(a)(4)*.

2. **Waiver of service requested.** When a plaintiff has sent a request for waiver of service under Rule 4(d), the defendant must respond to the complaint within 60 days from the date plaintiff sent the request for waiver, or 90 days if the defendant is outside the United States. *See Fed. R. Civ. P. 4(d)*, *12(a)(1)(A)(ii)*; *see also § 4.21 below*.

3. **Defendant is federal government or official.** The United States, a federal agency, or a federal officer or employee sued in an official capacity must serve an answer to the complaint within 60 days after the plaintiff serves the United States attorney with the pleading asserting the claim. *Fed. R. Civ. P. 12(a)(2)*. Similarly, a federal officer or employee sued in an individual capacity for conduct in connection with official duties must serve an answer to the complaint within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later. *Fed. R. Civ. P. 12(a)(3)(B)*.

4. **Statute or rule provides time for response.** A federal statute applicable to the case may prescribe a deadline that differs from that in Rule 12. *Fed. R. Civ. P. 12(a)(1). See e.g., 2 U.S.C. § 383(a)* (federal election contests); *18 U.S.C. § 983(a)(4)(A)* (civil forfeiture cases); *28 U.S.C. § 1608(d)* (suits against foreign entities); *28 U.S.C. § 2410(b)* (actions affecting property on which United States has a lien).

[2] Computing Time to Respond

To avoid a default judgment, the defendant must either file an answer or a Rule 12 motion within the time prescribed by the rules. *See Fed. R. Civ. P. 12(a)(1), 55(a).*

In calculating the time, the day on which the complaint is served is not included. *See Fed. R. Civ. P. 6(a)(1)(A).* Accordingly, the 21-day period for responding begins to run on the day after service of process.

Every day counts in the calculation, including intermediate Saturdays, Sundays, and legal holidays. *Fed. R. Civ. P. 6(a)(1)(B).* The last day of the period is included in the calculation, unless it is a Saturday, Sunday, legal holiday, or a day on which the weather or some other condition makes the clerk's office inaccessible. In those cases, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. *See Fed. R. Civ. P. 6(a)(1)(C), (a)(3)(A).*

Legal holidays are specified in *Rule 6(a)(6). See Garcia-Velazquez v. Frito Lay Snacks Caribbean, 358 F.3d 6, 9 (1st Cir. 2004)* (New Year's Eve was not "legal holiday" even though clerk's office was closed).

Three days are added to the time if service is by mail, service is on the court clerk because of no known address, or if service is made electronically or by other means consented to in writing. *Fed. R. Civ. P. 6(d).*

[3] Obtaining Extension of Time to Respond

Before the time period expires, the court may, for cause shown, extend the time for response with or without a motion or notice. *Fed. R. Civ. P. 6(b)(1)(A); see Baden v. Craig-Hallum, Inc., 115 F.R.D. 582, 584-585 (D. Minn. 1987)* (extensions liberally granted before time expires).

After the time period expires, an extension is only on motion with a showing of excusable neglect. *Fed. R. Civ. P. 6(b)(1)(B).* Whether neglect is "excusable" turns on all relevant circumstances surrounding the party's omission. *See Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 384-385, 113 S. Ct. 1489 (1993)* (court considers reasons for delay, good faith of movant, and prejudice to opposing party); *see also § 4.19[2] above.*

Warning:

When seeking an extension of time to respond to the complaint, the defendant should use language that encompasses both Rule 12 motions and answers as possible responses. Using language indicating only that the client seeks an extension of time to serve an answer may preclude filing a Rule 12 motion instead of an answer.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* §§ 4.07 -4.08, *6.02, 6.04 -6.06, 12.10 -12.13.*
- *Bender's Federal Practice Forms* Form Nos. 6:10, 6:12.

- *Fed. R. Civ. P. 4* (summons).
- *Fed. R. Civ. P. 6* (time).
- *Fed. R. Civ. P. 12* (defenses and objections).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 4.31 Preparing Answer

[1] Complying With "Notice Pleading" Requirements

"Notice pleading" requirements apply to answers. In drafting an answer to the complaint, the defendant must state in short and plain terms the defenses to each claim asserted. *Fed. R. Civ. P. 8(a), (b)(1)(A)*; *see also § 4.03 above*. The answer must admit or deny each of the material allegations raised in the complaint. *Fed. R. Civ. P. 8(b)(1)(B), (d)*.

[2] Drafting Admissions or Denials to Material Allegations in Complaint

A denial must fairly meet the substance of the allegation denied. *Fed. R. Civ. P. 8(b)(2)*. Failure to deny specific averments is deemed an admission. *Fed. R. Civ. P. 8(b)(6)*. Averments in a pleading to which no responsive pleading is required or permitted are taken as denied or as avoided. *Fed. R. Civ. P. 8(b)(6)*.

Exception:
Averments as to the amount of damages are not deemed admitted even when a defendant does not deny them in an answer. *Fed. R. Civ. P. 8(b)(6)*.

A general denial is permissible if the defendant can honestly controvert all allegations including jurisdictional averments. *Fed. R. Civ. P. 8(b)(3)*; *see Stringfellow v. Perry, 869 F.2d 1140, 1143 (8th Cir. 1989)* (general denial adequately addressed all of the claims in complaint). Alternatively, a defendant may use a limited general denial denying all the averments in the complaint as a whole, except for those expressly admitted. *Fed. R. Civ. P. 8(b)(3)*.

Unless the defendant intends in good faith to controvert all the averments in the complaint, the answer should contain specific denials that respond to each material allegation or to portions of each allegation, rather than to the complaint as a whole. *See Fed. R. Civ. P. 8(b)(3)*. General denials, whether blanket or limited, are subject to the Rule 11 obligations to avoid filing frivolous pleadings. *Fed. R. Civ. P. 8*, Committee Note of 2007; *see Fed. R. Civ. P. 11*; *see also § 4.11 above*.

A defendant may in good faith deny or qualify part of an allegation in a complaint. To do so, the defendant must admit the part of the complaint that is true and deny the rest. *Fed. R. Civ. P. 8(b)(4)*. When a defendant lacks knowledge or information sufficient to form a belief as to the truth of an averment, the defendant must so state and the statement has

the effect of an affirmative denial. *Fed. R. Civ. P. 8(b)(5)*. To avoid sanctions, such denials must be formed after reasonable inquiry. *See Fed. R. Civ. P. 11(b)(4)*; *see also Harvey Aluminum, Inc. v. NLRB, 335 F.2d 749, 758 (9th Cir. 1964)* (if assertion of ignorance is obvious sham, facts treated as admitted).

[3] Pleading Affirmative Defenses

[a] Determining Sufficiency of Pleading

Affirmative defenses plead matters extraneous to the plaintiff's prima facie case that deny the plaintiff's right to recover even if the allegations of the complaint are true. *Flav-O-Rich, Inc. v. Rawson Food Serv., Inc. (In re Rawson Food Serv., Inc.), 846 F.2d 1343, 1349 (11th Cir. 1988)* (defense that negates an element of the claim is not an affirmative defense).

As with claims pleaded in answers, the defendant must provide a short and plain statement of the affirmative defense pleaded. *See Fed. R. Civ. P. 8(a), (c)(1)* (listing examples of affirmative defenses).

The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense. *Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979)* (statute of limitations adequately pleaded by referencing the applicable statute); *see also § 4.08 above*.

[b] Considering Waiver Issues

In responding to a complaint, the defendant bears the burden of pleading any available affirmative defenses in the answer. *See Fed. R. Civ. P. 8(c)(1)*.

Rule 12 lists affirmative defenses that may, at the defendant's option, be raised initially in a motion to dismiss. *See Fed. R. Civ. P. 12(b)(1)-(7)*; *see also § 4.32 below*.

A defendant's failure to assert properly all available affirmative defenses in the first responsive pleading, whether in an answer or in a pre-answer motion to dismiss, may result in waiver of the defense. *Kontrick v. Ryan, 540 U.S. 443, 457-460, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004)* (failure to raise statute of limitations).

The affirmative defenses listed in Rule 8(c) must be specifically pleaded in response to the pleading setting forth the claim for relief. The Rule 8(c) bar operates only when the defendant files an answer and omits the defense. *See Perry v. Sullivan, 207 F.3d 379, 382-383 (7th Cir. 2000)* (pre-answer Rule 12 motion does not waive Rule 8(c) defenses).

The Rule 12 defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process may be waived if the defendant omits these defenses from a pre-answer motion to dismiss; or fails to include these defenses in another responsive pleading or amended pleading permitted as a matter of course under *Fed. R. Civ. P. 15(a)*. *See Fed. R. Civ. P. 12(h)(1)*; *see also §§ 4.32[1][b] -[c], 4.36 below* .

Warning:

Compliance with Rule 12(h)(1) does not guarantee preservation of the defense. Waiver may occur from conduct pursued by a party during litigation. *See Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 60 (2d Cir. 1999)* (delay in challenging personal jurisdiction by motion to dismiss may result in waiver, even though defense was asserted in timely answer).

The defenses of failure to state a claim on which relief can be granted and failure to join a required party under *Fed. R. Civ. P. 19* may be made in any pleading permitted or ordered under *Fed. R. Civ. P. 7(a)*, in a motion for judgment on the pleadings, or at a trial on the merits. *Fed. R. Civ. P. 12(h)(2)*. Subject matter jurisdiction may be challenged at any

time. *Fed. R. Civ. P. 12(h)(3)*; *see also § 4.06 above*; *§§ 4.32[2], [6], [7], 4.41[2] below* .

Despite the waiver rule, a court may grant leave to amend the answer to assert a belated affirmative defense. *See § 4.36[2] below*. Factors in the determination include bad faith, undue delay, prejudice to the opposing party, and futility. *See Saks v. Franklin Covey Co., 316 F.3d 337, 350-351 (2d Cir. 2003)* (amendment at summary judgment stage to allow Rule 8(c) defense); *Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001)* (motion for judgment on pleadings based on amended answer). If a plaintiff fails to object to a belated assertion of an affirmative defense, it is tried by consent of the parties under Rule 15(b) and plaintiff may not object on appeal. *See Fed. R. Civ. P. 15(b)(2)*; *Mooney v. New York, 219 F.3d 123, 127 (2d Cir. 2000)* (failure to object); *see also § 4.38 below*.

In diversity of citizenship actions, state law defines the nature of the defenses. However, the Federal Rules provide for the manner and time in which defenses must be raised and when waiver of those defenses occurs. *See Brunswick Leasing Corp. v. Wisconsin Cent., Ltd., 136 F.3d 521, 530 n.3 (7th Cir. 1998)* (pleading requirements determined by Federal Rules even in diversity cases).

[c] Determining Defenses That Must Be Pleaded with Particularity

Certain affirmative defenses must be pleaded with particularity, including the legal capacity of a party to sue and fraud or mistake. *See Fed. R. Civ. P. 9(a), (b)*; *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)* (specific allegations required); *see also §§ 4.07[1], 4.14[1] above*.

[d] Raising Multiple or Alternative Defenses

Under the Federal Rules, the defendant may:

1. Join a defense or objection with one or more other defenses or objections in a responsive pleading or motion. *See Fed. R. Civ. P. 12(b)*.

2. Set forth two or more statements of a defense alternatively or hypothetically, either in a single count or defense or in separate ones. *Fed. R. Civ. P. 8(d)(2)*.

3. State as many separate claims or defenses as it has, regardless of consistency. *Fed. R. Civ. P. 8(d)(3)*.

[4] Obtaining Affirmative Relief

Requests for affirmative relief against a plaintiff are made by asserting a counterclaim in the answer. *See Fed. R. Civ. P. 13(a), (b)*. When a defendant mistakenly designates a counterclaim as a defense in an answer, the court, when justice requires, must treat the pleading as if it were properly designated. *See Fed. R. Civ. P. 8(c)(2), 13*; *Reiter v. Cooper, 507 U.S. 258, 263, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993)* (asserted defense treated as counterclaim); *but see 389 Orange St. Partners v. Arnold, 179 F.3d 656, 664 (9th Cir. 1999)* (no redesignation after judgment entered); *see also § 4.45 below*.

[5] Considering Formatting Requirements

The format rules applicable to complaints also apply to answers. *See Fed. R. Civ. P. 10* (form of pleadings).

Exception:

Although the title of the complaint must name all the parties, the answer's caption, after naming the first party on each side, may refer generally to other parties. If there is more than one party, the defendant may indicate additional plaintiffs, through the use of "et al." *See Fed. R. Civ. P. 10(a)*. However, if there are several defendants, counsel should clearly state the name of each defendant for whom an answer is

being filed.

Though not a requirement, it is customary for a defendant to include a prayer for relief at the end of an answer. The prayer typically requests that the plaintiff take nothing as a result of the complaint, and that the court enter judgment in the defendant's favor. If the defendant, as a prevailing party, may recover costs or attorney's fees, counsel should include a request for them in the prayer. *See § 4.10 above*.

[6] Considering Signature Requirement

The answer must be signed by at least one attorney of record in the attorney's individual name or by the pro se defendant. Rule 11 signature requirements for pleadings apply to answers. Unless an applicable rule or statute specifically provides otherwise, the answer need not be verified nor accompanied by an affidavit. This is so even in cases when the complaint must be verified. *See Fed. R. Civ. P. 11(a)*; *see also §§ 4.11, 4.12 above*; *§ 11.03 below*.

[7] Filing and Serving Answer

Filing and service of the answer must be made in a timely manner. *See § 4.30 above* (discussing time to respond).

Service on a plaintiff represented by an attorney must be made on the attorney unless the court orders otherwise. *See Fed R. Civ. P. 5(b)* (methods for service).

In general, the answer is filed with the court by submitting it to the court clerk of the court where the action is docketed. *See Fed. R. Civ. P. 5(d)*.

Because the answer must be served on the other parties in the action, counsel must include with the answer a certificate of service to be filed with the court within a reasonable time after service. *See Fed. R. Civ. P. 5(a)(1)(B), (d)(1)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 8.06 -8.09, 11.10 -11.11, 11.20 -11.24, 12.22*.
- *Bender's Federal Practice Forms* Form Nos. 8(IX):1, 8(IX):10, 8(IX):50-55, 8(IX):57.
- *Fed. R. Civ. P. 5* (serving and filing pleadings and other papers).
- *Fed. R. Civ. P. 8* (general rules of pleading).
- *Fed. R. Civ. P. 11* (signing of pleadings, motions, and other papers).
- *Fed. R. Civ. P. 12* (defenses and objections).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswers



Moore's AnswerGuide: Federal Pretrial Civil Litigation

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Chapter 4 PLEADING STAGE
PART D: ANSWERS AND RESPONSIVE MOTIONS UNDER RULE 12

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.32

§ 4.32 Preparing Rule 12 Motion to Dismiss

[1] Examining Rule 12(b) Procedures

[a] Avoiding Waiver by Including Every Available Rule 12 Defense or Objection

A defendant must join all available Rule 12 defenses or objections in either a motion to dismiss or in the first responsive pleading. *Fed. R. Civ. P. 12(g)(2).*

An omitted defense or objection is waived unless it is one of the defenses or objections excepted from the waiver provision. *See Fed. R. Civ. P. 12(g)(2), (h)* (excepted defenses include failure to state claim on which relief may be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim).

When waiver occurs, the defense or objection is permanently lost. The defendant cannot assert the defense or objection in a second pre-answer motion or in an answer. *See Chilicky v. Schweiker, 796 F.2d 1131, 1136 (9th Cir. 1986) , rev'd on other grounds, 487 U.S. 412 (1988)* (omission from earlier motion is permanent waiver); *Palmer v. Braun, 376 F.3d 1254, 1259 (11th Cir. 2004)* (same); *see also § 4.31[3][b] above.*

The mandatory consolidation and waiver provisions do not apply to affirmative defenses that must be pleaded under *Fed. R. Civ. P. 8(c)(1). See Parker v. United States, 110 F.3d 678, 683 (9th Cir. 1997)* (Rule 12(g) refers to defenses that may be raised by Rule 12 motion, not to all defenses). Those defenses may be asserted in an amended answer. *See § 4.31[3][b] above.* Similarly, a defendant does not waive non-Rule 12 motions when omitted from a Rule 12 pre-answer motion to dismiss. *See Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1475 (9th Cir. 1988)* (Rule 12 waiver inapplicable to motion to stay).

[b] Avoiding Waiver of Omitted Defenses by Filing Amended Motion or Pleading

To avoid waiver of an omitted Rule 12(h)(1) defense, the defendant may attempt to file an amended motion to dismiss or other responsive pleading when permitted as a matter of course under Rule 15(a)(1). *See Fed. R. Civ. P. 12(h)(1)(B)(ii).* A party may amend a pleading once as a matter of course any time before the opposing party serves a responsive pleading. If the pleading is not one to which a responsive pleading is permitted, the party may amend at any time within 21 days after its service, providing the action has not been placed on the trial calendar. *See Fed. R. Civ. P.*

15(a)(1); *see also § 4.36 below*.

[c] Complying with Rules Governing Motion Practice

The rules governing motions generally apply with equal force to motions to dismiss under Rule 12. *See Fed. R. Civ. P. 7(b)(1), (2)*; *see also §§ 9.02 -9.14 below*. Similarly, the rules applicable to captions and formatting with regard to pleadings also apply to motions and motion-related papers. *See Fed. R. Civ. P. 7(b)(2), 10*.

Generally, a motion to dismiss should be made in writing stating with particularity the grounds for the motion and the relief or order sought. The writing requirement is satisfied if the defendant sets forth the motion in a written notice of the hearing on the motion. *See Fed. R. Civ. P. 7(b)(1)*. Counsel should consult local rules for other specific requirements.

A motion to dismiss must be signed. *Fed. R. Civ. P. 11(a)*; *see also Fed. R. Civ. P. 7*, Committee Note of 2007. A defendant may be sanctioned for filing a frivolous motion to dismiss or for filing a motion to dismiss for an improper purpose. *See Fed. R. Civ. P. 11(a), (b)*. Even when a motion to dismiss under *Fed. R. Civ. P. 12* is technically appropriate, a defendant may risk sanctions for filing a motion to dismiss for an improper purpose, such as to harass or to delay the proceedings. *See Cohen v. Virginia Electric & Power Co., 788 F.2d 247, 249 (4th Cir. 1986)* (sanctions appropriate when counsel had no intention of pursuing motion that had proper legal basis); *see also § 4.11 above*.

[d] Responding to Motion to Dismiss

The plaintiff has several options in responding to a motion to dismiss, including the following:

1. Not responding;

2. Filing opposition papers;

3. Filing a statement of nonopposition;

4. Filing an amended complaint. *See Fed. R. Civ. P. 15(a)(1)(A)*; *see also § 4.36 below*; or

5. Seeking voluntary dismissal of the action. *See Fed. R. Civ. P. 41(a)(1)(A)(i)*; *see also §§ 9.27 -9.29 below*.

If a plaintiff files written opposition papers in response to a motion to dismiss, local rules should be consulted to determine specific requirement of the district court where the case is pending. If a plaintiff chooses not to file opposition papers, local rules may require a statement of non-opposition.



Strategic Point:

Counsel should not file a statement of non-opposition unless conceding that the defendant's motion to dismiss, including the relief sought in the motion, should be granted. For example, if the motion requests that the court dismiss the complaint without leave to amend, opposition papers must be filed if the defendant plans to file an amended answer, unless amendment as a matter of right is available under *Fed. R. Civ. P. 15(a)(1)*. *See § 4.36[1] below*.

A motion to dismiss under *Fed. R. Civ. P. 12(b)* is not a responsive pleading. *See Fed. R. Civ. P. 7(a)*. Accordingly, filing a Rule 12(b) motion to dismiss, alone, does not terminate the plaintiff's right to amend the complaint once as a matter of course. *See Fed. R. Civ. P. 15(a)(1)(A)*. Therefore, in lieu of opposing a motion to dismiss the original

complaint, the plaintiff may serve and file an amended complaint without obtaining leave of court. *See Zaidi v. Ehrlich, 732 F.2d 1218, 1219 (5th Cir. 1984)* (filing motion to dismiss does not extinguish plaintiff's right to amend complaint); *see also § 4.36[1] below*.



Strategic Point:

Plaintiff should consider filing an amended complaint when the defendant's motion to dismiss is well-founded, as when the motion has exposed material defects in the original complaint. If the complaint can be easily amended to avoid the issues raised in the motion, filing an amended complaint may save time and expense.

The plaintiff may dismiss an action without a court order by filing a notice of dismissal any time before service by the defendant of an answer or a motion for summary judgment, whichever occurs first. *See Fed. R. Civ. P. 41(a)(1)(A)(i)*. Because a Rule 12(b) motion to dismiss is neither an answer nor a motion for summary judgment, its filing generally does not cut off a plaintiff's right to dismiss by notice. *See In re Bath & Kitchen Fixtures Antitrust Litig., 535 F.3d 161, 166 (3d Cir. 2008)* (only when a Rule 12(b)(6) motion is converted by the court into a motion for summary judgment does it bar voluntary dismissal). The plaintiff may also obtain a dismissal by filing a stipulation of dismissal signed by all parties who have appeared in the action. *See Fed. R. Civ. P. 41(a)(1)(A)(ii)*.



Warning:

Unless otherwise stated in the notice of dismissal or stipulation, voluntary dismissals are without prejudice. However, a notice of dismissal operates as an adjudication on the merits if filed by a plaintiff who has already dismissed an action based on or including the same claim in any federal or state court. *See Fed. R. Civ. P. 41(a)(1)(B)*; *see also §§ 9.27 -9.29 below*.

[e] Replying to Opposition Papers

Local rules may permit a defendant who has filed a motion to dismiss under Rule 12(b) to file a reply to the plaintiff's response. Typically, replies consist of a memorandum, supporting declarations, or other evidence rebutting the plaintiff's opposition papers. The time for filing memoranda or other materials in reply to the plaintiff's opposition varies depending on the district in which the case is filed. Counsel should consult local rules in the district in which the case is filed.

[2] Filing Motion to Dismiss for Lack of Subject Matter Jurisdiction

[a] Understanding Basic Prerequisites of Subject Matter Jurisdiction

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*; *see also § 4.06 above*.

Lack of subject matter jurisdiction is not a waivable defense. *Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* (without jurisdiction court lacks power to declare the law). Thus, subject matter jurisdiction may be challenged by the court or a party at any time in the proceedings. *Fed. R. Civ. P. 12(h)(3)*; *Arbaugh v. Y & H Corp., 546 U.S. 500, 506, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)* (challenge can be made after trial and entry of judgment).

[b] Challenging Subject Matter Jurisdiction on Face of Pleading

A complaint will be dismissed for lack of subject matter jurisdiction for any of the following reasons:

1. The cause does not arise under a federal law or under the United States Constitution. *See § 4.06[2] above*.

2. There is no case or controversy within the meaning of that constitutional term. *See § 4.06[6] above*.

3. The cause is not one described by any jurisdictional statute.

Baker v. Carr, 369 U.S. 186, 198, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (requirements for jurisdiction); *see also § 4.06 above*.

In a "facial attack" on a court's subject matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)*, the defendant contends that the jurisdictional allegations in the complaint are insufficient on their face to demonstrate the existence of jurisdiction. *See § 4.06 above*. In determining the motion, the court presumes the factual allegations of the complaint to be true, and grants the motion only if the plaintiff failed to allege an element necessary for subject matter jurisdiction. *See Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir. 1981)* (explaining facial attack).

When a defendant moves to dismiss based on the failure of the complaint to allege subject matter jurisdiction, the plaintiff may amend the complaint as a matter of course to cure the defect any time before the defendant serves an answer. *See Fed. R. Civ. P. 15(a)(1)(A)*; *see also § 4.36[1] below*. However, when leave of court is required the court may deny leave if amendment would be futile. *See Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110-111 (2d Cir. 2001)* (leave properly denied when amendment futile to cure defects); *see also § 4.36[2] below*.

[c] Challenging Subject Matter Jurisdiction Based on Facts

Factual attacks, also called "speaking motions," attack the court's subject matter jurisdiction as a matter of fact based on extrinsic evidence apart from the pleadings. *Morrison v. Amway Corp., 323 F.3d 920, 924 n.5 (11th Cir. 2003)* (factual attack relies on extrinsic evidence).

The defendant challenges the truthfulness of plaintiff's jurisdictional allegations by presenting affidavits or other evidence properly before the court. The plaintiff then must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction. *Safe Air v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)* (extrinsic evidence converts motion to dismiss into factual motion).

In deciding the motion, the court does not attach any presumptive truthfulness to the plaintiff's jurisdictional allegations nor to any inferences drawn from those allegations. Rather, the court may weigh the evidence presented, and may determine the facts in order to evaluate whether it has the power to hear the case. *Montez v. Department of the Navy, 392 F.3d 147, 149 (5th Cir. 2004)* (resolving factual attack on jurisdiction).

The court may not resolve genuinely disputed facts if the question of jurisdiction is dependent on the resolution of factual issues going to the merits. When jurisdiction is so intertwined with the merits such that the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the trial court must assume jurisdiction and proceed to the merits, employing the standard applicable to a motion for summary judgment. *See, e.g., Safe Air v. Meyer, 373 F.3d 1035, 1040 (9th Cir. 2004)* (statute provided basis both for jurisdiction and plaintiff's substantive claim).

The court may grant discovery when jurisdictional facts are contested or more facts are needed. However, a court's refusal to grant discovery to establish jurisdiction is not an abuse of discretion when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction. *See Laub v. United States Dep't of Interior,*

342 F.3d 1080, 1092 (9th Cir. 2003) (jurisdictional discovery should be permitted if allegations indicate its utility).

[d] Challenging Subject Matter Jurisdiction in Diversity Cases

A defendant may challenge diversity jurisdiction under *Fed. R. Civ. P. 12(b)(1)* on the basis that the amount in controversy falls below the minimum jurisdictional amount for bringing suit in federal court. *See 28 U.S.C. § 1332(a)(1)*. In general, the sum of the damages averred on the face of the complaint determines the amount in controversy. To justify dismissal, it must appear to a legal certainty that the claim is really for less than the jurisdictional amount. *Crum v. Circus Circus Enters., 231 F.3d 1129, 1131 (9th Cir. 2000)* (good faith allegation of amount controls); *see also § 4.06[3] above*; *§ 4.45[4][b] below*.

A defendant may challenge diversity jurisdiction under *Fed. R. Civ. P. 12(b)(1)* on the basis that the parties to the action lack diversity of citizenship. *See 28 U.S.C. §§ 1331*, *1332*. Plaintiff bears the burden of establishing complete diversity. A plaintiff may seek a court order to dismiss a dispensable party to achieve complete diversity. *See Fed. R. Civ. P. 19(a)*, *(b)*. Dispensable parties may be dropped or added by court order on motion of any party, or on the court's own initiative, at any stage of the action and on any just terms. *See Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 837-838, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (court of appeals has same authority as district courts to dismiss dispensable parties to effect complete diversity); *Fed. R. Civ. P. 21* (misjoinder of parties not grounds for dismissal of action); *see also § 4.06[3] above*; *4.42 below* .

[e] Challenging Subject Matter Jurisdiction Based on Lack of Federal Question

A defendant may challenge subject matter jurisdiction based on lack of a federal question under *Fed. R. Civ. P. 12(b)(1)*. *See 28 U.S.C. § 1331*. To determine whether a federal question is presented, a court must examine the allegations of the complaint, as well as whether federal jurisdiction would exist under a properly pleaded complaint. *Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1212 (9th Cir. 1998)* (face of complaint).

Jurisdictional dismissals in cases premised on federal question jurisdiction are exceptional. The court may dismiss a federal question claim for lack of subject matter jurisdiction only if the claim appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction, or if the claim is wholly insubstantial and frivolous. *See Williamson v. Tucker, 645 F.2d 404 415-416 (5th Cir. 1981)* (federal claim must be immaterial or insubstantial); *see also § 4.06[2] above*.

[f] Examining Court's Determination of Motion

When a defendant asserts lack of subject matter jurisdiction in a pre-answer motion to dismiss that also raises other defenses that require a determination of the merits, the court customarily resolves the issue of subject matter jurisdiction first. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)* (court cannot hypothesize jurisdiction to resolve merits). However, a district court may determine a challenge to personal jurisdiction before deciding a challenge to the court's subject matter jurisdiction when the personal jurisdiction issue presents no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 588, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)* (non-merits adjudication of personal jurisdiction given appropriate priority under the circumstances of case); *see also § 4.32[3] below*.

The defendant is the moving party on a motion to dismiss, but the plaintiff bears the burden of establishing that jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* (asserting party must prove jurisdiction). The plaintiff must affirmatively and distinctly establish the existence of whatever is essential to federal jurisdiction. If the plaintiff fails to do so, the court must dismiss the case unless the defect can be corrected by amending the complaint. *Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499*

(9th Cir. 2001) (pleading must establish jurisdiction).

Defective allegations of jurisdiction may be amended in either the trial or appellate courts if the defect may be cured by amendment. *28 U.S.C. § 1653*.

A dismissal for lack of subject matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)* is not an adjudication on the merits, and is generally without prejudice, so that the plaintiff may reassert the claims in a competent court. *Ernst v. Rising, 427 F.3d 351, 367 (6th Cir. 2005)* (lack of jurisdiction rarely dismissed with prejudice).

[3] Filing Motion to Dismiss for Lack of Personal Jurisdiction

[a] Raising Lack of Personal Jurisdiction

A motion to dismiss for lack of personal jurisdiction under *Fed. R. Civ. P. 12(b)(2)* challenges whether the court has authority to render a judgment commanding the defendant's personal obedience or imposing obligations on the defendant that are enforceable by other courts. *See Burnham v. Superior Court, 495 U.S. 604, 609-610, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* (explaining personal jurisdiction); *see also § 4.26 above*.

[b] Avoiding Waiver of Defense of Personal Jurisdiction

A defendant must assert the defense of lack of personal jurisdiction in a motion to dismiss, or in the first responsive pleading, or it is waived. *Fed. R. Civ. P. 12(h)(1)*; *see §§ 4.31[3][b], 4.32[1][b] above*.

Warning:

A defendant does not preserve an objection under *Fed. R. Civ. P. 12(b)(2)* by asserting a defense of insufficient process or insufficient service of process under *Fed. R. Civ. P. 12(b)(4)* or *Fed. R. Civ. P. 12(b)(5)*. *Chilicky v. Schweiker, 796 F.2d 1131, 1136 (9th Cir. 1986)* , *rev'd on other grounds*, *487 U.S. 412 (1988)* (defenses challenging process not designed to challenge personal jurisdiction); *see also § 4.32[5] below*.

Lack of personal jurisdiction may be waived by submitting to process or jurisdiction by filing a responsive pleading, by stipulation, or by other conduct. *See, e.g., Petrowski v. Hawkeye-Security Ins. Co., 350 U.S. 495, 496-497, 76 S. Ct. 490, 100 L. Ed. 639 (1956)* (waiver of lack of personal jurisdiction by stipulating to submit to jurisdiction of court without personal service); *Schnabel v. Lui, 302 F.3d 1023, 1037-1038 (9th Cir. 2002)* (party in consolidated action cannot bring claims mandating filing of counterclaims, then attack personal jurisdiction when judgment is entered against party on counterclaims); *cf. Fields v. Sedgwick Associated Risks, Ltd., 796 F.2d 299, 300-301 (9th Cir. 1986)* (motion to quash and to dismiss in state court did not waive jurisdictional objection in removed action because defendant timely objected to personal jurisdiction in federal court).

[c] Relying on Evidence Outside Pleadings

Either party may present sworn affidavits and declarations for the court's consideration in determining whether it has personal jurisdiction over the defendant. *See Doe v. Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001)* (extrinsic evidence allowed). Discovery is appropriate if the plaintiff makes a colorable claim of personal jurisdiction and explains how discovery will assist the court in resolving the issue. *United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 625-627 (1st Cir. 2001)* (plaintiff must set forth specific jurisdictional facts to be discovered). An evidentiary hearing may be held when necessary to determine disputed facts and issues of credibility. *See Data Disc, Inc. v. Systems Tech. Assocs., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977)* (evidentiary hearing discretionary).

[d] Examining Court's Determination of Motion

The plaintiff bears the burden of establishing the district court's personal jurisdiction over the defendant. If no evidentiary hearing is held, the plaintiff need only make a prima facie showing of the jurisdictional facts through the pleadings and affidavits. *See Bank of Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999)* (prima facie showing sufficient). If a hearing is held, the jurisdictional facts must be established by a preponderance of the evidence, just as at trial. *See Data Disc, Inc. v. Systems Tech. Assocs., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977)* (preponderance standard).

Generally, a dismissal for lack of personal jurisdiction is not on the merits, and is without prejudice to refiling the action in a court of proper jurisdiction. *See Grigsby v. CMI Corp., 765 F.2d 1369, 1372 n.5 (9th Cir. 1985)* (error to dismiss with prejudice). Additionally, a court may transfer the action to the appropriate federal court if transfer is in the interests of justice. *28 U.S.C. 1406(b)*; *see Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466-467, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962)* (even though court lacked personal jurisdiction over defendant transfer proper under *28 U.S.C. § 1406(a)*).

[4] Filing Motion to Dismiss for Improper Venue

[a] Moving to Dismiss Before Filing Responsive Pleading

To avoid waiver, an objection based on venue must be asserted either in the answer or in a motion to dismiss under *Fed. R. Civ. P. 12(b)(3)* before filing a responsive pleading. *King v. Russell, 963 F.2d 1301, 1305 (9th Cir. 1992)* (venue objection must be raised in first defensive maneuver).

The 12(b)(3) motion requires the court to decide whether venue is proper in the district in which the plaintiff filed suit. When venue in a particular judicial district is improper, the court must dismiss the action or if the court finds that it is in the interests of justice, it may transfer the case to any district or division in which it could have been brought. *28 U.S.C. § 1406(a)*; *see also § 1.84 above*.

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. *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 28 U.S.C. § 1404*; *see also § 1.85 above*.

Unless an action is brought under a specific venue statute, proper venue is determined under the general venue statute that applies to diversity and non-diversity actions. *28 U.S.C. § 1391*. In addition, the statute provides for venue in actions brought against a corporation, a foreign citizen, an alien, a federal employee or agency, or a foreign state, and multiparty actions based on minimal diversity. *28 U.S.C. §§ 1369*, *1391(g)*; *see also §§ 1.60 -1.62 above*.

Circuit Split:

Circuits are split on the proper method for treating an objection to venue based on a forum selection clause. The majority allow the issue to be raised by motion under Rule 12(b)(3) challenging venue. *See, e.g., Continental Ins. Co. v. M/V Orsula, 354 F.3d 603, 606-607 (7th Cir. 2003)* (Rule 12(b)(3) motion). The minority treats the motion as a motion to dismiss for failure to state a claim on which relief can be granted under Rule 12(b)(6). *See, e.g., Silva v. Encyclopedia Britannica Inc., 239 F.3d 385, 387-388 (1st Cir. 2001)* (Rule 12(b)(6). The distinction is important because it affects whether and at what point the defense is waivable, which party bears the burden of proof on the motion, and what standards must be applied by the court in determining the motion.

[b] Relying on Evidence Outside Pleadings

Either party may present sworn affidavits and declarations for the court's consideration in determining whether it has personal jurisdiction over the defendant. *See Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996)* (extrinsic evidence allowed). Discovery is appropriate if useful to resolve factual issues, and an evidentiary hearing may be held. *See Hayashi v. Red Wing Peat Corp., 396 F.2d 13, 14 (9th Cir. 1968)* (discovery and hearing allowed).

Circuit Split:

Circuits are split on whether the defendant or plaintiff has the burden of proof. *See Nissan Motor Co. v. Nissan Computer Corp., 89 F. Supp. 2d 1154, 1161 (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); *but see Dudash v. Varnell Struck & Assocs., 2004 U.S. Dist. LEXIS 24872, at *6 (N.D. Cal. 1004)* ("burden to prove venue is generally and properly placed on defendant, as the doctrine protects defendant's privilege to avoid litigation in inconvenient forums").

[5] Filing Motion to Dismiss for Insufficient Process or Service of Process

A defendant may challenge the sufficiency of the summons or the sufficiency of its service, by filing a motion to dismiss under *Fed. R. Civ. P. 12(b)(4)* or *Fed. R. Civ. P. 12(b)(5)*, respectively. A motion to dismiss for insufficient process is designed to challenge irregularities in the contents of the summons, while a motion to dismiss for insufficient service of process is designed to challenge irregularities in the manner of delivery of the summons and complaint. *See O'Brien v. R.J. O'Brien & Assocs., 998 F.2d 1394, 1400 (7th Cir. 1993)* (motion should specify the deficiencies). A motion to dismiss for insufficient service deals with failures occurring in attempts to serve as opposed to a complete failure to make timely service, which should be attacked through a motion to dismiss for lack of personal jurisdiction under *Fed. R. Civ. P. 12(b)(2). See also §§ 4.16[2], 4.19 -4.24 above.*

Warning:

While federal courts have authority to quash defective service of process as an alternative to dismissing the complaint, the federal rules technically do not provide for motions to quash. *Montalbano v. Easco Hand Tools, Inc., 766 F.2d 737, 740 (2d Cir. 1985)* (Rule 12(b)(5) motion is proper procedure).

Both defenses are waived if omitted from a motion to dismiss or not included in the defendant's answer. *See Fed. R. Civ. P. 12(g)(2), (h)(1); Schnabel v. Lui, 302 F.3d 1023, 1033 (9th Cir. 2002)* (waiver); *see also §§ 4.31[3][b], 4.32[1][b] above.* Local rules may provide for specific objections to process that must be raised to avoid waiver.

The plaintiff has the burden of establishing proper service. *See Hickory Travel Sys. Inc. v. Tui Ag, 213 F.R.D. 547, 550 (N.D. Cal 2003)* (plaintiff's burden). A signed acknowledgment of service is prima facie evidence of valid service. *See O'Brien v. R.J. O'Brien & Assocs., 998 F.2d 1394, 1398 (7th Cir. 1993)* (prima facie evidence). The parties may submit supplemental materials with the motions, including sworn affidavits, exhibits, and oral testimony. *See Travelers Cas. & Sur. Co. v. Telstar Constr. Co., 252 F. Supp. 2d 917, 922-923 (D. Ariz. 2003)* (supplemental materials). If the motions present genuine factual issues the court may hold an evidentiary hearing on the disputed facts. *See Fed. R. Civ. P. 12(d).*

Defects in the form of summons are considered technical and dismissals are generally disfavored unless the defendant demonstrates actual prejudice. *Chan v. Society Expeditions, 39 F.3d 1398, 1404 (9th Cir. 1994)* (dismissal only upon showing of actual prejudice). Similarly, a plaintiff's failure to comply with technical rules governing service of process does not necessarily require dismissal of the plaintiff's claims. *See Borzeka v. Heckler, 739 F.2d 444, 446 (9th Cir. 1984)* (dismissal denied when actual notice coupled with lack of prejudice).

[6] Filing Motion to Dismiss for Failure to State Claim

[a] Examining Purpose of Motion for Failure to State Claim

A defendant may object to the plaintiff's complaint for failing to state a claim on which relief can be granted by filing a motion to dismiss. *Fed. R. Civ. P. 12(b)(6)*. The purpose of the motion is to test the formal sufficiency of the plaintiff's statement of the claim for relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)* . The motion is not a procedure for resolving the facts or merits. Dismissal for failure to state a claim is appropriate only when the plaintiff can prove no set of facts supporting relief. *Bolen v. Dengel (In re Dengel), 340 F.3d 300, 312 (5th Cir. 2003)* (standard for dismissal). However, the Supreme Court has recently held that mere labels, conclusions, or a formulistic recitation of the elements will not be enough to survive a Rule 12(b)(6) motion. *See Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* (only well-pleaded factual allegations are entitled to assumption of veracity in deciding motion to dismiss); *Bell Atlantic v. Twombly, 550 U.S. 544, 555-556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (analyzing Rule 8 pleading requirements); *see also § 4.08[1][a] above*.

Dismissal can be based on an affirmative defense or other bar to relief apparent from the face of the complaint. *See Groten v. California, 251 F.3d 844, 851 (9th Cir. 2001)* (qualified immunity). Dismissal can also be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-534 (9th Cir. 1984)* (citing **Moore's**). However because a Rule 12(b)(6) motion tests the plaintiff's compliance with pleading requirements, in general the motion is viewed with disfavor and is rarely granted. *See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)* (Rule 12(b)(6) motions disfavored).

[b] Considering Judicial Treatment of Defenses Under Rule 9(b)

Allegations of fraud and mistake in a complaint must be stated with particularity. *Fed. R. Civ. P. 9(b)*; *see § 4.14[1] above*. Failure to plead fraud with particularity is not among the defenses set forth in *Fed. R. Civ. P. 12(b)*. However, some courts hold that when an entire complaint or claim is grounded in fraud, a motion to dismiss under Rule 9(b) for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *See, e.g., Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107-1108 (9th Cir. 2003)* (treating dismissals under the two rules in the same manner).

[c] Bringing Rule 12(b)(6) Motion

The defense of failure to state a claim is not waived if not asserted in a motion to dismiss or in the first responsive pleading if a further pleading is permitted. *Fed. R. Civ. P. 12(h)(2)*. The defense also may be made in a pleading permitted or ordered under *Fed. R. Civ. P. 7(a)* in a motion for judgment on the pleadings, and even at trial on the merits. *Fed. R. Civ. P. 12(h)(2)(C)*; *see also § 4.34 below*.

A party is entitled to amend his or her pleadings once as a matter of course at any time before a responsive pleading is served. *Fed. R. Civ. P. 15(a)(1)(A)*. A motion to dismiss is not a responsive pleading under the federal rule governing amendment of pleadings. *Fed. R. Civ. P. 15(a)(1)(A)*. Thus, if a defendant asserts the defense of failure to state a claim in a motion to dismiss rather than an answer, the plaintiff has an absolute right to file an amended complaint without leave of court. *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund, 332 F.3d 1198, 1201 (9th Cir. 2003)* (right to amend before motion decided); *see § 4.36[1] below*.

[d] Examining Court's Determination of Motion

The moving party has the burden of proof. *Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991)* (defendant's burden). In considering the motion, the court must treat all of plaintiff's allegations of material fact as true and construe them in the light most favorable to the plaintiff. *Maduka v. Sunrise Hosp., 375 F.3d 909, 911 (9th Cir. 2004)* (Rule 12(b)(6) standard). Mere conclusory allegations or bare legal conclusions are insufficient to survive a Rule

12(b)(6) motion. *See Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* (only well-pleaded factual allegations are entitled to assumption of veracity in deciding motion to dismiss); *Bell Atlantic v. Twombly, 550 U.S. 544, 555-556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (mere labels, conclusions, or formulistic recitation of elements insufficient); *see also § 4.08[1][a] above*. Generally, dismissal is without prejudice and leave to amend should be granted unless amendment would be futile. *Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003)* (dismissal with prejudice in extraordinary case only); *see also § 4.36[2] below*.

Unlike other Rule 12(b) motions, when ruling on a Rule 12(b)(6) motion to dismiss, if the court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a motion for summary judgment, and it must give the nonmoving party an opportunity to respond. *See Fed. R. Civ. P. 12(b), 56*; *Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 921-922 (9th Cir. 2004)* (conversion of Rule 12(b)(6) to one for summary judgment).

Exception:

A court may consider exhibits attached to the complaint, documents referenced in the complaint that are accepted by the parties as authentic, and matters of public record of which the court may take judicial notice under *Fed. R. Evid. 201. See, e.g., United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)* (consideration of certain materials will not convert 12(b)(6) motion to one for summary judgment).

[7] Filing Motion to Dismiss for Failure to Join Required Party Under Rule 19

[a] Bringing Rule 19 Motion

A defendant challenges a plaintiff's failure to join a required party by filing a motion to dismiss under *Fed. R. Civ. P. 12(b)(7)*. The defense may be raised in any pleading permitted or ordered under *Fed. R. Civ. P. 7(a)*, by a motion for judgment on the pleadings, and even at the trial on the merits. *Fed. R. Civ. P. 12(h)(2)(A)-(C). See Gonzalez v. Cruz, 926 F.2d 1, 5 n.6 (1st Cir. 1991)* (trial or appellate court may raise *sua sponte*). Supplemental materials may be submitted and a hearing held to determine the issues. *Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990)* (Rule 12(b)(7) motion is fact intensive); *see also § 4.41[2] below*.

[b] Examining Court's Determination of Motion

The moving party bears the burden of producing evidence to support the motion, and the burden of persuasion in showing that dismissal is necessary. *Shermoen v. United States, 982 F.2d 1312, 1317 (9th Cir. 1992)* (burden of proof).

In deciding the motion, the court performs a two-step analysis under Rule 19 to determine whether an action can proceed without the absent party. First, the court must determine if the absentee is a necessary party who must be joined if joinder is feasible. *Fed. R. Civ. P. 19(a)(1)*; *Clinton v. Babbitt, 180 F.3d 1081, 1088 (9th Cir. 1999)* (necessary party if complete relief cannot be afforded without joinder). If the absentee is a necessary party who cannot be joined, the court must determine whether the action can proceed with the existing parties, or whether it must be dismissed. *Fed. R. Civ. P. 19(b)*. In making the determination, the court considers the following:

1. The extent to which a judgment rendered in the person's absence might be prejudicial to the person or to those persons who are already parties;

2. The extent to which, by protective provisions in the judgment, by shaping relief, or through other measures, the court can lessen or avoid prejudice;

3. Whether a judgment rendered in the person's absence will be adequate; and

4. Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

See Fed. R. Civ. P. 19(b); *Schnabel v. Lui, 302 F.3d 1023, 1029-1030 (9th Cir. 2002)* (factors); *see also § 4.41[2] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 12.30 -12.35, 111.04*.
- *Bender's Federal Practice Forms* Form Nos. 12:10-12:13, 12:40-12:45, 12:60-12:62, 12:80-12:83, 12:90, 12:130.
- *Federal Litigation Guide* Ch. 3.
- *Fed. R. Civ. P. 7* (pleadings allowed; form of motions).
- *Fed. R. Civ. P. 12* (defenses and objections).
- *Fed. R. Civ. P. 15* (amended and supplemental pleadings).
- *Fed. R. Civ. P. 19* (joinder of persons needed for just adjudication).
- *Fed. R. Civ. P. 41* (voluntary dismissal).
- *Moore's AnswerGuide: Federal Civil Motion Practice* Chs. 3, 4.
- *Bell Atlantic v. Twombly, 550 U.S. 544, 555-556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (analyzing Rule 8 pleading requirements and effect on Rule 12(b)(6) motion to dismiss).
- *Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* (reinterpreting pleading standards set out in *Twombly*, and holding that only well-pleaded factual allegations are entitled to assumption of veracity in deciding motion to dismiss).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss



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Chapter 4 PLEADING STAGE
PART D: ANSWERS AND RESPONSIVE MOTIONS UNDER RULE 12

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.33

§ 4.33 Filing Motions to Clarify Pleadings

[1] Bringing Motion for More Definite Statement

When a complaint is so vague or ambiguous that the defendant cannot reasonably frame a responsive pleading, the defendant may move for a more definite statement before interposing an answer. *Fed. R. Civ. P. 12(e)*. Failure to assert the motion in an initial Rule 12 motion may result in waiver. *Fed. R. Civ. P. 12(g)(2)*; *see § 4.32[1][b] above*.



Strategic Point:

A motion for a more definite statement may be appropriate in cases asserting fraud or mistake under Rule 9(b). *See § 4.14[1] above*. If a plaintiff fails to plead these allegations with particularity, a motion for more definite statement is in order. The motion may be combined with a motion under Rule 12(b)(6) to dismiss for failure to state a claim. *See § 4.32[6] above*.

The motion is generally disfavored as a delaying tactic, and if the moving party can obtain the missing detail through discovery, the court will deny the motion. *Davison v. Santa Barbara High Sch. District, 48 F. Supp. 2d 1225, 1228 (C.D. Cal. 1998)* (discovery rules exist for that purpose).

If the court grants a motion for more definite statement, it typically will order the plaintiff to file an amended complaint within 14 days after notice of the order, or within the time fixed by the court. *Fed. R. Civ. P. 12(e)*. If the plaintiff fails to obey the order, the court may strike the complaint to which the motion was directed or may make any other orders it deems just. *Fed. R. Civ. P. 12(e)*; *see McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996)* (dismissal of complaint). Within 14 days after the plaintiff serves the amended complaint in response to the court's order, the defendant must serve a responsive pleading. *See Fed. R. Civ. P. 12(a)(4)(B)*.

[2] Bringing Motion to Strike Improper Material in Complaint

A defendant may attack any redundant, immaterial, impertinent, or scandalous matter in the plaintiff's complaint by filing a motion to strike the matter from the pleading. *Fed. R. Civ. P. 12(f)*.

The defendant must assert a motion to strike before responding to a pleading or within 21 days after service of the pleading if a response is not permitted or the motion may be waived. *Fed. R. Civ. P. 12(f)(2).*

In addition, the defendant may waive the right to file a motion to strike by filing a pre-answer Rule 12 motion on other grounds without including a motion to strike. *Fed. R. Civ. P. 12(g)(2)*; *see also § 4.32[1][c] above*.

A plaintiff may assert a motion to strike any insufficient or immaterial defense in a defendant's answer. Counsel must file a motion to strike a defense in an answer within 21 days after service of the answer. *Fed. R. Civ. P. 12(f)(2)*; *see also § 4.31[3] above*. The court may also issue a motion to strike on its own initiative at any time. *See Fed. R. Civ. P. 12(f)(1).*

Motions to strike are generally viewed with disfavor and generally will not be granted unless the material to be stricken is somehow prejudicial to presentation of the merits of the case. *Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003)* (motion to strike viewed as delaying tactic).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 12.36, 12.37.*
- *Bender's Federal Practice Forms* Form Nos. 12:171, 12:175, 12:176, 12:190, 12:191.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 12* (defenses and objections).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral Overview



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Chapter 4 PLEADING STAGE
PART D: ANSWERS AND RESPONSIVE MOTIONS UNDER RULE 12

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.34

§ 4.34 Filing Motion for Judgment on Pleadings

[1] Bringing Rule 12(c) Motion

After the pleadings are closed, any party may move for judgment on the pleadings. *Fed. R. Civ. P. 12(c)*; *Oneida Indian Nation v. City of Sherrill, 337 F.3d 139, 170-171 (2d Cir. 2003)* (timing of motion).

The motion is designed to test the legal sufficiency of the pleader's claims. *Church v. GMC, 74 F.3d 795, 798 (7th Cir. 1996)* (purpose of motion). A party moving for summary judgment asserts that, based on the existing record, no genuine dispute as to any material fact exists and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. In contrast, a motion for judgment on the pleadings contends that the moving party is entitled to judgment based on the pleadings alone; the court considering a motion on the pleadings is limited to an examination of the sufficiency of the pleadings. *Fed. R. Civ. P. 12(c)*.

[2] Examining Court's Determination of Motion

The standard governing a motion for judgment on the pleadings under *Fed. R. Civ. P. 12(c)* is essentially the same as that governing a motion to dismiss for failure to state a claim. *See § 4.32[6] above*. A motion for judgment on the pleadings will be granted only if, accepting as true all material allegations contained in the nonmoving party's pleadings, the moving party is entitled to judgment as a matter of law. *Torbet v. United Airlines, Inc., 298 F.3d 1087, 1089 (9th Cir. 2002)* (standard for granting motion).

As with Rule 12(b)(6) motions, if the court considers evidence outside the pleadings, it must normally convert the Rule 12(c) motion into a motion for summary judgment, and it must give the nonmoving party an opportunity to respond. *See Fed. R. Civ. P. 12(b), 56*; *Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 921-922 (9th Cir. 2004)* (conversion of Rule 12(b)(6) to one for summary judgment); *see also § 4.32[6][d] above*.

Exception:

A court may consider exhibits attached to the complaint, documents referenced in the complaint that are accepted by the parties as authentic and matters of public record of which the court may take judicial notice under *Fed. R. Evid. 201*. *See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)* (consideration of certain materials do not convert motion to one for summary judgment); *Chambers v.*

Time Warner, Inc., 282 F.3d 147, 152-153 (2d Cir. 2002) (same); *Venture Assocs. Corp. v. Zenith Data Systems Corp., 987 F.2d 429, 431 (7th Cir. 1993)* (same); *see also § 4.15 above*.

When granting a motion on the pleadings, the court may grant leave to amend. The court may also dismiss causes of action rather than grant judgment. *Lonberg v. City of Riverside, 300 F. Supp. 2d 942, 945 (C.D. Cal. 2004)* (dismissal instead of judgment within discretion of court); *see also § 4.36[3] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.38*.
- *Bender's Federal Practice Forms* Form Nos. 12:140-12:144.
- *Weinstein's Federal Evidence (2d Ed.)* Ch. 201.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Fed. R. Civ. P. 12* (defenses and objections).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview



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Chapter 4 PLEADING STAGE
PART E: AMENDING AND SUPPLEMENTING PLEADINGS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.35

§ 4.35 Checklist for Amending and Supplementing Pleadings

☐ Party's checklist if amending pleadings before trial. *See § 4.36 below.*

○ Amend once as of right before responsive pleading served or within time limit if no responsive pleading required. *Fed. R. Civ. P. 15(a)(1)(A), (B).*

○ Consider that responsive pleadings do not include pre-trial motions or other papers not listed in Rule 7(a).

○ After responsive pleading filed or time limit, amend only with written consent of adverse party or leave of court. *Fed. R. Civ. P. 15(a)(2).*

○ If court dismisses case with prejudice, show cause as provided in Rules 59 or 60 to obtain relief from judgment in order to amend. *See Fed. R. Civ. P. 59(e), 60(b).*

○ Consider that after summary judgment motion filed, leave to amend only granted in exceptional circumstances.

○ Prepare amended complaint that completely supersedes original complaint.

☐ Determine if there are issues as to whether amendment relates back to filing date of original pleading. *Fed. R. Civ. P. 15(c)(1). See § 4.37 below.*

○ If proposed amended pleading adds claims or parties, determine whether statute of limitations has run with respect to those claims or parties and if relation back is permitted by law that provides statute of limitations applicable to action. *Fed. R. Civ. P. 15(c)(1)(A).*

- ○ If relation back available, determine if amended pleading arose out of same conduct, transaction, or occurrence set forth or attempted to be set forth in original pleading. *Fed. R. Civ. P. 15(c)(1)(B).*

- ○ If amendment changed parties or party names, determine if notice and knowledge requirements met within time limit. *Fed. R. Civ. P. 4(m), 15(c)(1)(C).*

☐ Determine when to amend pleadings to conform to evidence. *Fed. R. Civ. P. 15(b). See § 4.38 below.*

- ○ Consider that no amendment necessary if issues tried by express or implied consent of parties. *Fed. R. Civ. P. 15(b)(2).*

- ○ Move to amend if evidence objected to at trial as outside scope of pleadings. *Fed. R. Civ. P. 15(b)(1).*

- ○ Consider that such amendment may be made on motion of any party at any time, even after judgment. *Fed. R. Civ. P. 15(b)(2).*

☐ Determine if supplemental pleading is needed to add new claims or counterclaims that have arisen after original pleading or to add parties when joined persons participated in subsequent events giving rise to supplemental pleading. *Fed. R. Civ. P. 15(d)*; *see § 4.39 below.*

☐ **Search by Topic:**

- ○ Civil Procedure > Pleading and Practice > Amended Pleadings

- ○ Civil Procedure > Pleading and Practice > Supplemental Pleadings

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 4 PLEADING STAGE
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.36

§ 4.36 Amending Pleadings Before Trial

[1] Amending Without Leave Before Responsive Pleading Is Served

A party may amend its pleading once "as a matter of course," that is, unilaterally, without court permission or consent of opposing parties, at any time before a responsive pleading is served. *Fed. R. Civ. P. 15(a)(1)(A).*

If a party's pleading is one to which no responsive pleading is permitted, and if the action has not been placed on the trial calendar, a party may amend its pleading at any time within 21 days after serving it. *Fed. R. Civ. P. 15(a)(1)(B).* The amending party need not file a motion for leave to amend. Filing and serving the amended pleading is sufficient. The court must accept the amendment. *Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995)* (refusal is abuse of discretion).

Exception:

When a plaintiff seeks to join additional defendants after removal, and when the joined parties' presence would destroy diversity jurisdiction, the court has discretion to either deny joinder or permit joinder and remand the action to state court. *28 U.S.C. § 1447(e)*; *see Lyster v. First Nationwide Bank Fin. Corp., 829 F. Supp. 1163, 1165 (N.D. Cal. 1993)* (Rule 15 cannot be used to deprive court of jurisdiction over removed action); *see also § 4.06[3] above.*

The right to amend a pleading ceases with the service of a "responsive pleading." *Fed. R. Civ. P. 15(a)(1)(A).* Responsive pleadings include an answer to a complaint, a reply to a counterclaim, an answer to a crossclaim, an answer to a third-party complaint, and may also include a reply to an answer or to a third-party answer, if ordered by the court. *See Fed. R. Civ. P. 7(a).* Responsive pleadings do not include pre-trial motions and other papers not listed in Rule 7. *See, e.g., McKinney v. Irving Indep. Sch. Dist., 309 F.3d 308, 315 (5th Cir. 2002)* (motion to dismiss is not responsive pleading); *see also § 4.32 above.* If only some defendants have answered, the plaintiff may amend the claims against the non-answering parties "as a matter of course," but must obtain leave with respect to the others. *See Barksdale v. King, 699 F.2d 744, 746-747 (5th Cir. 1983)* (error not to accept amendment as to non-answering defendants).

[2] Amending with Leave or Consent Required After Responsive Pleading

After a responsive pleading is served, a party may amend its pleading only with leave of court or by written consent of

the adverse party. *Fed. R. Civ. P. 15(a)(2)*. Local rules should be consulted for requirements regarding written stipulations.

The liberal amendment policy of Rule 15 requires that the court "freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. The policy strongly favoring granting leave to amend applies equally to amendments to add new parties, amendments to add new claims, and amendments to add omitted counterclaims. *Fed. R. Civ. P. 13(f)*. *See § 4.45 below*.

In the absence of some identifiable justification, it is an abuse of discretion to deny leave to amend. *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* (factors considered include undue delay, bad faith, dilatory motive, and futility of amendment).

Whether the proposed amendment will prejudice the opposing party is the most important factor in determining whether to grant leave to amend. Prejudice might occur if an opposing party will need to bear significant additional expense or will suffer significant delays in the resolution of the dispute, because the addition of claims or parties increases the scope and complexity of the litigation or because the amendment will require the court to reopen discovery. *See, e.g., Ackerman v. Northwestern Mut. Life Ins. Co., 172 F.3d 467, 471 (7th Cir. 1999)* (amendment to add party would destroy diversity); *Bell v. Allstate Life Ins. Co., 160 F.3d 452, 455 (8th Cir. 1998)* (lack of diligence in moving to amend would require reopening discovery).

Delay alone is insufficient justification but delay will justify denial of leave to amend when it causes prejudice, shows bad faith, or precludes full consideration of the possible futility of the proposed amendment. *See Bowles v. Reade, 198 F.3d 752, 758-759 (9th Cir. 1999)* (specific findings required). If a party seeks to amend after the deadline set by the court's scheduling order, good cause must be shown before amendment will be allowed. *Fed. R. Civ. P. 16(b)(4)*; *see Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000)* (after deadline Rule 16 governs over Rule 15).

An amendment that is legally insufficient is futile and should not be permitted even if there is no prejudice or delay. *See State of Cal. v. Neville Chem. Co., 358 F.3d 661, 673-674 (9th Cir. 2004)* (futility includes inevitable defeat on summary judgment).The court's discretion to deny a futile amendments particularly broad when the plaintiff has been given leave to amend previously. *Miller v. Yokohama Tire Corp., 358 F.3d 616, 622 (9th Cir. 2004)* (no written findings necessary to support denial when complaint previously amended and further amendment futile).

Generally, a denial of leave to amend without any explanation by the district court is an abuse of discretion and subject to reversal. *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* (court should state grounds for denial). However reversal is not required when a valid ground is apparent from the record. *Jet, Inc. v. Sewage Aeration Sys., 165 F.3d 419, 425 (6th Cir. 1999)* (futility apparent).



Strategic Point:

The defendant may move to strike the amended pleading under *Fed. R. Civ. P. 12(f)* if:

(1) The plaintiff failed to obtain the required leave of court. *See Vasquez v. Johnson County Hous. Coalition, Inc., 2003 U.S. Dist LEXIS 10786, at *2-*3 (D. Kan. 2003)* (motion granted); or

(2) The plaintiff has amended in a manner not authorized by an order granting leave. *See, e.g., Ambrose Packaging, Inc. v. FlexSol Packaging Corp., 2004 U.S. Dist LEXIS 18645, at *8-*10 (D. Kan. 2004)* (motion granted).

However, Rule 12(f) motions are disfavored and the motion should only be made if the defendant can demonstrate prejudice, bad faith, or that undue delay will result. *See, e.g., Sapiro v. Encompass Ins., 221 F.R.D. 513, 517-518 (N.D. Cal. 2004)* (motion denied); *see also § 4.33[2] above*.

[3] Amending After Dismissal

A party may amend a pleading as of right after dismissal provided no responsive pleading was filed and no final judgment was rendered. *See Mirpuri v. ACT Mfg., Inc., 212 F.3d 624, 628-629 (1st Cir. 2000)* (after final judgment district court lacked jurisdiction to permit amendment). Generally, an order dismissing a complaint is not a final judgment or a final, appealable order unless circumstances make it clear that the court concluded that the action could not be saved by any amendment. *Rothner v. Chicago, 929 F.2d 297, 300 (7th Cir. 1991)* (appellate court evaluates dismissal as a whole to determine lower court's intent); *see § 4.32[6][d] above*.

If a court dismisses a complaint with prejudice and without leave to amend, or if the court makes some similar dismissal order that is a final judgment, the pleader must show cause as provided in Rules 59 or 60 to obtain relief from the judgment in order to be allowed to amend. *See Fed. R. Civ. P. 59(e), 60(b); see, e.g., Confederate Memorial Ass'n v. Hines, 995 F.2d 295, 299 (D.C. Cir. 1993)* (after entry of judgment, appellants could amend the complaint only by leave or written consent under Rule 15(a) coupled with a motion under Rule 59(e) to alter or amend the judgment).

[4] Amending After Summary Judgment

The filing of a summary judgment motion impedes the right to amend by the party opposing the motion. Granting leave to amend after summary judgment is within the discretion of the trial court, but a court ordinarily will be reluctant to do so, as the court may consider amendment untimely. *Schlacter-Jones v. General Tel. of Cal., 936 F.2d 435, 443 (9th Cir. 1991) , overruled in part on other grounds, Cramer v. Consolidated Freightways, Inc., 255 F.3d 683, 692 (9th Cir. 2001)* ("A motion for leave to amend is not a vehicle to circumvent summary judgment"). Because amendment at this stage of proceedings may be nothing more than a maneuver to avoid an inevitable ruling on summary judgment, leave to amend may be denied unless the party seeking to amend makes a substantial factual showing of the allegations set out in the proposed amendment. *See Cowen v. Bank United of Tex., 70 F.3d 937, 944 (7th Cir. 1995)* (factual showing required).

Except in exceptional circumstances, a party may not have summary judgment set aside in order to amend the pleadings and have the case proceed on some other legal theory. *Nguyen v. United States, 792 F.2d 1500, 1503 (9th Cir. 1986)* (new theory would undermine summary judgment proceedings).

[5] Responding to Amended Pleading

Although a responsive pleading is not required, due process requires a right to notice of the amended pleading and an opportunity to respond. *See Fed. R. Civ. P. 15(a)(3); Nelson v. Adams U.S.A Inc., 529 U.S. 460, 465-466, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000)* (fundamental due process).

A party must plead in response to an amended pleading within the time remaining for response to the previous pleading or within 14 days after service of the amended pleading, whichever is longer, unless the court orders otherwise. *Fed. R. Civ. P. 15(a)(3); see also § 4.31 above*.

[6] Effect of Amended Pleading

An amended pleading, whether by right or by leave of court, supersedes the original pleading. Claims alleged in the previous pleading but not included in the amendment are waived. *See Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.), 226 F.3d 160, 162 (2d Cir. 2000)* (original pleading has no effect); *King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987)* (waiver).

A party not named in an amended pleading will not be bound by the judgment. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1989)* (irrelevant party was named in original complaint).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 15.10 -15.12, 59.30 -59.32, 60.40, 202.01 -202.05.*
- *Bender's Federal Practice Forms* Form Nos. 15:1-15:3, 15:30-15:32, 15:43, 15:44.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 15* (amended and supplemental pleadings).
- *Fed. R. Civ. P. 59* (new trials; amendments of judgments).
- *Fed. R. Civ. P. 60* (relief from judgment or order).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral Overview



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Chapter 4 PLEADING STAGE
PART E: AMENDING AND SUPPLEMENTING PLEADINGS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.37

§ 4.37 Examining Relation Back of Amendments

[1] Considering Relation Back as Permitted by Law Governing Statute of Limitations

An amendment of a pleading relates back to the date of filing of the original pleading when relation back is permitted by the law that provides the statute of limitations applicable to the action. *Fed. R. Civ. P. 15(c)(1)(A)*; *see Saxton v. ACF Indus. Inc., 254 F.3d 959, 962-964 (11th Cir. 2001)* (Rule 15(c)(1)(A) incorporates the relation-back rules of the law of a state when that state's law provides the applicable statute of limitations).

Accordingly, if the applicable limitations law, whether state or federal, affords a more forgiving principle of relation back than is provided in the other subdivisions of Rule 15, that law is available to save the claim. *Fed. R. Civ. P. 15*, Committee Note of 1991.

[2] Considering When Amendment Is Transactionally Related to Original Claims

An amendment of a pleading relates back to the date of filing of the original pleading when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. *Fed. R. Civ. P. 15(c)(1)(B). See Martell v. Trilogy, Ltd., 872 F.2d 322, 325 (9th Cir. 1989)* (original and amended pleadings must share "common core of operative facts").

This basis for relation back applies when a party seeks to add a new claim or defense against an existing party to ensure that the original defendant had sufficient notice of the new claim. Accordingly, in determining whether the claims are transactionally related, a court will consider whether the facts pleaded to support the original claim gave the defendant fair notice of the transaction or occurrence underlying the claim added by the amendment. *In re Dominguez v. Miller, 51 F.3d 1502, 1510 (9th Cir. 1995)* (claims sufficiently related when relied on same evidence).

When the original pleading fails to provide adequate notice of the claims, it cannot support relation back of the amended pleading. *Mayle v. Felix, 545 U.S. 644, 650, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)* (relation back denied when facts supporting amended complaint were distinct in time and type).

[3] Considering When Amendment Changes Parties or Names of Parties

An amendment adding or renaming parties relates back only if all of the following circumstances exist:

1. The claim asserted in the amended complaint arose out of the conduct, transaction, or occurrence described in the original complaint;

2. Within 120 days after filing the amendment, the defendant named in the amendment has received notice of the action so as not to be prejudiced in maintaining a defense on the merits; and

3. Within 120 days after filing the amendment, the defendant named in the amendment knew or should have known that the action would have been brought against it but for a mistake concerning identification.

Fed. R. Civ. P. 15(c)(1)(C); *see Fed. R. Civ. P. 4(m)* (120-day period for serving summons and complaint); *see also § 4.19 above*.

The party to be brought in by amendment must receive notice of the action so that the party will not be prejudiced in maintaining a defense on the merits. *Fed. R. Civ. P. 15(c)(1)(C)(i)*. Notice will be found when there is sufficient "community of interest" between the originally named party and the party named in the amendment to justify imputing knowledge of the action from the former to the latter. *See G.F. Co. v. Pan Ocean Shipping Co., 23 F.3d 1498, 1502-1503 (9th Cir. 1994)* (related entities); *Barkins v. International Inns, Inc., 825 F.2d 905, 907 (5th Cir. 1987)* (shared attorney).

Relation back also requires that the party to be brought in by amendment knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the new party. *Fed. R. Civ. P. 15(c)(1)(C)(ii)*; *see Nelson v. Adams U.S.A Inc., 529 U.S. 460, 467 n.1, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000)* (knowledge of mistake in identity required). "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)* . If the plaintiff fails to amend the complaint in a timely fashion, the unnamed party may conclude it was not named for tactical reasons and therefore defeat relation back of a later amendment. *See G.F. Co. v. Pan Ocean Shipping Co., 23 F.3d 1498, 1503-1504 (9th Cir. 1994)* (failure to amend after notification of mistake).

Circuit Split:

Circuits are split on whether an amended federal claim relates back if the identity of the defendant was unknown to the claimant at the time of the initial filing. Most courts hold that the relation back doctrine applies only if there was a mistaken identification of the defendant by the plaintiff. Thus when a plaintiff names a "Doe" defendant, the doctrine does not apply. *See, e.g., Wayne v. Jarvis, 197 F.3d 1098, 1102-1104 (11th Cir. 1999)* (lack of knowledge is not a "mistake" under Rule 15). The Third Circuit, however, permits lack of knowledge to be a "mistake" under Rule 15(c) if notice of the claim can be imputed to the substituted defendant by shared representation or through identity of interest. *See Arthur v. Maersk, Inc., 434 F.3d 196, 207-209 (3d Cir. 2006)* (irrelevant that mistake arose from lack of knowledge); *see also § 4.05 above*.

Exception:

Relation back with respect to "Doe" defendants is allowed when state law provides the statute of limitations and that law would allow relation back regardless of mistake issue. *Fed. R. Civ. P. 15(c)(1)(A)*; *see also § 4.05 above*.

The notice and knowledge requirements for relation back must be met within the Rule 4(m) time limit for service of the summons and complaint. *Fed. R. Civ. P. 4(m)*, *15(c)(1)(C)*; *see § 4.19 above*. This provision of Rule 15 includes both the nominal 120-day period and any extension of it granted by the court. *See Fed. R. Civ. P. 15*, Committee Note of 1991.

In suits against the United States or one of its corporations, agencies, or officers, notice to any one of those parties satisfies the notice requirement of Rule 15(c) if plaintiff later amends to change governmental defendants. *Fed. R. Civ. P. 15(c)(2)*; *see also § 4.22[4] above*.



Strategic Point:

Rule 15(c)(1)(C) applies to amendments changing a party "against whom a claim is asserted" and, therefore, does not explicitly apply to amendments adding plaintiffs. But a newly added plaintiff may take advantage of the relation back provision if all of the requirements for the rule are met. There must be an identity of interests between the original and newly added plaintiffs such that defendant had notice of the new plaintiff's claims and would not be surprised or prejudiced by their assertion. *See Young v. Lepone, 305 F.3d 1, 14-16 (1st Cir. 2002)* (mere filing of original complaint does not give defendant notice of impending joinder of similarly situated plaintiff).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 15.19*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 4* (summons).
- *Fed. R. Civ. P. 15* (amended and supplemental pleadings).
- *Krupski v. Costa Crociere S.p.A., -- U.S. --, 130 S. Ct. 2485, 177 L. Ed. 2d 48, 57 (2010)* (Rule 15(c)(1)(C)(ii) asks what the prospective defendant knew or should have known during the Rule 4(m) period, not what plaintiff knew or should have known when filing original complaint).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation Back



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Chapter 4 PLEADING STAGE
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.38

§ 4.38 Amending Pleadings to Conform to Evidence

Issues tried by express or implied consent of the parties, must be treated in all respects as if they had been raised in the pleadings; a failure to amend does not affect the result at trial. *Fed. R. Civ. P. 15(b)(2)*. An amendment conforming the pleadings to the evidence may be made on motion of any party at any time, even after judgment. *Fed. R. Civ. P. 15(b)(2)*; *see Galindo v. Stoody Co., 793 F.2d 1502, 1513 (9th Cir. 1986)* (amendment permitted post-trial). When evidence is objected to at trial as outside the scope of the pleadings, the partying offering the evidence must move to amend and leave is to be freely given if in the interests of justice and there is no prejudice to the objecting party. *Fed. R. Civ. P. 15(b)(1)*; *Green Country Food Mkt., Inc. v. Bottling Group, LLC, 371 F.3d 1275, 1280-1281 (10th Cir. 2004)* (motion required on objection).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 15.18*.
- *Bender's Federal Practice Forms* Form Nos. 15:90, 15:91.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 15* (amended and supplemental pleadings).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to Evidence



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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.39

§ 4.39 Supplementing Pleadings

Supplemental pleadings are limited to the presentation of subsequent matter related to the claims or defenses in the original pleading. *Fed. R. Civ. P. 15(d).* A supplemental pleading may be used to add new claims or counterclaims that have arisen after the original pleading or to add parties when the joined persons participated in the subsequent events giving rise to the supplemental pleading. *See Fed. R. Civ. P. 13(e)* (counterclaims); *Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 227, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964)* (parties); *Keith v. Volpe, 858 F.2d 467, 473-474 (9th Cir. 1988)* (claims); *see also § 4.45[2][a] below.* Permission to supplement may be granted even though the original pleading is defective in its statement of a claim for relief or defense. *Fed. R. Civ. P. 15(d).*

Supplemental pleadings are permissive with the parties and discretionary with the court. The failure to supplement an action with claims that have arisen since the action was filed does not create a bar to filing those claims in a future suit. *Baker Group, L.C. v. Burlington N. & Santa Fe Ry. Co., 228 F.3d 883, 886 (8th Cir. 2000)* (no res judicata bar); *SEC v. First Jersey Sec. Inc., 101 F.3d 1450, 1464-1465 (2d Cir. 1996)* (same).

Leave of court is required to file a supplemental pleading. *Fed. R. Civ. P. 15(d).* Courts have broad discretion, but allowing supplementation is favored in the interest of judicial economy and convenience. *See Keith v. Volpe, 858 F.2d 467, 476 (9th Cir. 1988)* (supplemental pleadings favored).

Circuit Split:

Circuits are split on whether leave to supplement should be judged under the same liberal policy as leave to amend under Rule 15(a). *See Glatt v. Chicago Park Dist., 87 F.3d 190, 194 (7th Cir. 1996)* (Rule 15(a) standard applies); *but see Burns v. Exxon Corp, 158 F.3d 336, 343 (5th Cir. 1998)* (Rule 15(d) contains no language explicitly requiring that leave be given "freely"); *see also § 4.36[2] above.*

Rule 15(c)(1), which governs relation back, speaks only of the relation back of "amendments," and does not refer to supplemental pleadings. *See Fed. R. Civ. P. 15(c)(1).* Nonetheless, particularly because the distinction between supplemental pleadings and amended pleadings is often tenuous, courts have applied the relation back standards of Rule 15(c) to supplemental as well as to amended pleadings. *See FDIC v. Knostman, 966 F.2d 1133, 1138 (7th Cir. 1992)* (applying relation back doctrine); *see also § 4.37 above.*

A party is not entitled to respond to a supplemental pleading as a matter of course, but only if the court orders one within a specified time. *Fed. R. Civ. P. 15(d)*; *see also § 4.31 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 15.30*.
- *Bender's Federal Practice Forms* Form No. 15:100.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 15* (amended and supplemental pleadings).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental Pleadings



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Chapter 4 PLEADING STAGE
PART F: ADDING, DROPPING, AND SUBSTITUTING PARTIES

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.40

§ 4.40 Checklist for Adding, Dropping and Substituting Parties

☐ Determine whether to add party to existing action. *See § 4.41 below.*

- ○ Consider procedural mechanisms available to add party. *Fed. R. Civ. P. 15(a), 19-21. See § 4.41[1] below.*
- ○ Determine if compulsory joinder is applicable. *Fed. R. Civ. P. 19. See § 4.41[2] below.*
- ○ Determine if permissive joinder is allowed. *Fed. R. Civ. P. 20. See § 4.41[3] below.*

☐ Determine if grounds exist to drop existing party by motion, amendment, or court initiative, or if severance of claim is appropriate. *Fed. R. Civ. P. 15(a), 21. See § 4.42 below.*

☐ Determine whether grounds exist for substitution of party, and if appropriate, file motion for substitution. *Fed. R. Civ. P. 25. See § 4.43 below.*

☐ **Search by Topic:**

- ○ Civil Procedure > Parties > Joinder
- ○ Civil Procedure > Parties > Substitutions

Legal Topics:

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

Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral Overview



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Chapter 4 PLEADING STAGE
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1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.41

§ 4.41 Adding Persons as Parties to Existing Action

[1] Examining Procedural Mechanisms for Joining Parties

Procedural mechanisms available for joining parties under the Federal Civil Rules include the following:

1. The plaintiff may join at the time of filing the complaint all persons who are proper parties under permissive joinder. *Fed. R. Civ. P. 20(a)*;

2. Any current party may move to add a party through an amendment to the pleadings. *Fed. R. Civ. P. 15(a)*;

3. The court may order the addition of a party on motion or of its own initiative at any stage of the action, including after judgment on appeal. *Fed. R. Civ. P. 21*; *California Credit Union League v. City of Anaheim, 190 F.3d 997, 1001 (9th Cir. 1999)* (adding party on appeal);

4. The defendant can opt to implead third-party defendants. *See Fed. R. Civ. P. 14(a)*; and

5. The defendant can opt to move for joinder of persons needed for just adjudication. *See Fed. R. Civ. P. 19*.

A defendant who files a counterclaim or crossclaim is treated as a plaintiff for purposes of permissive party joinder. *See Fed. R. Civ. P. 13(h)*; *see §§ 4.45*, *4.49 below*.

A motion to intervene is the proper procedure for a nonparty to enter existing litigation. *See Fed. R. Civ. P. 24*; *Hutchinson v. Pfeil, 211 F.3d 515, 518 (10th Cir. 2000)* (intervention); *Thompson v. Boggs, 33 F.3d 847, 858 n.10 (7th Cir. 1994)* (Rule 21 motion by existing party only); *see also § 4.59 below*.

When a person is added as a party, the court may grant judgment in favor of each added plaintiff according to the plaintiff's respective rights to relief, and against each added defendant according to the defendant's respective liabilities. *Fed. R. Civ. P. 20(a)(3)*.

[2] Examining Compulsory Joinder Under Rule 19

When a motion is made under Rule 19 to compel joinder of an absent party, the court must first determine if the absentee is a necessary party by examining the following:

1. Whether in the person's absence, complete relief cannot be accorded among existing parties; or

2. Whether the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may:

(a) as a practical matter impair or impede the person's ability to protect that interest; or

(b) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the absentee's claimed interest.

Fed. R. Civ. P. 19(a)(1).

If the absent party falls within any of these categories, but is not subject to service of process, or if the absentee's joinder would destroy diversity, the court must determine whether in equity and good conscience the action should proceed among the parties without the absent party, or in the alternative, be dismissed. *See EEOC v. Peabody W. Coal Co., 400 F.3d 774, 779 (9th Cir. 2005)* (determining parties required to be joined under Rule 19). Factors the court considers are the following:

1. The extent to which a judgment rendered in the person's absence might be prejudicial to the absent person or those already parties;

2. The extent to which the prejudice could be lessened or avoided by protective provisions in the judgment, by the shaping of relief, or by other measures;

3. Whether a judgment rendered in the person's absence will be adequate; and

4. Whether the plaintiff would have an adequate remedy if the action is dismissed.

Fed. R. Civ. P. 19(b).

If the court determines that the action cannot proceed to judgment without the absent party, the court will dismiss the action. *See United States ex rel. Hall v. Tribal Dev. Corp., 100 F.3d 476, 478 (7th Cir. 1996)* (dismissal under Rule 19); *see § 4.32[7] above.*

Warning:

While the failure to join a required party may be raised by motion to add a party under Rule 21, the nonjoinder of the absentee cannot be cured by ordering addition under that Rule. *Moubry v. Kreb, 58 F. Supp. 2d 1041, 1048 (D. Minn. 1999)* (citing **Moore's**) (Rule 21 discretion is circumscribed by Rule 19(b)).

For further discussion of compulsory joinder, see *§§ 3.14 -3.21 above.*

[3] Examining Permissive Joinder Under Rule 20

Permissive joinder of either plaintiffs or defendants is allowed under Rule 20 if the claims against the prospective party

arise out of the same transaction, occurrence, or series of transactions or occurrences and there is a common question of law or fact. *Fed. R. Civ. P. 20(a)(1), (2).* The court may issue orders, including separate trials, to protect any joined party from embarrassment, delay, expense, or other prejudice. *Fed. R. Civ. P. 20(b).*

For further discussion of permissive joinder, see *§§ 3.08 -3.13 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 19.02, 20.02, 21.02, 21.04 -21.05.*
- *Bender's Federal Practice Forms* Form Nos. 19:3, 20:1, 20:2, 21:20, 21:30.
- *Federal Litigation Guide* Ch. 4.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 19* (joinder of persons needed for just adjudication).
- *Fed. R. Civ. P. 20* (permissive joinder of parties).
- *Fed. R. Civ. P. 21* (misjoinder and nonjoinder of parties).

Legal Topics:

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



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Chapter 4 PLEADING STAGE
PART F: ADDING, DROPPING, AND SUBSTITUTING PARTIES

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.42

§ 4.42 Dropping Parties

[1] Dropping Parties by Motion or Amendment

Any current party may move the court to order a party dropped at any stage of the action and on such terms as are just. *Fed. R. Civ. P. 21.* A party may avoid the necessity of a court order by amending the pleadings to drop a party prior to the filing of a responsive pleading. *Fed. R. Civ. P. 15(a)(1), (2)*; *see also § 4.36 above*.

A party dropped from an action is not subject to any judgment rendered in the action. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1989)* (irrelevant party named in original complaint). Generally an order dropping a party under Rule 21 is without prejudice, unless the court specifies otherwise. *Coughlin v. Rogers, 130 F.3d 1348, 1350 (9th Cir. 1997)* (new claims may be filed).

[2] Dropping Parties Because of Misjoinder

A court by motion or its own initiative may drop a party because of misjoinder. *Fed. R. Civ. P. 21.* Misjoinder occurs when the requirements for permissive joinder are not met. *Fed. R. Civ. P. 20(a)*; *see e.g., Letherer v. Alger Group, LLC, 328 F.3d 262, 267-268 (6th Cir. 2003)* (no relief demanded from party joined as defendant).

The court may not cure misjoinder by dismissing an entire action. *Aaberg v. ACandS Inc., 152 F.R.D. 498, 501 (D. Md. 1994)* (dismissal prohibited). Rule 21 is the procedural device designed to cure a "defect of parties," and is used by the federal court to perfect its diversity jurisdiction by dropping a named, nondiverse party at any time, even after judgment. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 838, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (dismissal of nondiverse party appropriate at any time to preserve jurisdiction); *see also §§ 4.06[3], 4.32[2][d] above*.

[3] Curing Misjoinder by Severance of Claim

The court typically will sever a claim to cure misjoinder, rather than dismissing the party from the action. *Fed. R. Civ. P. 21. See Elmore v. Henderson, 227 F.3d 1009, 1012-1013 (7th Cir. 2000)* (error to dismiss instead of sever claim). The court may sever a claim to further the efficient administration of justice, even in the absence of misjoinder. *See Acevedo-Garcia v. Monroig, 351 F.3d 547, 560 (1st Cir. 2003)* (misjoinder not a prerequisite to Rule 21 severance). For example, the court may sever a claim against a party to facilitate transfer. *See Toro Co. v. Alsop, 565 F.2d 998, 1000*

(8th Cir. 1977) (severance and transfer for *forum non conveniens*).

Severance creates a separate cause of action, and judgment on the severed claim is final and appealable irrespective of the status of the initial action. *See E.S. v. Independent Sch. Dist. No. 196, 135 F.3d 566, 568-569 (8th Cir. 1998)* (judgment on severed claim final). By contrast, separate trials under Rule 42(b) remain part of the original, solitary action. Although two or more separate factual determinations may be made, they are not appealable until judgment is rendered in the action as a whole. *Fed. R. Civ. P. 42(b)*; *see Acevedo-Garcia v. Monroig, 351 F.3d 547, 558-559 (1st Cir. 2003)* (under Rule 42(b) separate trials remain under the umbrella of the original solitary action). For discussion of separate trials, see *§ 5.20 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 21.02 -21.06*.
- *Bender's Federal Practice Forms* Form Nos. 21:2, 21:4, 21:40-21:42.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 21* (misjoinder and nonjoinder of parties).
- *Fed. R. Civ. P. 42* (consolidation; separate trials).

Legal Topics:

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



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Chapter 4 PLEADING STAGE
PART F: ADDING, DROPPING, AND SUBSTITUTING PARTIES

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.43

§ 4.43 Substituting Parties

[1] Examining Procedural Mechanism for Substituting Parties

Rule 25 substitution is a procedural device that applies only when all of the proper parties have been joined in the action and substitution is warranted because of death, incompetency, transfer of interest by a party, or separation of an official from public office. *Fed. R. Civ. P. 25*. The rule does not determine survival of claims after substitution. *See Saylor v. Bastedo, 623 F.2d 230, 238 (2d Cir. 1980)* (the applicable substantive law determines which claims survive).

In a diversity case involving the substantive rights related to substitution of a party, the district court must refer to state law. *See First Idaho Corp. v. Davis, 867 F.2d 1241, 1242-1243 (9th Cir. 1989)* (in diversity case substantive state statute that determines whether a judgment may be entered against a deceased defendant); *see also § 4.06[3] above*.

Rule 25 applies only to changes such as death or transfers of interest occurring during the pendency of the litigation. *Andrews v. Lakeshore Rehab. Hosp., 140 F.3d 1405, 1407 (11th Cir. 2003)* (Rule 25 does not apply to changes occurring before litigation commenced). A substituted party stands in exactly the same position as the original party. *Educational Credit Mgmt. Corp. v. Bernal (In re Bernal), 207 F.3d 595, 598-599 (5th Cir. 2000)* (substituted party subject to all prior orders and rulings).

Substitution does not affect subject matter jurisdiction, diversity of citizenship, personal jurisdiction, and venue. *Minnesota Mining & Mfg. Co. v. Eco-Chem, Inc., 757 F.2d 1256, 1264 (Fed. Cir. 1985)* (venue); *Ransom v. Brennan, 437 F.2d 513, 518-519 (1971)* (subject matter jurisdiction).

[2] Substituting After Party's Death

If a party dies and the claim is not extinguished the court may, on motion, order substitution of the proper party after death is suggested on the record. *Fed. R. Civ. P. 25(a)(1)*. The purpose of a suggestion of death is to inform all interested persons that the party has died and to prevent dismissal due to lack of knowledge. *Unicorn Tales, Inc. v. Banerjee, 138 F.3d 467, 469-470 (2d Cir. 1998)* (suggestion of death). Thus, it must be served on both nonparties and parties. *Fed. R. Civ. P. 25(a)(3)*. The suggestion of death may be made by any person. *Unicorn Tales, Inc. v. Banerjee, 138 F.3d 467, 469-470 (2d Cir. 1998)* (suggestion not limited to appointed representative). But the motion for substitution must be made by the deceased's personal representative. *See Fariss v. Lynchburg Foundry, 769 F.2d 958,*

962 (4th Cir. 1985) (attorney was not representative of deceased for purposes of motion).

Timing:

The court may dismiss the action as to the deceased party if the motion has not been filed within 90 days of the suggestion of death, and the movant does not demonstrate the "excusable neglect" necessary for an extension. *See Russell v. City of Milwaukee, 338 F.3d 662, 665-668 (7th Cir. 2003)* (dismissal proper); *see also § 4.19[2] above*.

The moving party must serve the motion and a notice of hearing on all other parties in the manner provided by Rule 5 and on interested nonparties, including the successors or representatives of the deceased party in the manner provided by Rule 4 for service of a summons. *Fed. R. Civ. P. 25(a)(3)*; *see §§ 4.19 -4.27 above*.

In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death must be suggested on the record and the action must proceed in favor of or against the surviving parties. *Fed. R. Civ. P. 25(a)(2)*.

[3] Substituting Party Because of Incompetency

If a party becomes incompetent during the pendency of the action, the motion provision of Rule 25(a)(3) applies and the court may allow the action to continue by or against the substituted representative for the incompetent party. *Fed. R. Civ. P. 25(b)*. If a party is incompetent when the action is commenced, the court should not dismiss the action. Rather, the court should utilize Rule 17 to protect the interests of incompetent persons by allowing a representative to sue or defend on behalf of the incompetent. *Waldman v. Pediatric Servs. of Am., Inc., 1998 U.S. Dist. LEXIS 17322, at *10-*11 (E.D. Pa. 1998)* ; *see Fed. R. Civ. P. 17(c)(2)*; *see also § 4.17[4] above*.

[4] Substituting Party Because of Transfer of Interest During Pendency of Litigation

If a party to the action transfers an interest that is the subject of the litigation, the court has the following options:

1. Allow the action to continue by or against the original party;

2. On motion, order that the transferee of the interest be substituted in the action; or

3. On motion, order that the transferee of the interest be joined with the original party.

Fed. R. Civ. P. 25(c).

Substitution is generally within the court's discretion, but the substituted party must be a successor in interest to the prior party under applicable substantive law. *See Organic Cow, LLC v. Ctr. for New Eng. Dairy Compact Research, 335 F.3d 66, 71 (2d Cir. 2003)* (citing **Moore's**) (substitution improper when no legal authority for transfer of interest). The action may be continued by or against the original party, and the judgment will be binding on the transferee, even though the transferee is not named. *Educational Credit Mgmt. Corp. v. Bernal (In re Bernal), 207 F.3d 595, 598 (9th Cir. 2000)* (unnamed successor in interest bound).

The moving party must make a motion for substitution in the same manner as under Rule 25(a)(3). *Fed. R. Civ. P. 25(c)*. A Rule 25(c) motion may be made at any time after a transfer of interest occurring after the action is brought. *See American Fiber & Finishing, Inc. v. Tyco Healthcare Group, 362 F.3d 136, 140 (1st Cir. 2004)* (motion after judgment).

[5] Substituting Party After Separation of Public Officer from Office

When a public officer that is a party to an action in an official capacity dies, resigns, or otherwise leaves office, the officer's successor is automatically substituted as a party. *Fed. R. Civ. P. 25(d)*. Consequently, unlike other types of substitution, official capacity substitution does not require the filing of a motion, service, or hearing regarding the substitution. *See Cheney v. United States Dist. Court, 541 U.S. 913, 917-918, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004)* (automatic substitution). If a substituted officer decline to pursue the action, the suit may be dismissed after substitution as moot. *Spomer v. Littleton, 414 U.S. 514, 523, 94 S. Ct. 685, 38 L. Ed. 2d 694 (1974)* (failure to prosecute claim).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 25.10 -25.15*, *25.20*, *25.30 -25.36*, *25.40 -25.42*.
- *Bender's Federal Practice Forms* Form Nos. 25:1-25:4, 25:20, 25:21, 25:50, 25:51, 25:70, 25:90-25:92.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 25* (substitution of parties).

Legal Topics:

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



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Chapter 4 PLEADING STAGE
PART G: COUNTERCLAIMS, CROSSCLAIMS, AND REPLIES

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.44

§ 4.44 Checklist for Counterclaims, Crossclaims, and Replies

☐ Determine if any counterclaims should be pleaded against opposing party. *Fed. R. Civ. P. 13(a), (b). See § 4.45 below.*

- ○ Distinguish between counterclaim and affirmative defense. *Fed. R. Civ. P. 8(c)(2). See § 4.45[1] below.*
- ○ Determine if counterclaim is compulsory. *Fed. R. Civ. P. 13(a)(1)(A), (B). See § 4.45[2] below.*
- ○ Consider that statute of limitations applies to counterclaims. *See § 4.45[3] below.*

☐ Plead all compulsory counterclaims. *Fed. R. Civ. P. 13(a)(2)(A), (B).*

☐ Determine if any crossclaims should be pleaded against coparty. *Fed. R. Civ. P. 13(g). See § 4.46 below.*

- ○ Determine if crossclaim is transactionally related to original claim or counterclaim. *Fed. R. Civ. P. 13(g).*
- ○ Comply with statute of limitations.
- ○ If omitted crossclaim from answer consider whether amendment allowed. *Fed. R. Civ. P. 15(a)(1), (2).*

- Comply with pleading standards, filing, and service requirements. *Fed. R. Civ. P. 5, 8, 12, 13, 38.*

☐ Determine response to counterclaim or crossclaim. *See § 4.47 below.*

- Determine whether to file answer or move to dismiss under Rule 12. *Fed. R. Civ. P. 12(b).*

- Determine whether to bring additional claims as counterclaims in reply to counterclaim or in answer to crossclaim, raising all compulsory counterclaims or waived. *Fed. R. Civ. P. 13.*

- Comply with pleading standards, filing and service requirements. *Fed. R. Civ. P. 5, 8, 12, 13, 38.*

☐ **Search by Topic:**

- Civil Procedure > Pleadings > Counterclaims

- Civil Procedure > Pleadings > Cross Claims

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 4 PLEADING STAGE
PART G: COUNTERCLAIMS, CROSSCLAIMS, AND REPLIES

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.45

§ 4.45 Preparing and Drafting Counterclaims

[1] Distinguishing Counterclaims from Affirmative Defenses

Counterclaims seek relief from an opposing party, while affirmative defenses challenge the plaintiff's legal right to bring an action without seeking to recover damages or other relief. Unlike a defense, a counterclaim may be adjudicated separately from a plaintiff's claim. *Reiter v. Cooper, 507 U.S. 258, 265, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993)* (defense cannot be adjudicated separately). If a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may, if justice requires and on whatever terms prevent prejudice to other parties, treat the pleading as if there had been a proper designation. *Fed. R. Civ. P. 8(c)(2)*; *cf. Dubied Mach. Co. v. Vermont Knitting Co., 739 F. Supp. 867, 871 (S.D.N.Y. 1990)* (court permitted labeling of claim as both counterclaim and affirmative defense); *see also § 4.31[3] above*.

[2] Distinguishing Between Compulsory and Permissive Counterclaims

[a] Examining Which Counterclaims are Compulsory

Rule 13(a) requires that a pleading state every compulsory counterclaim that the pleader has against an opposing party. A compulsory counterclaim (1) arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and (2) does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. *Fed. R. Civ. P. 13(a)(1)*. All other counterclaims are permissive. *Fed. R. Civ. P. 13(b)*.

The courts tend to use a policy-based flexible approach with regard to the factors that should be considered in determining when claims arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. Thus, a "logical relationship" must exist between the claim and counterclaim in issue. *See Pochiro v. Prudential Ins. Co., 827 F.2d 1246, 1249 (9th Cir. 1987)* (liberal "logical relationship" test to determine whether two claims arise out of the same transaction or occurrence). Among the factors courts consider is whether the claims depend on the same operative facts and whether the same evidence can be offered to prove or refute the claims. *See Iglesias v. Mutual Life Ins. Co. of New York, 156 F.3d 237, 241-242 (1st Cir. 1998)* (same "aggregate of operative facts").

A counterclaim is compulsory only if the claim exists at the time that the responsive pleading is served. *Fed. R. Civ. P. 13(a)(1)*; *see § 4.36[1] above*. A claim that matured or was acquired by a party after serving a pleading may, with the

permission of the court, be presented as a counterclaim by supplemental pleading. *Fed. R. Civ. P. 13(e)*; *see, e.g., Harris v. Steinem, 571 F.2d 119, 124 (2d Cir. 1978)* (defamatory statements that are sufficiently related to subject matter of original action are compulsory counterclaims, but defamatory statements made after filing of original complaint are not); *see also § 4.39 above*.

[b] Considering Effect of Omitted Compulsory Counterclaim

Failure to properly plead compulsory counterclaims will generally result in a waiver of those claims. *See Hydranautics v. FilmTec Corp., 70 F.3d 533, 536 (9th Cir. 1995)* (omitted compulsory counterclaim cannot be asserted in a second, separate action after conclusion of the first); *but see Competitive Techs. v. Fujitsu Ltd., 286 F. Supp. 2d 1118, 1140 (N.D. Cal. 2003)* (failure to bring otherwise compulsory counterclaim in a prior administrative pleading not waiver because relief available in administrative proceeding might not be same as that available in judicial proceeding). Thus the primary difference between compulsory and permissive counterclaims is the res judicata bar that applies to omitted compulsory counterclaims. *See Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1, 94 S. Ct. 2504, 41 L. Ed. 2d 243 (1974)* (omitted compulsory counterclaim "is thereafter barred").

[c] Considering When Compulsory Counterclaim Properly May Be Omitted

In general a pleader may omit a compulsory counterclaim without facing a res judicata bar in any of the following three situations:

1. The claim was pending in other litigation when the action was commenced. *Fed. R. Civ. P. 13(a)(2)(A)*.

2. The defendant is subject to in rem or quasi in rem jurisdiction and the defendant asserts no counterclaims. *See Fed. R. Civ. P. 13(a)(2)(B)*; *see also § 4.27 above*.

3. The claim requires joinder of a required party under Rule 19. *See Fed. R. Civ. P. 13(a)(1)(B)*; *see also §§ 4.32[7], 4.41[2] above*.

Additionally, the failure to assert an otherwise compulsory counterclaim will not result in a waiver if a case is settled before an answer is filed or the case is dismissed on a pre-answer Rule 12 motion. *See Bluegrass Hosiery, Inc., v. Speizman Indus., 214 F.3d 770, 772 (6th Cir. 2000)* (settlement); *Mellon Bank v. Ternisky, 999 F.2d 791, 795 (4th Cir. 1993)* (Rule 12 dismissal); *see §§ 4.31, 4.32 above*.

[3] Considering That Statute of Limitations Applies to Counterclaims

Counterclaims must be filed within the applicable statutory limitations period. If a counterclaim is not brought within the requisite time period, the claim, even if compulsory, may be barred. A party may not revive time-barred claims by asserting the claims as compulsory counterclaims in a later action. *See 118 East 60th Owners, Inc. v. Bonner Properties, Inc., 677 F.2d 200 (2d Cir. 1982)* (time-barred claim may not be later asserted as a defense or counterclaim).

When a responsive pleading omits a counterclaim, the party may with leave of court amend the pleading to assert the claim if it was omitted due to oversight, inadvertence, or excusable neglect. *Fed. R. Civ. P. 13(f)*. If the pleader moves to amend its timely and previously filed answer to add a compulsory counterclaim, the counterclaim will relate back to the filing of the original answer. *See Fed. R. Civ. P. 15(a)(1), (2)* and *(c)(1)*; *see, e.g., Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank, 744 F.2d 237, 243-244 (2d Cir. 1984)* (relation back); *see also § 4.37 above*.

Circuit Split:

Circuits are split as to whether a compulsory counterclaim that would otherwise be barred by the statute of limitations relates back to the time of the filing of plaintiff's complaint. *See Kirkpatrick v. Lenoir County Bd. of Educ., 216 F.3d 380, 387 (4th Cir. 2000)* (institution of plaintiff's suit tolls statute of

limitations governing compulsory counterclaim); *Meadowbrook-Richman, Inc. v. Associated Financial Corp., 325 F. Supp. 2d 341, 363 (S.D.N.Y. 2004)* (same); *but see Katherine G. v. Kentfield Sch. Dist., 261 F. Supp. 2d 1159, 1185 (N.D. Cal. 2003)* (refusing to toll statute of limitations because no "case suggests that this ... is the rule in the Ninth Circuit").

[4] Considering Subject Matter Jurisdiction Over Counterclaims

[a] Examining Supplemental Jurisdiction

In any civil action over which the district courts have original jurisdiction, the court has supplemental jurisdiction over all related claims in the action within its original jurisdiction that form part of the same case or controversy under Article III of the United States Constitution. *28 U.S.C. § 1367(a)*; *see also § 4.06[5] above*.

Circuit Split:

While a compulsory counterclaim by definition passes the "case or controversy" test, circuits are split on whether a permissive counterclaim may be supported by supplemental jurisdiction even though it does not arise from the same "transaction or occurrence." *See, e.g., Jones v. Ford Motor Credit Co., 358 F.3d 205, 210-214 (2d Cir. 2004)* (even though the relationship is not such as would make the counterclaims compulsory, the counterclaims and the underlying claim bear a sufficient factual relationship to constitute the same "case" within the meaning of Article III and hence of § 1367); *Rothman v. Emory Univ., 123 F.3d 446, 454 (7th Cir. 1997)* (same); *Global NAPs, Inc. v. Verizon New England, Inc., 603 F.3d 71, 87 (1st Cir. 2010)* (First Circuit joined Second and Seventh Circuits in holding that, by its plain text, § 1367 governs supplemental jurisdiction over all counterclaims, superseding pre-§ 1367 case law distinguishing between compulsory and permissive counterclaims); *but see Taylor v. Bryant, Inc., 275 F. Supp. 2d 1305, 1306 (D. Nev. 2003)* (federal courts have supplemental jurisdiction over compulsory counterclaims, but permissive counterclaims require their own jurisdictional basis).

In a diversity case, district courts do not have supplemental jurisdiction over claims by plaintiffs against persons made parties under *Fed. R. Civ. P. 14*, *19*, *20*, or *24*, or over claims by persons proposed to be joined as plaintiffs under Rule 19, or seeking to intervene as plaintiffs under Rule 24, if exercising supplemental jurisdiction over the claims would be inconsistent with the diversity jurisdictional requirements. *28 U.S.C. § 1367(b)*. *See §§ 4.06[3]*, *4.41[2]*, *4.41[3]*, *4.49[4][a] above*; *§ 4.59 below*.

[b] Satisfying Amount in Controversy by Compulsory Counterclaim

In cases originally filed in federal court, a compulsory counterclaim in excess of the jurisdictional minimum is sufficient to establish subject matter jurisdiction in a diversity case. *See Fenton v. Freedman, 748 F.2d 1358, 1359 (9th Cir. 1984)* ; *see also 28 U.S.C. § 1332(a)* (diversity jurisdiction statute). On the other hand, in cases removed from state court to federal court, most courts agree that a compulsory counterclaim may not be used to satisfy the amount-in-controversy requirement. *See*, *e.g., Al-Cast Mold & Pattern, Inc. v. Perception, Inc., 52 F. Supp. 2d 1081, 1082-1083 (D. Minn. 1999)* (citing cases pro and con, and holding that the better view is that counterclaims cannot be used to satisfy the jurisdictional amount in removed cases); *see also § 4.06[3] above*.

[c] Considering That Removal May Not Be Based on Federal-Question Counterclaim

Removal of a case to federal court may not be based on a counterclaim in the state court action that raises a federal question. *See Redevelopment Agency of San Bernardino v. Alvarez, 288 F. Supp. 2d 1112, 1115 (C.D. Cal. 2003)* (federal question must be presented by plaintiff's complaint); *see also § 2.06 above*; *§ 4.06[2] above*.

[5] Considering Personal Jurisdiction Over Counter-Defendant

A court has personal jurisdiction over a counter-defendant who has submitted to the jurisdiction of the court by bringing suit as the plaintiff. *Adam v. Saenger, 303 U.S. 59, 67-68, 58 S. Ct. 454, 82 L. Ed. 649 (1938)* (by filing a lawsuit plaintiff consents to jurisdictional power and may not contest personal jurisdiction against counterclaim filed by defendant); *see also § 4.26 above*.

[6] Considering Application of *Erie* Doctrine to Counterclaims

In diversity actions, or in cases in which a court is exercising supplemental jurisdiction over a state law claim, the *Erie* Doctrine applies. *See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

Therefore, a district court will construe the substantive issues raised by a counterclaim under applicable state law. *See, e.g., Carteret Sav. & Loan Ass'n, F.A. v. Jackson, 812 F.2d 36, 40 (1st Cir. 1987)* (applying substantive state law).

The Federal Rules of Civil Procedure, however, apply to the purely procedural aspects of the counterclaim. *See Karakas v. McKeown, 783 F. Supp. 1028, 1033-1034 (E.D. Mich. 1992)* (federal court presiding over diversity case applies federal rules of procedure, and in event of conflict between state and federal rules, federal rule governing counterclaims prevails); *see § 4.06[3] above*.

[7] Preserving Jurisdiction and Venue Objections When Asserting Counterclaim

The defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process may be waived unless raised by motion or included in a responsive pleading. *Fed. R. Civ. P. 12(h)(1)*.

Assertion of a compulsory counterclaim does not constitute a waiver of jurisdictional or venue defenses. *See Dragor Shipping Corp. v. Union Tank Car Co., 378 F.2d 241, 244 (9th Cir. 1967)* (no waiver as not voluntary claim for relief).

Assertion of a permissive counterclaim will not constitute a waiver of jurisdictional or venue defenses if either the counterclaim is asserted after the defendant has made a Rule 12(b) motion asserting the defenses, or the counterclaim and the *jurisdictional defenses are asserted in the same responsive pleading. See Bayou Steel Corp. v. M/V Amstelvoorn, 809 F.2d 1147, 1149 (5th Cir. 1987)* (no waiver); *see §§ 4.31[3][b], 4.32[1][b], [c] above*.



Strategic Point:

The safest course of action always appears to be assertion of any personal jurisdiction or venue objections in a *Fed. R. Civ. P. 12(b)* motion or *28 U.S.C. § 1406(a)* motion made before filing the responsive pleading containing a counterclaim. This strategy has the added advantage of securing additional time for filing the responsive pleading.

[8] Examining Relief Available Through Counterclaims

A party asserting relief as a counterclaim may join as many claims--legal, equitable, or maritime--as the party has against an opposing party. *Fed. R. Civ. P. 18(a)*. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. Additionally, a counterclaim may seek relief that exceeds in amount of relief, or that seeks a different kind of relief, from that sought in the pleading of the opposing party. *Fed. R. Civ. P. 13(c)*. Injunctive and declaratory relief may be sought through a counterclaim. *See Altvater v. Freeman, 319 U.S. 359, 363-364, 63 S. Ct. 1115, 87 L. Ed. 1450 (1943)* (declaratory relief); *Moore v. New York Cotton Exch., 270 U.S. 593, 610, 46 S. Ct. 367, 70 L. Ed. 750 (1926)* (injunctive relief).

[9] Determining Parties to Counterclaim

[a] Bringing Counterclaim Against Opposing Party Only

Counterclaims are affirmative claims for relief made against an opposing party. *Fed. R. Civ. P. 13(a), (b)*; *see also Earle M. Jorgenson Co. v. T.I. United States, Ltd., 133 F.R.D. 472, 475 (E.D. Pa. 1991)* (defining opposing party).

With regard to counterclaims, "opposing party" refers only to a person or entity that is already a party to the action when the counterclaim is asserted. *See Youell v. Grimes, 203 F.R.D. 503, 508 (D. Kan. 2001)* (opposing parties to counterclaims). There is also limited authority for the proposition that co-parties may become "opposing parties" within the meaning of Rule 13 after one pleads a substantive crossclaim, as opposed to a claim that is just for contribution or indemnity, against the other. *See Rainbow Mgmt. Group, Ltd. v. Atlantis Submarines Hawaii, LP 158 F.R.D. 656, 659-660 (D. Haw. 1994)* (citing **Moore's**) (effect of crossclaim).

Generally, a party may assert a counterclaim only in the capacity in which the party has been sued, and against an opposing party only in the capacity in which the opposing party brought the original claim. *See Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 886 (2d Cir. 1981)* (capacity); *see § 4.07 above*.

Exception:

If a plaintiff sues in a representative capacity, but will benefit individually from any recovery, a counterclaim may be made against the plaintiff in his or her individual capacity. In addition, a counterclaim may be made against a plaintiff in a capacity different than that in which he or she sued if principles of equity and judicial economy support such a counterclaim. *Blanchard v. Katz, 117 F.R.D. 527, 528-529 (S.D.N.Y. 1987)* (exceptions).

[b] Bringing Counterclaim Against Third Parties

A defendant to the original complaint may file a third-party complaint against a new party under *Fed. R. Civ. P. 14*. With regard to that pleading, the defendant is the third-party plaintiff, and the new party is the third-party defendant. The third-party defendant may then bring a counterclaim against the third-party plaintiff. *Fed. R. Civ. P. 14(a)(2)(B)*; *see also §§ 4.49 -4.50 below*.

[c] Bringing Counterclaim Against Joined Parties

Persons other than those made parties to the original action may be made parties to a counterclaim in accordance with the provisions of Rule 19 (compulsory joinder) and Rule 20 (permissive joinder). *Fed. R. Civ. P. 13(h)*; *see FDIC v. Bathgate, 27 F.3d 850, 873-874 (3d Cir. 1994)* (joining additional counterclaim defendants).

Rule 13(h) does not authorize third party claims, which are governed by Rule 14, but rather applies to counterclaims that already exist to which additional parties may be joined to grant complete relief. *Fed. R. Civ. P. 13(h)*; *see SAES Getters SpA v. Aeronex, Inc., 219 F. Supp. 2d 1081, 1085 (S.D. Cal. 2002)* (discussing correlation between Rules 13(h), 15(a), 19, and 20); *see also §§ 4.41[2] -[3] above*; *§ 4.49 below*.



Strategic Point:

Before joining multiple parties on a counterclaim, consider whether this joinder will create new issues concerning personal jurisdiction or venue. The existing parties also should weigh carefully whether additional counterclaims or crossclaims will result from this joinder, and whether these are likely to unduly lengthen or complicate the proceeding. Joinder should not be automatic merely because it is possible, but should be used only for required parties or when there will be a significant advantage in resolving the pending litigation. *See § 4.41 above*; *§ 4.49 below*.

[d] Bringing Counterclaim Against Governmental Entity

Rule 13 does not expand the right to assert a counterclaim against the United States, its agencies, or officers. *Fed. R. Civ. P. 13(d).*

In general, a counterclaim may be asserted against the United States, a state, or tribal entity only if the governmental entity has waived its sovereign immunity as to the counterclaim. However, in most cases, once a governmental entity invokes the jurisdiction of the federal courts, the entity waives its sovereign immunity as to compulsory counterclaims. *See, e.g., Ossen v. Connecticut Dep't of Social Servs., 361 F.3d 760, 772 (2d Cir. 2004)* (waiver).

The waiver of sovereign immunity to compulsory counterclaims does not apply to unrelated, permissive counterclaims, merely by invoking the jurisdiction of the federal court on the claims asserted. *See Regents of the Univ. of N.M. v. Knight, 321 F.3d 1111, 1126 (Fed. Cir. 2003)* (waiver as to compulsory counterclaims only and remanding to determine which claims were permissive); *see also §§ 4.07[4], 4.13 above.*

[10] Examining Pleading Standards for Counterclaim

[a] Raising Counterclaim in Responsive Pleadings

Counterclaims must be raised in a responsive pleading, such as the answer to the complaint or a reply to a counterclaim. *Fed. R. Civ. P. 13(a), (b)*; *see also Davis & Cox v. Summa Corp., 751 F.2d 1507, 1525 (9th Cir. 1985)* (although the Federal Rules of Civil Procedure do not expressly authorize a plaintiff's bringing of "counterclaims in reply" to a defendant's counterclaims, the weight of authority allows the plaintiff to file such pleadings if the counterclaims in reply are compulsory, but denies them if permissive); *see also § 4.31 above.*

[b] Properly Pleading Counterclaim

Whether asserted in the answer or in a reply to a counterclaim, counterclaims are claims for relief and therefore must be pleaded in accordance with all applicable pleading standards of Rule 8.

Warning:

As is the case when pleading any claim, careful pleading of counterclaims is important because averments in a pleading to which no responsive pleading is required or permitted are taken as denied or avoided. *Fed. R. Civ. P. 8(b)(6).*

A counterclaim must contain a short and plain statement of the grounds on which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it. *Fed. R. Civ. P. 8(a)(1).* It must also contain a short and plain statement of the claim showing the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2).* A counterclaim must contain a demand for judgment for the relief the pleader seeks. *Fed. R. Civ. P. 8(a)(3)*; *see also §§ 4.03 -4.15, 4.31 -4.32 above.*

[c] Properly and Timely Serving Counterclaim

Even when counterclaims are asserted in the answer, the answer must be served in accordance with the rules applicable to any other answer. *See Fed. R. Civ. P. 5(d)*; *see also Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1267 (9th Cir. 1992)* (service required).

Strategic Point:

If it is determined that compulsory counterclaims will be asserted in the answer to the complaint, consider seeking from the court an extension of time in which to file the answer, to ensure sufficient time to determine which counterclaims are compulsory and must be included in the answer. Consult local rules and individual judges' standing orders for the proper procedure for obtaining such an extension.

[d] Serving Demand for Jury Trial

If a jury trial on a counterclaim is desired, a jury demand must be served on the other parties at any time after the commencement of the action and not later than 14 days after the service of the last pleading directed to such issue. *Fed. R. Civ. P. 38*; *see also §§ 4.54 -4.56 below*.

[e] Obtaining Separate Trial on Counterclaim

The court may order a separate trial on a counterclaim in furtherance of convenience, to avoid prejudice, or when separate trials will be conducive to expedition and economy or may sever the claim. *See Fed. R. Civ. P. 21, 42*; *see also § 4.42[3] above*. If a court orders separate trials as provided in *Fed. R. Civ. P. 42(b)*, judgment on a counterclaim may be rendered in accordance with *Fed. R. Civ. P. 54(b)* if the court has jurisdiction to do so even if the opposing party's claims have been dismissed or otherwise resolved. *Fed. R. Civ. P. 13(i)*; *see Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363, 1367-1368 (7th Cir. 1990)* (separate judgment on compulsory counterclaim).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 13.10 -13.16*, *13.30*, *13.42*, *13.90 -13.96*, *13.110 -13.113*, *13.123*, *106.25*, Ch. 124.
- *Bender's Federal Practice Forms* Form Nos. 13:1, 13:23, 13:30, 13:31, 13:40.
- *Weinstein's Federal Evidence (2d ed.)* Ch. 302.
- *Fed. R. Civ. P. 13* (counterclaim and crossclaim).
- *28 U.S.C. § 1367* (supplemental jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral Overview



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Chapter 4 PLEADING STAGE
PART G: COUNTERCLAIMS, CROSSCLAIMS, AND REPLIES

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.46

§ 4.46 Preparing and Drafting Crossclaims

[1] Determining Parties to Crossclaims

[a] Making Crossclaim Against Existing Coparty

Unlike counterclaims, crossclaims are always permissive. Crossclaims are brought against an existing coparty. *Fed. R. Civ. P. 13(g)*. A claim against a new party is a third-party claim. *Fed. R. Civ. P. 14*. A crossclaim may be brought against a party who has been brought into the suit by third-party complaint. *Fed. R. Civ. P. 14(a)(3)*; *see also § 4.49 below*.

Coparties have been defined as parties having like status or as a party on the same side of a litigation. *See Stahl v. Ohio River Co., 424 F.2d 52, 55 (3d Cir. 1970)* (defining coparty for crossclaim purposes). There is some authority for the proposition that co-parties may become "opposing parties" within the meaning of Rule 13 after one pleads a substantive crossclaim (as opposed to a crossclaim that is just for contribution or indemnity) against the other. *See Rainbow Mgmt. Group, Ltd. v. Atlantis Submarines Hawaii, LP, 158 F.R.D. 656, 659-660 (D. Haw. 1994)* (citing **Moore's**) (effect of crossclaim).

[b] Joining Parties to Crossclaim

Persons other than those made parties to the original action may be made parties to a counterclaim in accordance with the provisions of Rule 19 (compulsory joinder) and Rule 20 (permissive joinder). *Fed. R. Civ. P. 13(h)*; *see FDIC v. Bathgate, 27 F.3d 850, 873-874 (3d Cir. 1994)* (joining additional counterclaim defendants); *see also § 4.41 above*.

Rule 13(h) does not authorize third party claims, which are governed by Rule 14, but rather applies to counterclaims that already exist to which additional parties may be joined to grant complete relief. *Fed. R. Civ. P. 13(h)*; *see SAES Getters SpA v. Aeronex, Inc., 219 F. Supp. 2d 1081, 1085 (S.D. Cal. 2002)* (discussing correlation between Rules 13(h), 15(a), 19 and 20); *see also § 4.49 below*.

[c] Filing Crossclaim Against Governmental Entity

A crossclaim may be filed against the United States, a state, or a tribal entity only if the governmental entity has waived

its sovereign immunity as to the crossclaim. *See Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765, 778 (D.C. Cir. 1986)* (sovereign immunity as to crossclaim by coparty was not waived by tribe's instituting action); *United States v. 255. 21 Acres in Anne Arundel County, 722 F. Supp. 235, 237 (D. Md. 1989)* (when government has consented to suit with respect to particular claims, claim may be asserted in any manner procedural rules permit, whether as original action, counterclaim, crossclaim, or third-party claim); *see also §§ 4.07[4], 4.13 above*.

[2] Examining Requirements for Bringing Crossclaim

[a] Considering Crossclaims Must be Transactionally Related

A crossclaim must arise out of the same transaction or occurrence as the claim that is the subject matter of the original action or of a counterclaim. *Fed. R. Civ. P. 13(g)*. The test is essentially the same as when determining compulsory counterclaims. *See Broad v. Barnes, 711 F.2d 1055 (6th Cir. 1983)* (applying "logical relationship" test); *see also § 4.45[2][a] above*.

[b] Considering Jurisdictional Issues

Because crossclaims by definition arise out of the same transaction or occurrence as the main claim, they fall within the court's supplemental jurisdiction under *28 U.S.C. § 1367*. *See Fed. R. Civ. P. 13(g)*; *Allstate Ins. Co. v. James, 779 F.2d 1536, 1539 (11th Cir. 1986)* (independent basis for jurisdiction not required); *In re Oil Spill by Amoco Cadiz, 699 F.2d 909, 913 (7th Cir. 1983)* (same); *see also § 4.06[5] above*. As with counterclaims, removal of a case to federal court may not be based on a crossclaim that raises a federal question. *See Redevelopment Agency of San Bernardino v. Alvarez, 288 F. Supp. 2d 1112, 1115 (C.D. Cal. 2003)* (federal question must arise from plaintiff's complaint); *see also § 4.06[2] above*.

A cross-defendant may raise the same jurisdictional defenses against the coparty crossclaimant as against the plaintiff. *National Trust for Historic Pres. v. 1750 K Inv. P'ship, 100 F.R.D. 483, 487 (E.D. Va. 1984)* , *aff'd*, *755 F.2d 929 (4th Cir. 1985)* (even though crossclaimant filed crossclaim, court never had in personam jurisdiction over co-defendant, who was not properly served with original complaint, and crossclaim would, therefore, be dismissed as well). If, however, a court has personal jurisdiction over a defendant for purposes of the main claim, it will have personal jurisdiction for purposes of a crossclaim, which arises out the same transaction or occurrence as the original action. *Chemco Int'l Leasing, Inc. v. Meridian Eng'g, Inc., 590 F. Supp. 539, 544 (S.D.N.Y. 1984)* (court had jurisdiction over crossclaim arising from same transaction as subject matter of original action when plaintiff was properly before court on main claim); *see also §§ 4.26, 4.32[3] above*.

[c] Considering Statute of Limitations Issues

Crossclaims that seek affirmative and independent relief are time barred if not filed within the applicable statute of limitations period. *Kansa Reinsurance Co. v. Congressional Mortgage Corp., 20 F.3d 1362, 1367 (5th Cir. 1994)* (Rule 13(g) governing crossclaims does not permit relation back of a crossclaim seeking affirmative and independent relief to the original complaint); *see also § 4.37[1] above*.

[3] Examining Pleading Standards for Crossclaims

[a] Raising Crossclaims in Pleading

A crossclaim must be stated in a pleading. *Fed. R. Civ. P. 13(g)*. *See Bernstein v. IDT Corp., 582 F. Supp. 1079, 1089 (D. Del. 1984)* (citing **Moore's**) (crossclaims are not pleadings but must be set forth in pleading). The rule is that a crossclaim must be asserted in the answer. *In re Cessna Aircraft Distributorship Antitrust Litig., 532 F.2d 64, 67-68 (8th Cir. 1976)* (asserting crossclaim); *see Fed. R. Civ. P. 7(a)*; *see also § 4.31 above*.

[b] Considering Pleading Requirements for Crossclaims

A crossclaim must contain a short and plain statement of the grounds on which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it. *Fed. R. Civ. P. 8(a)(1)*. It also must contain a short and plain statement of the claim showing the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. A crossclaim must contain a demand for judgment for the relief the pleader seeks. *Fed. R. Civ. P. 8(a)(3)*; *see also §§ 4.03 -4.15 above*.

[c] Considering that Crossclaims Must Be Properly and Timely Served

An answer containing a crossclaim must be served in accordance with the rules applicable to any other answer. *See Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1267 (9th Cir. 1992)* (service required); *see also § 4.31 above*.

[d] Considering that Demand for Jury Trial Must Be Served

If a jury trial on a counterclaim is desired, a jury demand must be served on the other parties at any time after the commencement of the action, and not later than 14 days after the service of the last pleading directed to such issue. *Fed. R. Civ. P. 38*; *see also §§ 4.54 -4.56 below*.

[e] Considering Crossclaim May Be Severed for Separate Trial

The court may order a separate trial on a crossclaim in furtherance of convenience, to avoid prejudice, or when separate trials will be conducive to expedition and economy or may sever the claim. *See Fed. R. Civ. P. 21*, *42(b)*; *see also § 4.42[3] above*. If a court orders separate trials as provided in *Fed. R. Civ. P. 42(b)*, judgment on a crossclaim may be rendered in accordance with *Fed. R. Civ. P. 54(b)* if the court has jurisdiction to do so even if the opposing party's claims have been dismissed or otherwise resolved. *Fed. R. Civ. P. 13(i)*.

[4] Amending Pleading to Include Omitted Crossclaim

A party may amend the answer to include an omitted crossclaim once as a matter of right, *Fed. R. Civ. P. 15(a)(1)*. *See A. J. Industries, Inc. v. United States Dist. Court for Cent. Dist., 503 F.2d 384, 388 (9th Cir. 1974)* (amendment as of right). After responsive pleadings have been served, the party must obtain the court's permission to amend the answer to include an omitted crossclaim. *See Fed. R. Civ. P. 15(a)(2). In re Cessna Aircraft Distributorship Antitrust Litig., 532 F.2d 64, 67-68 (8th Cir. 1976)* (amendment with leave of court); *see also § 4.36 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 13.60*, *13.70*, *13.71*, *13.91 -13.96*, *13.110 -13.113*, *13.123*.
- *Bender's Federal Practice Forms* Form Nos. 13:50, 13:70.
- *Fed. R. Civ. P. 13* (counterclaim and crossclaim).
- *28 U.S.C. § 1367* (supplemental jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral Overview



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Chapter 4 PLEADING STAGE
PART G: COUNTERCLAIMS, CROSSCLAIMS, AND REPLIES

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.47

§ 4.47 Responding to Counterclaims and Crossclaims

[1] Considering All Options Available to Attack Claim for Relief

Counterclaims and crossclaims state claims for affirmative relief. Therefore, all of the vehicles that are available with respect to answering and moving to dismiss claims in general are applicable when replying to counterclaims and crossclaims. The sufficiency of a counterclaim or crossclaim may be challenged by a Rule 12 motion. *Fed. R. Civ. P. 12(b)*; *see also §§ 4.32, 4.45[2] above*.

[2] Examining Responsive Pleadings to Counterclaim and Crossclaim

A reply to a counterclaim must be designated as such. *Fed. R. Civ. P. 7(a)*. The pleading to be filed in response to a crossclaim is denominated an answer. *Fed. R. Civ. P. 7(a)*.

If the defendant's answer asserts counterclaims or crossclaims that, in turn, involve additional claims that the plaintiff or coparty has against the defendant, the plaintiff or coparty may assert these claims as counterclaims in the reply to the counterclaim or answer to the crossclaim. *See Fed. R. Civ. P. 13*; *see also Frank Briscoe Co. v. Clark County, 857 F.2d 606, 610 (9th Cir. 1988)* (in action by contractor against county, contractor was entitled to file counterclaims for breach of contract and warranty in its reply to county's answer stating counterclaims for breach). If these claims arise from the same transaction and occurrence as the defendant's counterclaim or crossclaim, then they are compulsory counterclaims and must be made in the reply or answer. Failure to do so may result in waiver. *Fed. R. Civ. P. 13(a)*. Permissive counterclaims may also be included. *Fed. R. Civ. P. 13(b)*.

Crossclaims against a coparty may also be included in any pleading, including a reply to a counterclaim or answer to a crossclaim. Crossclaims must arise from the same transaction or occurrence as the defendant's counterclaim. *Fed. R. Civ. P. 13(g)*; *see also § 4.46 above*.

[3] Examining Pleading Standards for Responsive Pleading

When asserting a reply to a counterclaim or answer to a crossclaim, all applicable pleading standards pertaining to assertion of denials and affirmative defenses apply, including the following:

1. The responding party must state in short and plain terms the party's defenses to each claim asserted in the counterclaim or crossclaim and must admit or deny the averments on which the counterclaimant or crossclaimant relies. *Fed. R. Civ. P. 8(b)(1)(A), (B)*;

2. If the responding party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party must so state. *Fed. R. Civ. P. 8(b)(5)*;

3. If the responding party intends in good faith to deny only part or a qualification of an averment, the party must specify so much of it as is true and material and deny only the remainder. *Fed. R. Civ. P. 8(b)(4)*; and

4. The responding party must set forth all applicable affirmative defenses. *Fed. R. Civ. P. 8(c)*.

[4] Considering That Responsive Pleading Must Be Timely Served

A party served with a pleading stating a crossclaim against the party must serve an answer within 21 days after being served. Similarly, the plaintiff must serve a reply to a counterclaim in the defendant's answer within 21 days after service of the answer. *Fed. R. Civ. P. 12(a)(1)(B)*; *see also § 4.31[7] above*.

Warning:

Failure to respond to a pleading to which a response is required will result in an admission of the averment to which no response is made. *Fed. R. Civ. P. 8(b)(6)*. Further, opposing counsel may seek to obtain a default judgment on a counterclaim or crossclaim to which no response is made. *Fed. R. Civ. P. 55(a)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 7.02, 13.44*.
- *Bender's Federal Practice Forms* Form Nos. 7:1, 13:20, 13:23, 13:70.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Fed. R. Civ. P. 7* (pleadings allowed; form of motions).
- *Fed. R. Civ. P. 13* (counterclaim and crossclaim).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProcedurePleading & PracticePleadingsCounterclaimsPermissive CounterclaimsCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsPermissive Cross-Claims



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Chapter 4 PLEADING STAGE
PART H: THIRD-PARTY ACTIONS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.48

§ 4.48 Checklist for Third-Party Actions

☐ Bringing third party claim. *See § 4.49 below*.

○ Identify any persons or entities who might be liable to third-party plaintiff for all or part of claims asserted against third-party plaintiff. *Fed. R. Civ. P. 14(a)(1)*.

○ Determine, for each person or entity that might be liable to third-party plaintiff for claims asserted against third-party plaintiff, whether person or entity is a party or a nonparty.

○ Determine, for each person or entity that might be liable to third-party plaintiff for claims asserted against third-party plaintiff, whether court will have subject matter jurisdiction over the third-party claim on bases of diversity jurisdiction, federal subject matter jurisdiction, and supplemental jurisdiction. *28 U.S.C. §§ 1331*, *1332*, *1367*. *See § 4.49[4][a] below*.

○ Determine, for each person or entity that might be liable to third-party plaintiff for claims asserted against third-party plaintiff, whether court will have personal jurisdiction over person or entity. *See § 4.49[4][b] below*.

○ Analyze substantive basis for each potential impleader claim to determine whether it is derivative (i.e., whether person or entity is liable to third-party plaintiff if and when third-party plaintiff is found to be liable on claims asserted against it), such as claims for contribution among tortfeasors, indemnity, subrogation, or other derivative liability, including contractual liability. *See § 4.49[2] below*.

○ Analyze substantive basis for each potential impleader claim to determine whether

impleader is not available for the claim because third-party defendant has direct liability to plaintiff or counterclaimant, but no liability to third-party plaintiff. *See § 4.49[2] below*.

○ Analyze substantive basis for each potential impleader claim to determine whether impleader is not available for the claim because claim against third-party defendant is only transactionally related to plaintiff's or counterclaimant's claims, and not dependent on third-party plaintiff's liability to plaintiff or counterclaimant. *See § 4.49[2] below*.

○ If summons and third-party complaint is not to be served on third-party defendant within 14 days of filing of the original answer, file motion requesting leave of court, and serve the motion on all parties. *Fed. R. Civ. P. 14(a)(1). See § 4.49[2] below*.

○ Serve third-party defendant with third-party summons and complaint (and with motion for leave to file and the order on the motion, if any) in the same manner as the original action.

○ If a motion for leave is filed, participate in the hearing as required by the court.

○ Once third-party defendant is impleaded, consider asserting any other claims against third-party defendant, whether transactionally related or not, under rule allowing joinder of claims. *Fed. R. Civ. P. 18*.

☐ Responding to third-party claim. *See § 4.50 below*.

○ Move to strike third-party claims if impleading party failed to obtain leave of court, if required; claim asserted in third-party complaint is not derivative claim suitable for impleader; or third-party claim in civil action attempts to assert liability to original plaintiff rather than to impleading party. *Fed. R. Civ. P. 14(a). See § 4.50[1] below*.

○ Move to dismiss third-party complaint within 21 days of service if court lacks subject matter jurisdiction of third-party claim, court lacks personal jurisdiction over third-party defendant, third-party claim was improperly served on third-party defendant, or third-party complaint fails to state claim on which relief may be granted. *Fed. R. Civ. P. 12, 14(a)(2)*.

○ Answer complaint within 21 days of service, asserting all available defenses to the claim not raised in motion to dismiss, including lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of process or service, failure to state claim on which relief may be granted, or statute of limitations. *Fed. R. Civ. P. 12, 14(a)(2). See § 4.50[2][a] below*.

○ Assert against the original plaintiff any defenses that the third-party plaintiff has to the plaintiff's claims. *Fed. R. Civ. P. 14(a)(2)(C). See § 4.50[2][b] below*.

○ File any compulsory counterclaims against the third-party plaintiff. *Fed. R. Civ. P. 14(a)(2)(B). See § 4.50[3][a] below.*

○ If desired, file any permissive counterclaims against the third-party plaintiff and any crossclaims against other parties. *Fed. R. Civ. P. 14(a)(2)(B). See § 4.50[3][a], [b] below.*

○ If a counterclaim or crossclaim is filed against any party, consider filing any additional claims, whether or not transactionally related, against that party under the liberal claim-joinder rule. *Fed. R. Civ. P. 18. See § 4.50[3][c] below.*

○ If desired, file any transactionally related claims against the original plaintiff, as allowed by the impleader rule. *Fed. R. Civ. P. 14(a)(2)(D). See § 4.50[3][d] below.*

○ Consider impleading any additional parties that may be liable for all or part of the claim. *Fed. R. Civ. P. 14(a)(5).*

○ Consider moving for separate trial of the impleader claim to avoid prejudice or for convenience. *Fed. R. Civ. P. 14(a)(4). See § 4.50[1] below.*

☐ Plaintiff's claim against third-party defendant. *See § 4.51 below.*

○ If third-party defendant has been impleaded, determine if claim should be asserted against that third-party defendant. *Fed. R. Civ. P. 14(a)(3). See § 4.51[1] below.*

○ Determine whether a separate action would be preferable.

○ If asserting claim against third-party defendant, assert as counterclaim if third party defendant brought claim against plaintiff, and if claim is not a counterclaim, assert claim specifically labeled as a Rule 14(a) claim against third-party defendant.

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

Legal Topics:

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



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Chapter 4 PLEADING STAGE
PART H: THIRD-PARTY ACTIONS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.49

§ 4.49 Bringing Third-Party Claim

[1] Determining Who May Be Impleaded

Any defendant may bring in or "implead" one who is not a party to the action. *Fed. R. Civ. P. 14(a)(1).* In addition, a third-party defendant who has been impleaded may implead other nonparties. *Fed. R. Civ. P. 14(a)(5). See, e.g., Interstate Power Co. v. Kansas City Power & Light Co., 992 F.2d 804, 806 (8th Cir. 1993)* (sometimes called "fourth party" practice). Also, when a claim is asserted against a plaintiff, the plaintiff may implead a third party. *Fed. R. Civ. P. 14(b).*

Impleader applies only to bring in nonparties. *Fed. R. Civ. P. 14(a)(1); see, e.g., Bank of the West v. Estate of Leo, 231 F.R.D. 386, 389 (D. Ariz. 2005)* (citing **Moore's**) (dismissed settling defendant is nonparty subject to impleader); *Russo v. Blue Ocean Shipping, 2003 U.S. Dist. LEXIS 25002, at *4-*6 (N.D. Cal. 2003)* (defendant cannot implead existing party); *see also §§ 4.45, 4.46 above.*

Exceptions:

Some courts permit direct impleader of contribution or indemnity claims against already-existing parties on the grounds that counterclaims or crossclaims are not available; Others require severance of the claim and then consolidation. *See, e.g., National Union Fire Ins. Co. v. Continental Ill. Corp., 658 F. Supp. 781, 794 (N.D. Ill. 1987)* (direct impleader allowed); *Judd v. General Motors Corp., 65 F.R.D. 612, 613-614 (M.D. Pa. 1974)* (severance and consolidation); *see also §§ 4.45 -4.46 above.*

[2] Determining Whether Third-Party Claim Is Derivative

A third-party claim under Rule 14 must be derivative in that the third party's liability is in some way dependent on the outcome of the main claim. *Fed. R. Civ. P. 14(a)(1); United States v. One 1977 Mercedes Benz, 708 F.2d 444, 452 (9th Cir. 1983)* (related claims not sufficient). The third party must be liable to the impleading party for losses that the impleading party may suffer as a result of the plaintiff's original claim. *Southeast Mortg. Co. v. Mullins, 514 F.2d 747, 749 (5th Cir. 1975)* (related, but non-derivative claims do not provide basis for impleader).

Rule 14 is not limited to any particular type of claim. Typical impleader claims include:

1. Indemnity. *See, e.g., Brogle v. South Carolina Elec. & Gas Co., 509 F.2d 1216, 1217 (4th Cir. 1975)* ;

2. Contribution among joint tortfeasors. *See, e.g., Andrulonis v. United States, 26 F.3d 1224, 1233 (2d Cir. 1994)* ;

3. Subrogation. *National Union Fire Ins. Co. v. FDIC, 887 F. Supp. 262, 264 (D. Kan. 1995)* (subrogation); and

4. Warranty. *Beights v. W.R. Grace & Co., 62 F.R.D. 546, 547 (W.D. Okla. 1974)* .

Once impleader is established, the defending party may assert any additional claims it has against the third-party defendant under the permissive claim-joinder rule. *Fed. R. Civ. P. 18(a)*; *see also § 4.13 above*.

[3] Considering Discretionary Nature of Impleader

Leave of court is not required if the third party complaint is filed within 14 days of serving the original answer to a claim. *Fed. R. Civ. P. 14(a)(1)*. But the court always has the power to decide whether to permit impleader. *See Fed. R. Civ. P. 14*, Committee Note of 1963. Additionally, any party may move to strike or sever the third-party claim, or have it made the subject of a separate trial. *Fed. R. Civ. P. 14(a)(4)*.

After the 14-day period, leave is within the court's sound discretion. *Southwest Adm'rs, Inc. v. Rozay's Transfer, 791 F.2d 769, 777 (9th Cir. 1986)* (impleader is discretionary).

Impleader is favored in the interests of judicial economy, and leave should be granted unless there has been undue delay in bringing the claim that would prejudice existing parties or the impleaded party. *See Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 650 (7th Cir. 2002)* (denial was abuse of discretion); *see also Lehman v. Revolution Portfolio LLC, 166 F.3d 389 (1st Cir. 1999)* (denial only if impleader would result in undue prejudice, unduly complicate trial, or foster an obviously unmeritorious claim).

[4] Examining Procedural Issues in Bringing Third-Party Complaint

[a] Meeting Requirements for Subject Matter Jurisdiction

Rule 14 is the procedural mechanism for bringing a third-party claim, and it does not provide a basis for jurisdiction. *See Fed. R. Civ. P. 14, 82*.

If federal jurisdiction exists for the main claims, supplemental jurisdiction will generally extend to Rule 14 claims. *See 28 U.S.C. § 1367(a)*; *Alumax Mill Prods., Inc. v. Congress Fin. Corp., 912 F.2d 996, 1005 (8th Cir. 1990)* (impleader satisfies constitutional test for supplemental jurisdiction); *see also § 4.06 above*.

Exceptions:

Supplemental jurisdiction will not support a third-party claim asserted by a plaintiff in diversity cases. A plaintiff faced with a counterclaim may implead a third party under Rule 14(b). But, if the court's subject matter jurisdiction over the plaintiff's original claim is based solely on diversity pursuant to *28 U.S.C. § 1332*, the court will not have supplemental jurisdiction over a third-party claim asserted by the plaintiff. *28 U.S.C. § 1367(b)*. Additionally, a court may decline to exercise its supplemental jurisdiction in certain circumstances. *28 U.S.C. § 1367(c)*; *see also §§ 4.06[3], [5], above*.

[b] Meeting Requirements for Personal Jurisdiction

The third-party defendant must have sufficient contacts with the forum in which the action is pending such that it is constitutionally permissible for the court to exercise general or specific personal jurisdiction over the third-party defendant. But the defense of lack of personal jurisdiction may be waived by a failure to assert it. *See Fed. R. Civ. P. 12(h)(1)*; *see also §§ 4.31[2][b], 4.32[1][b] above*.

Additionally, the court may only exercise personal jurisdiction, if the impleading third-party plaintiff can serve the third-party defendant with a summons in a manner authorized by Rule 4. *See Fed. R. Civ. P. 4*; *see also §§ 4.19 -4.26, 4.32[3] above*.

[c] Considering Application of Venue Statutes

The third-party plaintiff need not establish separate venue for the impleader claim, as the venue statutes apply only to the original claim by the plaintiff against the defendant. *See 28 U.S.C. § 1391 et seq*.

[d] Considering Applicability of Statute of Limitations

The applicable limitations period is a matter of substantive rather than procedural law. Therefore, when a third-party claim arises under state law, a federal court will apply the statute of limitations applicable in state court. If the third-party claim arises under federal law, the court must determine what statute of limitations applies under federal law. *See Guaranty Trust Co. v. York, 326 U.S. 99, 108, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)* (statute of limitations is substantive).

[5] Examining Third-Party Claims by or Against United States

When the United States is a defendant to an action, it may implead a third-party defendant under the same circumstances as any other litigant. *See Fed. R. Civ. P. 14(a)*. A party's ability to implead the United States is limited by sovereign immunity principles. The Federal Tort Claims Act permits a private tortfeasor defendant to implead the United States as a joint tortfeasor. *See United States v. Yellow Cab Co., 340 U.S. 543, 547-548, 71 S. Ct. 399, 95 L. Ed. 523 (1951)* (impleader of United States on contribution claim); *see also 28 U.S.C. § 2671 et seq*. (Tort Claims Act). However, the Act requires the timely filing of an administrative claim before filing suit. This jurisdictional prerequisite applies to Rule 14 impleader, and the failure to file will deprive the district court of an independent basis of jurisdiction over the third-party claim against the United States. *See 28 U.S.C. § 2675(a)*; *see also §§ 4.45[9][d], 4.46[1][c]*.

[6] Examining Third-Party Claims in Admiralty and Maritime Suits

Rule 14(c) governs impleader by defendants sued in admiralty or maritime claims. Impleader under Rule 14(c) differs from traditional impleader in that an impleader claim may be based on liability of the third-party defendant either to the third-party plaintiff or directly to the pleader of the admiralty claim. *Fed. R. Civ. P. 14(c)(1)*.

Warning:

The more liberal admiralty impleader rules apply only in suits in which the plaintiff's original claim is an admiralty or maritime claim. *Fed. R. Civ. P. 14(c)(1)*. If the plaintiff's original claim is an ordinary civil claim, a third-party claim that sounds in admiralty must satisfy the ordinary civil impleader standards set out in Rule 14(a). *Fed. R. Civ. P. 14(a)(6)*; *see also §§ 4.06[4], 4.14[9] above*.

In an admiralty case, the third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. *Fed. R. Civ. P. 14(c)(2)*. This provision forces the third-party defendant to defend against the plaintiff's claim. This procedure avoids a separate suit for contribution, repetitious pleadings, and testimony on the part of the plaintiff and the third-party plaintiff. The original plaintiff is therefore not required to amend its complaint to assert specific claims against the third-party defendants. *See Royal Ins. Co. of Am. v. Southwest Marine, 194 F.3d 1009, 1019*

(9th Cir. 1999) (action proceeds as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff).

It is unclear what language is necessary for the third-party plaintiff to make a proper Rule 14(c) demand; however, a failure to make any type of request will make the rule inapplicable. *See Texas A&M Research Found. v. Magna Transp. Inc., 338 F.3d 394, 399-400 (5th Cir. 2003)* (Rule could not be applied when no request made).

PRACTICE RESOURCES:

- *Moore's Federal Practice §§ 14.05*, *14.06*, *14.25*, 14.37, 14.38, 14.46 *-14.50*.
- *Bender's Federal Practice Forms* Form Nos. 14:1, 14:20.
- *Federal Litigation Guide*, Ch. 1.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 14* (third-party practice).
- *28 U.S.C. § 1367* (supplemental jurisdiction).
- *28 U.S.C. § 2671 et seq*. (Federal Tort Claims Act).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleader



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Chapter 4 PLEADING STAGE
PART H: THIRD-PARTY ACTIONS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.50

§ 4.50 Responding to Impleader

[1] Moving to Strike or Sever Third-Party Claim

A third-party defendant or any other party may move to strike, sever, or try separately the third-party claim. *Fed. R. Civ. P. 14(a)(4)*. The grounds for granting a severance or separate trial of a third-party claim should not differ from the grounds that would justify the severance or separate trial of any claim. *Fed. R. Civ. P. 21*, *42(b)*; *see also § 4.42[3] above*.

[2] Responding to Particulars of Third-Party Claim

[a] Asserting Rule 12 Defenses by Answer or Motion to Dismiss

The rules for timely filing an answer or Rule 12 motion to dismiss apply when responding to a Rule 14 claim. *See* Fed. R. 12(a)(1)(A), (b); *see also §§ 4.31*, *4.32 above*.

Warning:

Failure to answer or otherwise timely respond may subject the third-party defendant to a default judgment. *See Fed. R. Civ. P. 55(a)*.

The third-party defendant must assert its defenses in the manner provided by Rule 12. *Fed. R. Civ. P. 14(a)(2)(A)*. Rule 12 waiver rules also apply in impleader cases. *See Fed. R. Civ. P. 12(h)(1)*; *see also §§ 4.31[3][b]*, *4.32[1][b] above*.

[b] Asserting Defenses of Third-Party Plaintiff Against Plaintiff

The third-party defendant may assert against the plaintiff any defense that the impleading party has to the plaintiff's original claim. *Fed. R. Civ. P. 14(a)(2)(C)*. Thus, the third-party defendant may claim not only that it is not liable to the impleading party, but that the impleading party is not liable to the original plaintiff. This provision protects the impleaded third-party defendant when the impleading party fails or neglects to assert a proper defense to the plaintiff's action. *See Fed. R. Civ. P. 14*, Committee Note of 1946.

[3] Asserting Additional Claims of Third Party Defendant

[a] Asserting Counterclaims Against Impleading Party

Under Rule 13, the third-party defendant must assert any compulsory counterclaims it has against the impleading party. Compulsory counterclaims are those claims against the impleading party arising out of the subject matter of the third-party claim. *Fed. R. Civ. P. 13(a)(1)(A)*. In addition, the third-party defendant may assert any permissive counterclaims. *Fed. R. Civ. P. 13(b)*; *see also § 4.45 above*.

[b] Asserting Crossclaims Related to Impleader Claims Against Other Parties

A third-party defendant may assert any crossclaims against any other third-party defendants, provided the crossclaims arise from the transaction involved in the impleader claim. *Fed. R. Civ. P. 13(g)*; *see also § 4.46 above*.

[c] Joining Other Claims of Third-Party Defendant

Once the third-party defendant has asserted a counterclaim or crossclaim against a party as permitted by the impleader rule, the third-party defendant may join any other claims against the same party, whether transactionally related or not, under the claim-joinder rule. *See Fed. R. Civ. P. 18(a)*; *see also § 4.13 above*.

[d] Asserting Third-Party Defendant's Claims Against Plaintiff

The third-party defendant may assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the impleading party. *Fed. R. Civ. P. 14(a)(2)(D)*. Once the third-party defendant asserts a claim against the original plaintiff, the two become "opposing parties" under the counterclaim rule. Therefore, the plaintiff must assert any transactionally related claims it has against the third-party defendant as compulsory and may assert any unrelated claims against the third-party defendant as permissive counterclaims. *Fed. R. Civ. P. 13(a)(1)*, *(b)*; *see also § 4.45[2] above*.



Strategic Point:

Rule 14 is silent as to the procedure for bringing a claim against the original plaintiff. The original plaintiff and the third-party defendant are not "opposing parties," so a counterclaim is not authorized. *See Fed. R. Civ. P. 13(a)*, *(b)*. Courts have accepted without comment the designation of such a claim as a "crossclaim." *See, e.g., L & E Co. v. United States ex rel. Kaiser Gypsum Co., 351 F.2d 880, 882 (9th Cir. 1965)* (crossclaim designation). However Rule 14 authorizes only crossclaims against "another third-party defendant." *Fed. R. Civ. P. 14(a)(2)(B)*. The best practice is for a third-party defendant to assert its claim against a plaintiff as something *sui generis*, explicitly labeled as a "Rule 14(a) Claim by Third-Party Defendant Against Plaintiff" or similar language. *See §§ 4.45*, *4.46 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 14.02*, 14.16 *-14.26*.
- *Bender's Federal Practice Forms* Form Nos. 14:40, 14:45-14:47, 14:50.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 14* (third-party practice).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 4 PLEADING STAGE
PART H: THIRD-PARTY ACTIONS

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.51

§ 4.51 Bringing Plaintiff's Claims Against Third-Party Defendant

[1] Asserting Transactionally-Related Claims Against Third-Party Defendant

Once a third-party defendant has been impleaded into the action, the plaintiff may assert any claim it has against the third-party defendant that arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the impleading party. *Fed. R. Civ. P. 14(a)(3)*. These claims are permissive and in the absence of another bar, such as the statute of limitations, a plaintiff has the option of filing them in a separate action. *Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc., 146 F.3d 1071, 1074 (9th Cir. 1998)* (plaintiff's claims under Rule 14 permissive).

[2] Considering Jurisdiction and Venue

Rule 14 prescribes the procedural circumstances in which certain claims may be asserted, but does not extend the jurisdiction of the federal courts. *See Fed. R. Civ. P. 82*. The court must have subject matter jurisdiction of the claim asserted by plaintiff against the third-party defendant on some basis other than Rule 14. In cases in which the court's subject matter jurisdiction is based solely on diversity of citizenship, supplemental jurisdiction is not available for any Rule 14 claim asserted by a plaintiff. *28 U.S.C. § 1367(b)*. The plaintiff need not establish that venue is proper for a claim against the third-party defendant, as the venue statutes apply only to the original claim by the plaintiff against the defendant. *See 28 U.S.C. § 1391 et seq.*; *see also § 4.06 above*.



Strategic Point:

Rule 14 is silent as to the procedure for bringing a direct claim by the plaintiff against the third-party defendant. Unless the third-party defendant files a Rule 14 claim against the plaintiff, the original plaintiff and the third-party defendant are not "opposing parties," so a counterclaim is not authorized. *Fed. R. Civ. P. 13(a), (b)*. Nor are the original plaintiff and the third-party defendant "co-parties," so a crossclaim is not appropriate. *Fed. R. Civ. P. 13(g)*. The best practice is for a plaintiff to assert its claim against a third-party defendant as something *sui generis*, explicitly labeled as a "Rule 14(a) Claim by Plaintiff Against Third-Party Defendant" or similar language. *See §§ 4.45 -4.46 above*.

[3] Considering Third-Party Defendant Must Assert its Defenses and Claims

If the plaintiff asserts a claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the impleading party, the third-party defendant must assert any defenses it has against the plaintiff's claim as provided by Rule 12. *Fed. R. Civ. P. 14(a)(3)*. Similarly, the third-party defendant may, and in the case of compulsory counterclaims must, assert any counterclaims or crossclaims that are authorized by Rule 13. *Fed. R. Civ. P. 13(a)*, *(b)*, *14(a)(3)*; *see also §§ 4.31[3]*, *4.45*, *4.46 above*.

[4] Considering Impleader by Plaintiff

If a claim is asserted against the original plaintiff, the plaintiff may then bring in any third party that may be liable to it for all or part of that claim, in the same manner as Rule 14 allows the original defendant to implead a third party. *Fed. R. Civ. P. 14(b)*. *See § 4.49 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 14.21*, 14.36 -14.38.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 14* (third-party practice).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 4 PLEADING STAGE
PART I: DEMANDING A JURY TRIAL

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.52

§ 4.52 Checklist for Demanding a Jury Trial

☐ Determine if right exists under *Seventh Amendment* or by statute or rule. *See § 4.53 below*.

☐ If right to jury trial does not exist, consider options of advisory jury and jury trial by consent of parties. *Fed. R. Civ. P. 39(c)(2)*.

☐ Determine whether to rely on jury demand made by any other party or if need to make demand for additional issues. *Fed. R. Civ. P. 38(c), 39(a)(1)*.

☐ If jury trial available and desired, make timely jury demand. *Fed. R. Civ. P. 38(b)(1), (d). See § 4.54 below*.

- ○ General rule: demand must be served on all parties within 14 days after service of the last pleading directed to the issues on which a jury trial is demanded. *Fed. R. Civ. P. 38(b)(1)*.
- ○ Endorse demand on pleading in accordance with Federal and local rules. *Fed. R. Civ. P. 38(b)*.
- ○ File and serve demand in accordance with Federal Rules. *Fed. R. Civ. P. 38(b)(1), (2), (d)*.

☐ Party opposing jury trial should prepare written motion to strike demand on grounds issues not properly triable by jury or jury demand not timely served or filed. *Fed. R. Civ. P. 38(d), 39(a)(2). See § 4.54[4] below*.

☐ **Search by Topic:** Civil Procedure > Trials > Jury Trials > Jury Demands

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 4 PLEADING STAGE
PART I: DEMANDING A JURY TRIAL

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.53

§ 4.53 Obtaining Trial by Jury

[1] Determining Right to Jury Trial Under Seventh Amendment

In all cases in federal court, the right to a jury trial is governed by federal law. *Simler v. Conner, 372 U.S. 221, 222, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963)* (federal law controls even in diversity cases). In civil cases, the right to a jury trial is established under either the *Seventh Amendment* or a federal statute or rule. *Fed. R. Civ. P. 38(a)*; *see Fed. R. Civ. P. 71.1(h)(1)(B)*. Rules 38 and 39 govern the procedures for obtaining a jury trial, they do not enlarge or restrict the right. *Craig v. Atlantic Richfield Co., 19 F.3d 472, 475 (9th Cir. 1994)* (discussing right to jury trial).

The *Seventh Amendment* preserves the right to jury trial in actions at law in which the amount in controversy exceeds twenty dollars. *U.S. Const., amend. VII*. The right to jury trial applies not only to common-law actions cognizable when the *Seventh Amendment* was adopted, but also to newly created legal rights that would be enforceable under common-law principles. *See, e.g., Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 347-348, 118 S. Ct. 1279 ,. 140 L. Ed. 2d 438 (1998)* (jury trial in copyright infringement actions because recognized at common law).

The nature of the issues presented and the remedies sought determines whether an action qualifies as legal or equitable. *See Simplot v. Chevron Pipeline Co., 563 F.3d 1102, 1115 (10th Cir. 2009)* (in case of first impression, court held that a party who is required to pay the opposing party's costs and attorney's fees may have a *Seventh Amendment* right to a jury trial to determine the amount of those costs and fees).

Actions traditionally deemed to be "at law" generally are those that seek "legal" remedies, such as money damages. *See, e.g., Pernell v. Southall Realty, 416 U.S. 363, 370-376, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974)* (ejectment actions); *Ross v. Bernhard, 396 U.S. 531, 542, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* (breach of contract claim seeking damages); *Smoot v. Fox, 353 F.2d 830, 833 (6th Cir. 1965)* (citing **Moore's**) (malicious prosecution claims).

Actions seeking equitable remedies are generally not triable by a jury. *Tull v. United States, 481 U.S. 412, 417, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987)* (discussing equitable actions). *See, e.g., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 44, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989)* (action to set aside fraudulent conveyance); *Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1502 (5th Cir. 1992)* (reformation of contracts); *Adams v. Johns-Manville Corp., 876 F.2d 702, 709-710 (9th Cir. 1989)* (citing **Moore's**) (specific performance).

Declaratory relief is neither strictly equitable nor legal, but depends on the nature of the underlying controversy. *Transamerica Occidental Life Ins. Co. v. Digregorio, 811 F.2d 1249, 1251 (9th Cir. 1987)* (discussing right to jury trial in declaratory relief action).

[2] Determining Right to Jury Trial in Statutorily Created Actions and Proceedings

If Congress creates an action that did not exist at common law, trial by jury is available if that action invokes rights and remedies of the kind traditionally enforced in an action at law. *See Curtis v. Loether, 415 U.S. 189, 193, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)* (*Seventh Amendment* applies to statutory rights). The court examines the nature of the action and the nature of the remedy--with an emphasis on whether the relief sought is legal or equitable. *See Wooddell v. International Bhd. of Elec. Workers, 502 U.S. 93, 97, 112 S. Ct. 494, 116 L. Ed. 2d 419 (1991)* (determination of right to jury trial). In addition, a federal statute or rule may expressly provide for trial by jury. *Standard Oil Co. v. Arizona, 738 F.2d 1021, 1023 (9th Cir. 1984)* (Congress may provide right even when *Seventh Amendment* would not); *see, e.g., Fed. R. Civ. P. 71.1(h)(1)(B)* (jury trial in condemnation proceedings).

[3] Considering That Admiralty Proceedings Generally Not Triable by Jury

There is no constitutional right to jury trial in a case within the district court's admiralty or maritime jurisdiction, unless there is an alternative basis for federal jurisdiction. *Fed. R. Civ. P. 38(e)*; *see also §§ 4.06[4], 4.14[9] above*.

Exceptions:

The following are exceptions:

1. Claims at law and in admiralty that arise out of the same incident and are so intertwined as to require trial by a single fact finder. *Fitzgerald v. United States Lines Co., 374 U.S. 16, 21, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963)* (intertwined claims);

2. Claims arising on the Great Lakes and connecting navigable waters. *28 U.S.C. § 1873*; and

3. The "saving to suitors" clause of the statutory provision conferring admiralty and maritime jurisdiction permits claims to be brought as actions at law if the requisite diversity and jurisdictional amount are present. *28 U.S.C. § 1333*.

In an action not otherwise triable of right by a jury, the court may order a jury trial with the consent of all parties, except in an action against the United States for which a federal statute provides for trial without a jury. *Fed. R. Civ. P. 39(c)(2)*. In such case, the court may try any issue with an advisory jury, even if the parties do not consent. *Fed. R. Civ. P. 39(c)(1)*; *see also § 4.57 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 38.10, 38.30 -38.34, 39.15*.
- *Federal Litigation Guide* Ch. 30.
- *Weinstein's Federal Evidence (2d Ed.)* Ch. 1008.
- *Fed. R. Civ. P. 38* (right to jury trial; demand).

- *Fed. R. Civ. P. 39* (trial by jury or by court).
- *28 U.S.C. § 1333* (admiralty and maritime jurisdiction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsRight to Jury Trial



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Chapter 4 PLEADING STAGE
PART I: DEMANDING A JURY TRIAL

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.54

§ 4.54 Demanding Jury Trial

[1] Determining Whether Jury Demand Is Necessary

A party seeking a jury trial of any issue triable of right by a jury must make a timely demand for a jury trial. *Fed. R. Civ. P. 38(b)*; *see Fed. R. Civ. P. 71.1(h)(1)(B)* (rule in condemnation proceedings).

If one party makes a jury demand, other parties are entitled to rely on it for the issues it covers, and all parties must consent to withdrawal of demand. *Fed. R. Civ. P. 38(c), (d), 39(a)(1)*; *see Fuller v. City of Oakland, 47 F.3d 1522, 1531 (9th Cir. 1995)* (unilateral withdrawal not allowed); *see also Rosen v. Dick, 639 F.2d 82, 88-89 (2d Cir. 1980)* (Rule 38 incorporates equitable principles of reasonable reliance). A demand covers an issue when it turns on the same "matrix of facts" and concerns the same "general area of dispute." *California Scents v. Surco Prods., 406 F.3d 1102, 1109 (9th Cir. 2005)* (factual overlap).

Exception:

In condemnation proceedings the right to a jury trial is based solely on *Fed. R. Civ. P. 71.1(h)(1)(B)*. A party in a condemnation proceeding may unilaterally withdraw its jury demand without obtaining the consent of the adverse party. *See United States v. Keller, 142 F.3d 718, 720 (4th Cir. 1998)* (Rule 38 does not apply to condemnation proceedings); *see also Fed. R. Civ. P. 38(d)*.

[2] Following Special Rules in Removed Cases

In a case that has been removed from state court to federal court, if either party demanded a jury trial in accordance with state law prior to the removal, that demand need not be repeated in federal court after removal. If the case was removed from a state court that does not require an express demand for a jury, no demand need be made after removal unless the district court requests it. The court must so order at a party's request and may so order on its own. *See Fed. R. Civ. P. 81(c)(3)(A)*.

If a jury demand has not already been made in state court, a jury demand must be served within 14 days after filing the removal petition, if the party making the demand is the petitioner. If the party making the jury demand is not the petitioner, the demand must be served within 14 days after service of notice of the removal petition. *See Fed. R. Civ. P. 81(c)(3)(B)*.

[3] Making Jury Demand on Pleading

A demand for a trial by jury may be endorsed on a pleading or made in a separate jury demand. *Fed. R. Civ. P. 38(b).* Local rules may require a separate demand in the body of the pleading, in addition to the endorsement. Indicating on the civil cover sheet that a jury is demanded does not constitute a valid demand. *See Wall v. National R.R. Passenger Corp., 718 F.2d 906, 909 (9th Cir. 1983)* (invalid). But a notation on a civil cover sheet may be deemed sufficient if it is served contemporaneously with the summons and complaint. *See Favors v. Coughlin, 877 F.2d 219, 220 (2d Cir. 1989)* (valid); *see also §§ 4.09, 4.17[1] above.*

The pleading or other document containing the jury demand must be signed in accordance with Rule 11. *See Fed. R. Civ. P. 11(a), (b); see also § 4.11 above.*

[4] Serving and Filing of Jury Demand Must be Timely

A waiver will be found unless a jury demand is served on all parties within 14 days after service of the last pleading directed to the issues on which a jury trial is demanded, except in condemnation actions. *Fed. R. Civ. P. 38(b)(1), (d); see Fed. R. Civ. P. 71.1(h)(1)(B).*

The demand must be filed in accordance with Rule 5(d). *Fed. R. Civ. P. 38(b)(2).* The "last pleading directed to" an issue is the pleading that contests it. Normally, that pleading is the answer to a complaint (or the reply to a counterclaim). Accordingly, if the pleadings are limited to a complaint and an answer, the time for serving a jury demand by either party is measured from service of the answer. *Fed. R. Civ. P. 38(b)(1).* If there are multiple defendants, the time begins to run from service of the last defendant's answer addressed to the issue. *See In re Kaiser Steel, 911 F.2d 380, 388 (10th Cir. 1990)* (multiple defendants); *see also Fed. R. Civ. P. 81(c)(3)(B)* (timing of demand in removal cases).

Warning:

An amended pleading does not restart the time unless it raises new jury claims. *See Huff v. Dobbins, Fraker, Tennant, Joy & Perlstein, 243 F.3d 1086, 1090 (7th Cir. 2001)* (amended pleading).

If a party has demanded trial by jury for only some of the issues, any other party may, within 14 days after service of the demand or a lesser time ordered by the court, serve a demand for trial by jury of any other or all issues of fact in the action. *Fed. R. Civ. P. 38(c).* In a condemnation proceeding, any jury demand must be filed within the time allowed for an answer or later time set by the court. *Fed. R. Civ. P. 71.1(e)(2), (h)(1)(B).* The rule does not specify a time for service, but it is prudent to serve within the same time as filing. *See § 4.31[7] above.*

[5] Striking Jury Demand

The court may upon motion or on its own strike a jury demand if it finds no right to a jury trial exists or that the demand was not timely made. *Fed. R. Civ. P. 38(d), 39(a)(2); see Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 1158 (5th Cir. 1982)* (jury issue not presented by case).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 38.50, 38.51, 39.10 -39.12.*
- *Bender's Federal Practice Forms* Form Nos. 38:1-38:4, 39:2-39:5.
- *Fed. R. Civ. P. 38* (right to jury trial; demand).

- *Fed. R. Civ. P. 39* (trial by jury or by court).
- *Fed. R. Civ. P. 71.1* (condemnation of property).
- *Fed. R. Civ. P. 81(c)(3)* (demand for jury trial in removed action).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury Demands



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Chapter 4 PLEADING STAGE
PART I: DEMANDING A JURY TRIAL

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.55

§ 4.55 Waiving and Obtaining Relief From Waiver of Jury Right

[1] Waiving Right to Jury Trial

In addition to waiver by failure to timely file the demand, the right to a jury trial may be waived by contractual agreement, if knowing and intentional. *National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977)* (contractual waiver recognized).

The court examines the contract terms, disparity in bargaining power, and conspicuousness of the waiver provision. *See, e.g., RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 814 (N.D. Tex. 2002)* (waiver buried in contract in small print was not knowing and intentional). Absent a clear waiver the right remains intact. *See, e.g., Lawson v. Kolender, 658 F.2d 1362, 1371-1372 (9th Cir. 1981)* (no waiver by failure to submit proposed jury instructions).

Once a party properly files a jury demand, the court may not require the parties to satisfy additional procedural requirements to avoid waiver of the right to a jury trial. *See Solis v. County of Los Angeles, 514 F.3d 946, 955 (9th Cir. 2008)* (district court lacked authority to impose forfeiture of right to jury trial as penalty for failure to submit proposed jury instructions and special verdict forms).

[2] Moving for Relief from Waiver of Jury

If a timely jury demand has not been made, the court has discretion on motion to order a jury trial of any or all issues. *Fed. R. Civ. P. 39(b)*. A formal motion is not necessary. *See, e.g., Moores v. Greenberg, 834 F.2d 1105, 1108 (1st Cir. 1987)* (citing **Moore's**) (letter from counsel); *Merritt v. Faulkner, 697 F.2d 761, 767 (7th Cir. 1983)* (late filing of demand).

Circuit Split:

Circuits are split as to the standard courts should apply. In general, good cause must be shown, and mere oversight or inadvertence does not constitute sufficient grounds for granting a motion for relief from a waiver. *See Zivkovic v. Southern Cal. Edison Co., 302 F.3d 1080, 1086-1087 (9th Cir. 2002)* (Rule 39 discretion narrow); *Raymond v. IBM Corp., 148 F.3d 63, 65-67 (2d Cir. 1998)* (excusable neglect required); *but see Pinemont Bank v. Belk, 722 F.2d 232, 235-236 (5th Cir. 1984)* (denial of relief only if strong and compelling reason). Additionally, the Second Circuit has applied a more flexible standard

when a party is involuntarily removed to federal court. *See Cascone v. Ortho Pharm. Corp., 702 F.2d 389, 392 (2d Cir. 1983)* (involuntary removal); *cf. Lewis v. Time, Inc., 710 F.2d 549, 556-557 (9th Cir. 1983)* (refusing to apply flexible standard).

[3] Obtaining Relief from Court's Denial of Jury Trial

An order denying a claimed right to a jury trial is reviewable by petition for a writ of mandamus which requires the petitioner to establish a clear and indisputable right to the writ, such as by showing the district court abused its power or discretion. *See Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382-384, 74 S. Ct. 145, 98 L. Ed. 106 (1953)* (standard of review).

As an alternative to mandamus review, a denial by the trial court of a claimed right to a jury trial may be reviewed on interlocutory appeal, if the district court certifies its order for appeal and the court of appeals exercises its discretion to hear the appeal. *See 28 U.S.C. § 1292(b)*. A denial by the trial court of a claimed right to a jury trial may be reviewed on appeal from the final judgment absent a clear waiver of the right. *White v. McGinnis, 903 F.2d 699, 703 (9th Cir. 1990)* (en banc) (affirmative waiver results in loss of right to appeal); *cf. National Union Elec. Corp. v. Wilson, 434 F.2d 986, 988 (6th Cir. 1970)* (failure to timely file demand is a forfeiture that does not waive right to appeal).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 38.50 -38.52, 39.13, 39.16, 39.30, 39.31, 202.04, 204.03.*
- *Bender's Federal Practice Forms* Form Nos. 38:30, 39:20.
- *Fed. R. Civ. P. 38* (right to jury trial; demand).
- *Fed. R. Civ. P. 39* (trial by jury or by court).

Legal Topics:

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Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsRight to Jury Trial



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Chapter 4 PLEADING STAGE
PART I: DEMANDING A JURY TRIAL

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.56

§ 4.56 Withdrawing Jury Demand

Once a party has demanded a jury trial, the demand may be withdrawn only with the consent of all affected parties or their attorneys of record. *Fed. R. Civ. P. 38(d), 39(a)(1).* But unilateral withdrawal is allowed before the start of trial if all other parties opposed the demand. *Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1304 (9th Cir. 1983)* (unilateral). And no consent is required when the demand did not cover issues affecting a party. *See Rosen v. Dick, 639 F.2d 82, 92 (2d Cir. 1980)* (citing **Moore's**) (consent not required).

Knowing participation in a bench trial may constitute a withdrawl of a jury demand, but "reluctant" participation in a bench trial, while continuing to demand a jury trial, does not waive the right to a jury trial or amount to a withdrawal of a jury demand. *See Solis v. County of Los Angeles, 514 F.3d 946, 955 (9th Cir. 2008)* ("knowing participation" exception applies only when party claiming jury trial right is attempting to act strategically, participating in bench trial hoping for favorable outcome, then asserting lack of consent to bench trial if result is unfavorable).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 38.50.*
- *Bender's Federal Practice Forms* Form No. 38:30.
- *Fed. R. Civ. P. 38* (right to jury trial; demand).
- *Fed. R. Civ. P. 39* (trial by jury or by court).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial



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Chapter 4 PLEADING STAGE
PART I: DEMANDING A JURY TRIAL

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.57

§ 4.57 Obtaining Advisory Jury

In any action not triable of right by a jury, the court, on motion or on its own initiative, may try any issue with an advisory jury. *Fed. R. Civ. P. 39(c)(1)*. The findings are merely advisory, and the use of an advisory jury is wholly discretionary and not reviewable on appeal or by mandamus. *Cox v. Babcock & Wilcox Co., 471 F.2d 13, 14 (4th Cir. 1972)* (no appeal); *see also Fed. R. Civ. P. 52(a)(1)*. If a proper demand has been made, an advisory jury may not be substituted for a jury of right under the *Seventh Amendment*. *See Fischer Imaging Corp., v. GE, 187 F.3d 1165, 1174 (10th Cir. 1999)* (new trial required when court erroneously impaneled advisory jury).

Advisory juries are not favored, and the court's discretion to empanel an advisory jury will be exercised only in an exceptional case. *See Moss v. Lane Co., 471 F.2d 853, 855 (4th Cir. 1973)* (requiring unique and peculiar circumstances). If the court grants a motion for an advisory jury in conjunction with a decision to deny a request for a regular jury, the decision to deny a jury trial of right will be reviewable on appeal after final judgment. *See Pradier v. Elespuru, 641 F.2d 808, 811 (9th Cir. 1981)* (reversing for retrial). But to preserve the objection, counsel should make a clear objection on the record before participating in a bench trial with an advisory jury. *See White v. McGinnis, 903 F.2d 699, 703 (9th Cir. 1990)* (en banc) (waiver in absence of objection).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 39.40 -39.43*.
- *Bender's Federal Practice Forms* Form Nos. 39:30, 39:40.
- *Fed. R. Civ. P. 39* (trial by jury or by court).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsRight to Jury Trial



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Chapter 4 PLEADING STAGE
PART J: INTERVENTION

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.58

§ 4.58 Checklist for Intervention

☐ Determine whether intervention available and desirable. *See § 4.59 below.*

- ○ Review grounds for intervening as of right. *Fed. R. Civ. P. 24(a). See § 4.59[3] below.*
- ○ Review grounds for permissive intervention. *Fed. R. Civ. P. 24(b). See § 4.59[4] below.*
- ○ Review timing considerations for seeking intervention. *See § 4.59[2] below.*

☐ Move for intervention. *Fed. R. Civ. P. 7, 24(c). See § 4.59[5] below.*

- ○ If applicable, cite grounds for intervention as of right based on federal statute. *See § 4.59[3][a] below.*
- ○ If applicable, cite grounds for intervention as of right based on interest in subject matter of action. *See § 4.59[3][b] below.*
- ○ If applicable, cite grounds for permissive intervention based on federal statute. *See § 4.59[4][a] below.*
- ○ If applicable, cite grounds for permissive intervention based on common questions of law and fact. *See § 4.59[4][b] below.*
- ○ Include argument as to why motion is timely. *See § 4.59[2] below.*

○ If necessary, include a detailed discussion of the legal basis supporting intervention in the accompanying memorandum of points and authorities.

○ Include a pleading setting forth the claim or defense.

○ If appropriate, request a hearing on the motion to intervene.

○ If required by local rule, draft the proposed court order.

○ Attach declaration[s] establishing all facts set forth in argument.

○ Provide legal authority for all relevant claims.

☐ Opposing motion for intervention as of right. *See § 4.59[3] below*.

○ If motion based on statute, explain why statute is not applicable to applicant's claim or defense.

○ If motion based on applicant's purported interest in action, (1) attack assertion that interest is protected by law, (2) attack assertion that applicant's interest relates to plaintiff's interest, (3) argue that strength of interest is insufficient to justify intervention, (4) explain that complications of intervention would add to existing suit, making it less efficient than separate litigation by applicant, and (5) dispute contentions concerning adequacy of representation of applicant's interest by existing parties.

☐ Opposing motion for permissive intervention. *See § 4.60[4] below*.

○ If motion based on statute, explain why statute is not applicable to applicant's claim or defense.

○ If motion based on common questions of law or fact (1) dispute existence of each claimed common issue of law or fact, (2) argue insignificance of each claimed common issue of law or fact to existing case as whole, and (3) compare importance of claimed common issues with non-common issues in case as whole.

○ Enumerate all factors that establish prejudice to existing parties.

○ Enumerate all potential delays caused by intervention.

○ Assert any potential manageability issues caused by intervention.

- ○ Argue suitability of all less-intrusive alternatives to intervention, from separate litigation to amicus curiae status.

- ○ If appropriate, challenge admissibility or persuasiveness of any evidence offered in support of motion, including supplying counter-declarations and exhibits.

☐ Determine whether to appeal denial of motion considering standard of review. *See § 4.60 below*.

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

Legal Topics:

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



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Chapter 4 PLEADING STAGE
PART J: INTERVENTION

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.59

§ 4.59 Moving to Intervene

[1] Examining Scope of Intervention

The purpose of intervention is to obtain party status in an existing case. Generally, an intervenor obtains the same rights as an original party. *See League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1304 (9th Cir. 1997)* (intervenors permitted to litigate case fully).

Intervention may be for a limited purpose. *See United Airlines, Inc. v. McDonald, 432 U.S. 385, 396 n.16, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977)* (limited intervention when existing parties chose not to appeal adverse judgment); *Jessup v. Luther, 227 F.3d 993, 997 (7th Cir. 2000)* (limited purpose to modify protective order); *Yniguez v. Arizona, 939 F.2d 727, 738 (9th Cir. 1991)* (interpreting *28 U.S.C. § 2403(b)* as authorizing limited intervention only).

The presence of a nondiverse, necessary but not required defendant intervenor will not destroy complete diversity. *Mattel, Inc. v. Bryant, 446 F.3d 1011, 1013 (9th Cir. 2006)* (discussing jurisdiction issues); *see Fed. R. Civ. P. 19*; *see also §§ 4.06[3], 4.32[7], 4.41[2] above*.

[2] Timing Motion to Intervene

A motion for permissive intervention or intervention "as of right" must be timely. *Fed. R. Civ. P. 24(a), (b)(1), (2)*. Rule 24 sets forth no express time period: instead the court considers the facts and circumstances of the case and exercises its discretion to determine timeliness. *See NAACP v. New York, 413 U.S. 345, 366, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973)* (discussing timeliness determination). A more lenient standard is applied when intervention is "as of right." *See Ozee v. American Council on Gift Annuities, Inc., 110 F.3d 1082, 1094-1095 (5th Cir. 1997)* (discussing difference in standards); *see also § 4.50[3] below*.

The court evaluates the following three factors:

1. **Stage of the proceedings.** This factor examines whether pretrial proceedings are substantially complete. If so, this factor weighs against intervention. *See California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc., 309 F.3d 1113, 1119 (9th Cir. 2002)* (length of time alone not dispositive); *see also Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, 72 F.3d 361,*

369 (3d Cir. 1995) (motion timely: four years had elapsed, but with little activity by parties).

2. **Prejudice.** The court looks at whether the delay in seeking intervention has harmed the existing parties, not whether intervention itself will delay the proceedings or expand their scope. *See Ruiz v. Estelle, 161 F.3d 814, 827-828 (5th Cir. 1998)* (prejudice refers to harm caused by delay in seeking intervention). Some courts also consider the potential prejudice to the applicant if intervention is denied. *See, e.g., Reich v. ABC/York-Estes Corp., 64 F.3d 316, 321 (7th Cir. 1995)* (examining prejudice to prospective intervenor).

3. **Length of delay and reason for delay.** The motion must be filed as soon as the proposed intervenor knows or has reason to know that its interests might be adversely affected by the outcome of the litigation. *League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1307 (9th Cir. 1997)* (timeliness measured from time applicant aware interests not adequately protected); *see D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001)* (unexplained delay justified denial of motion).

[3] Moving to Intervene as of Right

[a] Moving to Intervene as of Right: Federal Statute

Rule 24(a)(1) recognizes that a federal statute may confer an unconditional right to intervene as to private persons. These statutes include: *28 U.S.C. § 2348* (judicial review of agency order); *42 U.S.C. §§ 4911(b)(1)(B), 6972(b)(1), 30 U.S.C. § 1270(b)(1)(B)* (enforcement of environmental statutes); *42 U.S.C. § 2000e-5(f)(1)* (civil rights actions); *42 U.S.C. §§ 3612(o)(2), 3614(a), (b), (e)* (FHA actions); *26 U.S.C. § 7464* (bankruptcy trustee); *28 U.S.C. §§ 2321, 2323* (surface transportation board actions); and *47 U.S.C. § 309(e)* (FCC hearings).

Some federal statutes provide the United States with an unconditional right to intervene, including: *42 U.S.C. § 2000h-2* (private civil rights actions); *29 U.S.C. § 1132(h)* (private ERISA actions); *35 U.S.C. § 146, 15 U.S.C. § 1071* (patent and trademark cases); *31 U.S.C. § 3730(b)(2)* (private claims under False Claims Act); *33 U.S.C. § 1515(b)(1)* (private action to enforce deepwater ports regulation); *28 U.S.C. § 2403(a)* (challenges to constitutionality of federal statute affecting public interest); *28 U.S.C. § 2403(b)* (state attorney general may intervene when constitutionality of state statute raised); and *2 U.S.C. § 288b(c)* (Senate resolutions).

[b] Moving to Intervene as of Right: Interest in Subject Matter of Case

Non-statutory intervention as of right may be available if all of the following are met:

1. Timeliness;

2. An interest relating to the subject of the litigation;

3. Practical impairment of an interest of the party seeking intervention if intervention is not granted; and

4. Inadequate representation by the parties to the action.

Fed. R. Civ. P. 24(a)(2); *see State ex rel. Lockyer v. United States, 450 F.3d 436, 440-441 (9th Cir. 2006)* (criteria); *see also § 4.59[2] above* (discussion of timeliness requirement).

An applicant must have a "significant protectable interest" in the action to justify intervention as of right. Thus, the applicant must assert a legally-protected interest that is related to the interests asserted by the existing parties. *See State ex rel. Lockyer v. United States, 450 F.3d 436, 441 (9th Cir. 2006)* (interest requirement); *see also Sokaogon*

Chippewa Community v. Babbitt, 214 F.3d 941, 945-948 (7th Cir. 2000) (desire to influence outcome not sufficient); *cf. N.L. Indus. v. Secretary of the Interior, 777 F.2d 433, 435 (9th Cir. 1985)* (applicant had mining claim in direct competition with mining claims being litigated). The relationship requirement is met if resolution of existing parties' claims will actually affect the applicant. *See United States v. City of Los Angeles, 288 F.3d 391, 398 (9th Cir. 2002)* (relationship requirement).

Additionally, the applicant must show that the denial of intervention would impair or impede its ability to protect that interest. *Fed. R. Civ. P. 24(a)(2)*. The applicant need not be bound by the judgment in the case, but must show how the interest might be impaired or impeded, in some practical sense, by the judgment in the case. *Fed. R. Civ. P. 24*, Committee Note of 1966. Speculative or theoretical impairments are not sufficient. *See, e.g., Greene v. United States, 996 F.2d 973, 977 (9th Cir. 1993)* (substantial impairment of nonparty's interest may be present when precedential effect of ruling will be controlling); *Southmark Corp. v. Cagan, 950 F.2d 416, 418-419 (7th Cir. 1991)* (intervention denied because foreclosure action against piece of real estate partnership's property had only speculative effect on tort claimant of partnership); *but see Washington Elec. Coop v. Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92, 98 (2d Cir. 1990)* (intervention denied when neither res judicata nor collateral estoppel would bar future claim).

Intervention will be denied if the existing parties adequately represent the applicant's interests. *Fed. R. Civ. P. 24(a)(2)*. The key factor the court looks at is whether the applicant has similar interests and motives in litigating as the existing parties. *See Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 176-181 (2d Cir. 2001)* (intervention denied because existing parties had same ultimate objective). The burden of showing inadequate representation is on the applicant and is satisfied if the applicant shows that representation of his or her interest by existing parties "may be" inadequate. *United States v. City of Los Angeles, 288 F.3d 391, 398 (9th Cir. 2002)* (discussing burden).

Exception:

When a person seeks to intervene as of right in an action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the burden is on the government to show that the person's interests are adequately represented by the existing parties. *42 U.S.C. § 9613(i)*; *United States v. Acton Corp., 131 F.R.D. 431, 433 (D.N.J. 1990)* (burden under CERCLA).

A presumption of adequate representation arises when the applicant's interests in a case are represented be a governmental body or officer charged by law with representing those interests. *United States v. City of Los Angeles, 288 F.3d 391, 401-402 (9th Cir. 2002)* (United States adequately represented interests of community groups seeking to intervene). The presumption may be rebutted by a showing of actual conflict. *See South Dakota v. Ubbelohde, 330 F.3d 1014, 1025 (8th Cir. 2003)* (intervention improperly denied when government required to balance divergent interests of various parties).

Circuit Split:

Circuits are split as to whether a prospective intervenor must establish Article III standing. The majority holds that only existing parties must satisfy the "case or controversy" requirement of Article III. *See, e.g., San Juan County v. United States, 420 F.3d 1197, 1203-1206 (10th Cir. 2005)* (party on side of intervenor need only have standing). The minority view is that the intervenor must establish its own standing. *Jones v. Prince George's County, 348 F.3d 1014, 1017 (D.C. Cir. 2003)* (intervenor must possess standing). The Supreme Court has recognized the split but has not decided the issue. *Diamond v. Charles, 476 U.S. 54, 68-69, n.21 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986)* (discussing but not deciding issue).

Warning:

A permissive intervenor must have independent Article III standing to pursue an appeal absent an appeal by the party on whose side the intervenor intervened. *See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1109 (9th Cir. 2002)* (standing required); *see also § 4.06[6] above*.

[4] Moving for Permissive Intervention

[a] Moving for Permissive Intervention: Federal Statute

On timely application, a court may permit an applicant to intervene when a federal statute confers a conditional right to intervene. *Fed. R. Civ. P. 24(b)(1)(A)*. There is no "right" to intervene. The statute merely informs the court that this is a situation in which Congress deemed that intervention "might" be appropriate. Some statutes that provide a conditional right to private persons include: *Fed. R. Bankr. P. 2018(a)* (bankruptcy); and *20 U.S.C. § 1717* (school desegregation actions). As to government officials, some statutes include: *26 U.S.C. § 7424* (tax liens); *42 U.S.C. § 2000e-5(f)(1)* (under the EEOC); and *42 U.S.C. § 1997c(a)(1)* (under the Civil Rights of Institutionalized Persons Act).

[b] Moving for Permissive Intervention: Common Question of Law or Fact

A court, in its discretion, may permit intervention when the applicant's claim or defense shares a common question of fact or law with the main action. *Fed. R. Civ. P. 24(b)(1)(B). Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1108 (9th Cir. 2002)* (discretionary). In addition to a common question, the motion must be timely, and there must be an independent basis for jurisdiction if the claims do not come within the court's supplemental jurisdiction. *See Southern Cal. Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir. 2002)* (requirements for permissive intervention). *See 28 U.S.C. § 1367(a), (b)*; *see also § 4.06[5] above*.

In exercising its discretion, the court must consider whether the intervention will unduly delay the proceedings or prejudice the rights of the original parties. *Fed. R. Civ. P. 24(b)(3)*. Undue delay and prejudice will be found in the following circumstances:

1. When an application is made at a late stage of the proceedings. *Aleut Corp. v. Tyonek Native Corp., 725 F.2d 527, 530 (9th Cir. 1984)* (eve of settlement);

2. The applicant seeks relief that may interfere with relief sought by an existing party. *Donnelly v. Glickman, 159 F.3d 405, 412 (9th Cir. 1998)* (prejudice to existing parties); or

3. The applicant's claims would require court to decide new and complex issues or otherwise render the litigation unmanageable. *See, e.g., Taylor Communications Group, Inc. v. Southwestern Bell Tel. Co., 172 F.3d 385, 389 (5th Cir. 1999)* (denial when intervention would requiring litigating wholly unrelated facts).

[c] Moving for Permissive Intervention: Government Officer or Agency

A court may grant permissive intervention to a federal or state officer or agency when a party bases its claim or defense on a statute or executive order administered by the officer or agency or on any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order. *Fed. R. Civ. P. 24(b)(2)*.

[5] Meeting General Notice and Pleading Requirements

Rule 24(c) requires service of the motion on all existing parties in the manner set forth in Rule 5. *See Fed. R. Civ. P. 5(a)(1)(D)*.

The motion must state the grounds for intervention and be accompanied by a proposed pleading setting forth the applicants claims or defenses. *Fed. R. Civ. P. 24(c)*; *see Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 595 (7th Cir. 1993)* (pleading insufficient when it merely incorporated prior pleadings of existing parties).

Rule 24(c) applies to both permissive and intervention as of right, no matter what the basis for the right; *see also §*

4.59[3], [4] above.

[6] Meeting Special Notice Requirement When Suit Challenges Constitutionality of Statute

When the constitutionality of a federal statute is drawn in question in any action in which the United States is not a party, the party making the constitutional challenge must file a notice of constitutional question stating the question and identifying the paper that raises it and must serve that notice on the Attorney General of the United States. *28 U.S.C. § 2403(a)*; *Fed. R. Civ. P. 5.1(a)(1)(A), (a)(2).*

The United States has a right to intervene for the limited purpose of argument on the constitutionality of the statute in question. *28 U.S.C. § 2403(a).* The same rules apply to a constitutional challenge to a state statute, requiring notice to the state attorney general. *Fed. R. Civ. P. 5.1(a)(1)(B), (a)(2).*

The court must certify to the Attorney General of the United States that there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute. *28 U.S.C. § 2403*; *Fed. R. Civ. P. 5.1(b)*; *see also § 4.17[8] above.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 24.02, 24.03*, 24.06-24.08, 24.18.
- *Bender's Federal Practice Forms* Form Nos. 24:1-24:4, 24:20, 24:30.
- *Federal Litigation Guide* Ch. 4.
- *28 U.S.C. § 2403* (intervention by United States or a state; constitutional question).
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 2.
- *Fed. R. Civ. P. 5.1* (constitutional challenge to statute; notice, certification, and intervention).
- *Fed. R. Civ. P. 24* (intervention).
- *Oklahoma ex rel. Edmondson v. Pope, 516 F.3d 1214, 1216 (10th Cir. 2008)* (circuit court vacated district court's judgment and remanded with directions to notify U.S. Attorney General when both defendant and district court failed to notify Attorney General that case raised constitutional challenge to federal statute).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to Intervene



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Chapter 4 PLEADING STAGE
PART J: INTERVENTION

1-4 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 4.60

§ 4.60 Appellate Review of Intervention Rulings

[1] Considering Whether Order Is Immediately Appealable

A district court's denial of a motion for intervention is an appealable final decision. *See Mercury News, Inc. v. United States Dist. Court, 187 F.3d 1096, 1099 (9th Cir. 1999)* (denial of motion for permissive intervention in civil case is directly appealable); *Shea v. Angulo, 19 F.3d 343, 345 (7th Cir. 1994)* (denial of motion for intervention whether permissive or as of right is appealable final decision). However, an order denying full intervention as of right but granting limited intervention for the remedial phase of the trial may not be appealed as a final order, because the intervenor may appeal the final judgment. *See Churchill County v. Babbitt, 150 F.3d 1072, 1082 (9th Cir. 1998)* (partial denial). And an order permitting intervention is reviewable only on appeal from the final judgment. *Alsea Valley Alliance v. DOC, 358 F.3d 1181, 1187 (9th Cir. 2004)* (interlocutory).

[2] Examining Scope of Review

The issue of whether intervention was timely is reviewed for an abuse of discretion. *See NAACP v. New York, 413 U.S. 345, 366, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973)* (standard of review for timeliness determination). Additionally, an order as to permissive intervention is also reviewed for abuse of discretion. *See Purcell v. BankAtlantic Fin. Corp., 85 F.3d 1508, 1513 (11th Cir. 1996)* (standard of review for permissive intervention); *see also New York News, Inc. v. Kheel, 972 F.2d 482, 487 (2d Cir. 1992)* (same).

Circuit Split:

Circuits are split on the standard to be employed in reviewing a district court's determination of an applicants right to intervene under Rule 24(a)(2). The majority rule is that the determination is reviewed de novo. *See, e.g., Vollmer v. Publishers Clearing House, 248 F.3d 698, 705-706 (7th Cir. 2001)* (de novo). The minority view is an abuse of discretion standard. *See, e.g., Cotter v. Massachusetts Ass'n of Minority Law Enforcement Officers, 219 F.3d 31, 34 (1st Cir. 2000)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 24.20.*

- *Fed. R. Civ. P. 24* (intervention).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedureAppealsGeneral Overview



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation 5.syn

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§ 5.17 Moving for Consolidation

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[4] Moving for Consolidation

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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART A: PROCEDURAL CONTEXT

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.01

§ 5.01 Procedural Context--Required Conferences and Case Management

The Rule 26(f) conference and initial disclosures required under Rule 26(a) permit parties to explore the basis of their opponents' claims and defenses and the possibilities for prompt settlement and resolution of the case. One aspect of the meeting requires the parties to arrange for initial disclosures of specified information early in the pretrial phase, without a formal request from the opposing party. Parties must also make certain disclosures concerning expert witnesses without a formal discovery request from the opposing party.

Under *Fed. R. Civ. P. 16*, judges may fix deadlines for completing the major pretrial tasks. The Rule encourages judges to participate actively in designing case-specific plans for positioning litigation as efficiently as possible for disposition by settlement, motion, or trial. Rule 16 authorizes and regulates the use of a wide range of case management tools and powers--principally through pretrial conferences. The pretrial conference process requires parties to contemplate and articulate a plan of action throughout the course of litigation. This helps counsel to develop an overall theme or theory for the case, and to identify its strengths and weaknesses. It is extremely important for counsel to do this at the earliest possible time, and certainly by the time of the initial meeting between counsel.

The final pretrial conference under *Fed. R. Civ. P. 16(e)* is used to facilitate a just and efficient trial. The critical importance of the final pretrial order cannot be overemphasized. The order supersedes the pleadings; governs who may be called as witnesses (and possibly impeachment witnesses and rebuttal witnesses); may contain binding stipulations; and may limit the questions, evidence, exhibits, and legal theories to be presented at trial. Matters not preserved in the final pretrial order are eliminated from the case. If counsel is unprepared for the final pretrial conference, he or she exposes the client to the risk of unwarranted adverse rulings, including sanctions, and squanders an opportunity to affect the substance and shape of the trial.

Consolidating separate actions under *Fed. R. Civ. P. 42(a)* promotes efficiency when there are common questions of fact and law. It can avoid duplication of discovery and presentation of evidence and reduce costs, as well as accelerate the litigation process. Consolidation may also help to prevent inconsistent results. Consolidation may be used for limited purposes, and may be expressly limited to pretrial proceedings, including pleadings and discovery.

Conversely, a single action may be bifurcated under *Fed. R. Civ. P. 42(b)* depending on the complexity of the issues, the factual proof involved in the individual issues, the risk of jury confusion, the differences between the separate issues,

the chance that separate trials will lead to economy in discovery, and the possibility that the first trial may be dispositive of the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART B: RULE 26(f) CONFERENCE AND INITIAL DISCLOSURES

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.02

§ 5.02 Checklist for Rule 26(f) Conference and Initial Disclosures

☐ If proceeding is not exempt, schedule initial conference of parties to be held at least 21 days before scheduling conference is held or scheduling order is due under *Fed. R. Civ. P. 16(b). See § 5.03 below.*

☐ Prepare and file Rule 26(a)(1) initial disclosures within 14 days after discovery planning meeting held pursuant to Rule 26(f). *See § 5.04 below.*

☐ At least 90 days before trial, unless otherwise stipulated or ordered by the court, prepare and provide Rule 26(a)(2) expert-witness disclosures. *See § 5.05 below.*

☐ If party fails to make disclosure required by Rule 26(a)(1) or Rule 26(a)(2), seek informal resolution first, and if attempt unsuccessful, move to compel disclosure. *See § 5.06 below.*

☐ **Search by Topic:**

- ○ Civil Procedure > Pretrial Matters > Conferences
- ○ Civil Procedure > Discovery > Disclosures

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersConferencesGeneral Overview



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART B: RULE 26(f) CONFERENCE AND INITIAL DISCLOSURES

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.03

§ 5.03 Scheduling and Attending Rule 26(f) Conference

[1] Determining Whether Proceedings Are Exempt From Rule 26(f) Conference and Initial Disclosure Requirements

The following categories of proceedings are exempt from the Rule 26(f) requirement that the parties confer at the outset of the case:

1. An action for review on an administrative record;

2. A forfeiture action in rem arising from a federal statute;

3. A petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

4. An action brought without an attorney by a person in custody of the United States, a state, or a state subdivision;

5. An action to enforce or quash an administrative summons or subpoena;

6. An action by the United States to recover benefit payments;

7. An action by the United States to collect on a student loan guaranteed by the United States;

8. A proceeding ancillary to a proceeding in another court; and

9. An action to enforce an arbitration award.

Fed. R. Civ. P. 26(a)(1)(B).

[2] Meeting Timing Requirements for Rule 26(f) Conference

[a] Rule 26(f) Conference Must Occur at Least 21 Days Before Scheduling Conference or Order

The conference between opposing counsel mandated by Rule 26(f) is the parties' first pretrial conference. *Fed. R. Civ. P. 26(a), (f).*

Timing:

Except in categories of cases exempted under Rule 26(a)(1)(B) or when otherwise ordered, the parties must hold the Rule 26(f) conference as soon as practicable, and in any event at least 21 days before the Rule 16(b) scheduling conference is held or the scheduling order is due. *Fed. R. Civ. P. 26(f)(1).*

[b] Expedited Schedules May be Required Under Local Rules

If necessary to comply with a court's expedited schedule for Rule 16(b) conferences, the court may, by local rule:

1. Require that the Rule 26(f) conference occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); or

2. Require that the written report outlining the discovery plan be filed fewer than 14 days after the parties' conference; or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

Fed. R. Civ. P. 26(f)(4)

[c] Generally No Discovery May Occur Until Parties Have Rule 26(f) Conference

Except in exempted proceedings, or when authorized under the federal rules or by order or agreement of the parties, a party may not seek discovery from any source before the Rule 26(f) conference. *Fed. R. Civ. P. 26(d)(1).*

[3] Covering Topics That Must Be Discussed at Rule 26(f) Conference

At the Rule 26(f) conference, the parties must confer to accomplish the following:

1. Consider the nature and basis of their claims and defenses;

2. Consider the possibilities for promptly settling or resolving of the case;

3. Make or arrange for the required initial disclosures of documents and witnesses (*see Fed. R. Civ. P. 26(a)(1)*);

4. Discuss any issues relating to preserving discoverable information, particularly electronically stored information; and

5. Develop a proposed discovery plan to assist in crafting an appropriate scheduling order.

Fed. R. Civ. P. 26(f)(2).

The Rule 26(f) conference should include a discussion of any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced, privilege issues, and how to allocate costs involved with electronic discovery. *Fed. R. Civ. P. 26(f); see In re Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437, 444 (D.N.J. 2002) .*

[4] Addressing Initial Disclosures At Rule 26(f) Conference

[a] Disclosures Must Ordinarily Be Made Within 14 Days of Rule 26(f) Conference

Unless the court directs or the parties stipulate otherwise, or a party objects, the initial disclosures must be made within 14 days of the Rule 26(f) conference. *Fed. R. Civ. P. 26(a)(1)(C).*

Any party joined after the Rule 26(f) conference has 30 days after being served or joined within which to make its initial disclosures. The court or the parties may modify the schedule for any subsequently joined party's initial disclosures. *Fed. R. Civ. P. 26(a)(1)(D).*

[b] Categories of Cases Exempt From Initial Disclosure Requirements

The same categories of cases that are exempt from the Rule 26(f) conference requirement are exempt from the initial disclosure requirements. *Fed. R. Civ. P. 26(a)(1)(B)*; *see § 5.03[1] above*.

District courts retain authority to issue case-specific orders requiring initial disclosure in any case included within the enumerated list when appropriate. The parties may also stipulate that they will make the disclosures. *Fed. R. Civ. P. 26(a)(1)*, Committee Note of 2000; *see Fed. R. Civ. P. 16*.

[c] Initial Disclosures Stayed Pending Objection of Party

Any party can delay making the initial disclosures at the time required by Rule 26(a)(1) by:

1. Objecting that initial disclosures are not appropriate in the circumstances of the action at the Rule 26(f) conference; and

2. Restating the objection in the discovery plan reflecting the occurrences at the conference.

Fed. R. Civ. P. 26(a)(1)(C).

An objection by one party in the proposed discovery plan relieves all parties of the obligation to make their initial disclosures at the time specified in Rule 26(a)(1), pending resolution of the objection. Stating the objection in the proposed discovery plan allows the objecting party to present its objection to the court before any party is required to make any of the initial disclosures. *Fed. R. Civ. P. 26(a)(1)*, Committee Note of 2000.

A court ordinarily rules on objections to initial disclosures when it issues the Rule 16(b) scheduling order. However, it may rule on the objection in a different fashion and at a different time. The court's ruling should encompass any disclosures to be made and when they should be made. The advisory committee notes that even when the circumstances of the case warrant suspending some disclosure obligations, others, such as the disclosure of damages and insurance information may continue to be appropriate. *Fed. R. Civ. P. 26(a)(1)*, Committee Note of 2000.



Strategic Point:

The right to delay or to partially or completely avoid the initial disclosures does not permit fewer than all of the parties to the action to opt out of the initial disclosures unilaterally. That result can be achieved only if all of the parties so stipulate or the court so orders. *Fed. R. Civ. P. 26(a)(1)*, Committee Note of 2000.

[d] Parties May Stipulate to Extend Deadline for Initial Disclosures

The parties may stipulate to extend the deadline for initial disclosures, which is ordinarily within 14 days after the parties' Rule 26(f) conference. *Fed. R. Civ. P. 26(a)(1)(C)*.

For example, an extension may be appropriate when a defendant who received service of process late would have less than 60 days after being served in which to make its initial disclosures. *See Fed. R. Civ. P. 26(f)*, Committee Note of 1993.

[e] Noncompliance Not Excused by Inadequate Disclosure by Opponent or Party's Incomplete Investigation

A party must make its initial disclosures based on information then reasonably available and is not excused from making disclosures because the party challenges the sufficiency of another party's disclosures or another party has not made its disclosures, or because the party has not fully completed its investigation of the case. *Fed. R. Civ. P. 26(a)(1)(E)*.

[f] Matters Subject to Initial Disclosure Requirements

In making the initial disclosures, the disclosing party must provide to the other parties all of the following:

> 1. The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment;
>
> 2. A copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;
>
> 3. A computation of each category of damages claimed by the disclosing party, making available for inspection and copying as under *Fed. R. Civ. P. 34* the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and
>
> 4. For inspection and copying any agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Fed. R. Civ. P. 26(a)(1)(A).

[g] Sanctions for Noncompliance

The penalty for failure to make any of the disclosures required by *Fed. R. Civ. P. 26(a)* without substantial justification can be significant. *See Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi), (c)(1)* (sanctions may include striking of pleadings, prohibition from introducing designated matters in evidence, and payment of reasonable expenses incurred by other parties due to failure).

[5] Determining Who Must Participate In Rule 26(f) Conference

All parties and unrepresented parties must confer to discuss the nature and the basis of their claims and defenses. *Fed. R. Civ. P. 26(f)*. Attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging for the conference and attempting in good faith to agree on the proposed discovery plan. *Fed. R. Civ. P. 26(f)(2)*.

[6] Rule 26(f) Conference Need Not be Attended in Person Unless Court Orders It

The court may order the parties or attorneys to attend the conference in person. *Fed. R. Civ. P. 26(f)(2)*. Otherwise, the parties may conduct the conference by other means.



Strategic Point:

For the most part, the parties are not required to meet face-to-face unless the court orders that the parties or attorneys attend the conference in person. *Fed. R. Civ. P. 26(f)*; *see Fed. R. Civ. P. 26(f)*, Committee Note of 2000. The parties may confer by telephone or email. However, the better practice is to meet in person. Meeting in person is more likely to accomplish the objectives of the conference and establish a positive relationship among counsel.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.140 -26.146*.
- *Bender's Federal Practice Forms* Form Nos. 26:500-26:503.
- *Fed. R. Civ. P. 26(a)* (required disclosures).
- *Fed. R. Civ. P. 26(f)* (conference of the parties; planning for discovery).
- *Fed. R. Civ. P. 37(c)* (sanctions for failure to disclose).

Legal Topics:

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



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Moore's AnswerGuide: Federal Pretrial Civil Litigation

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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART B: RULE 26(f) CONFERENCE AND INITIAL DISCLOSURES

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.04

§ 5.04 Making Initial Disclosures Under Rule 26(a)(1)

[1] Determining Whether Work Product Protection Applies

The work product doctrine provides that a party may not obtain discovery of documents, information, or other tangible things prepared in anticipation of litigation or trial by or for another party or that other party's representative, unless the party seeking discovery (1) has substantial need of the materials in the preparation of his or her case, and (2) the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *Fed. R. Civ. P. 26(b)(3)(A)(ii)*.

In ordering discovery of such materials when the required showing has been made, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. *Fed. R. Civ. P. 26(b)(3)(B)*.

A party asserting protection must make the claim expressly, and describe the nature of the information not produced in a manner that, without revealing information itself protected, will enable other parties to assess the applicability of the protection. *Fed. R. Civ. P. 26(b)(5)*; *see Intel Corp. v. Via Techs., Inc., 204 F.R.D. 450, 451-452 (N.D. Cal. 2001)* , *aff'd, 319 F.3d 1357 (Fed. Cir. 2003)* (declaration of former employee who was located near end of discovery period was work product until the moment it was filed and not a document subject to discovery under Rule 26(a)).

[2] Considering Requesting Extension of Time

If there are particular problems in complying with the time limits of Rule 26(a), counsel should request an extension of time. *See Quevedo v. Trans-Pac. Shipping, Inc., 143 F.3d 1255, 1258 (9th Cir. 1998)* (court refused to consider expert's report because it was filed one-and-a-half months late and plaintiff could have asked for an extension of time).

[3] Considering Protective Orders on Confidential, Proprietary, or Trade Secret Information

The parties should consider whether to enter into a protective order governing confidential, proprietary, and/or trade secret information. The parties may want to stipulate to such an order or a party may move for such an order in advance of making initial disclosures. *Fed. R. Civ. P. 26(c)*; *see In re Terra Int'l, Inc., 134 F.3d 302, 306-307 (5th Cir. 1998)* . Further, the parties may include such a provision in the Rule 26(f) discovery plan. *Fed. R. Civ. P. 26(f)*.

For discussion of protective orders, *see §§ 8.62 -8.65 below*.

[4] Considering Stipulating to Format and Contents of Privilege Log

The parties may wish to reach agreement on the format and contents of privilege logs for initial and later disclosures. *Fed. R. Civ. P. 26(b)(5)(A)*.

[5] Objecting to Disclosures at Rule 26(f) Conference

A party may also object during the Rule 26(f) conference that initial disclosures are not appropriate in the circumstances of the action; the objection must be stated in the Rule 26(f) discovery plan. *Fed. R. Civ. P. 26(f)*; *see also § 5.03[4][c] above*.

[6] Disclosures Must Be Timely

[a] Disclosures Must Be Made 14 Days After Rule 26(f) Conference

The disclosures required under *Fed. R. Civ. P. 26(a)(1)* must be made at or within 14 days after the *Fed. R. Civ. P. 26(f)* conference, unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. *Fed. R. Civ. P. 26(a)(1)(C)*, *(f)(2)*; *see, e.g., Flores v. Southern Peru Copper Corp., 203 F.R.D. 92, 94 (S.D.N.Y. 2001)* (citing **Moore's,** courts retain power to defer initial disclosures). In ruling on an objection, the court will determine what disclosures, if any, are to be made, and set the time for disclosure. *Fed. R. Civ. P. 26(a)(1)*.

[b] Disclosure Date Inapplicable If Party Objects to Initial Disclosures During Rule 26(f) Conference

The disclosure date set forth in Rule 26(a)(1) does not apply if a party objects to the initial disclosures during the Rule 26(f) conference and states its objection in the Rule 26(f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally. However, the objecting party may present to the court its position that disclosure would be "inappropriate in the circumstances of the action." *See Fed. R. Civ. P. 26(a)*, Committee Note of 2000.

Objecting to initial disclosures at the Rule 26(f) conference presents the objection to the judge before any party is required to make disclosures. The court must then rule on the objection and determine what disclosures, if any, should be made. Ordinarily, this determination would be included in the *Fed. R. Civ. P. 16(b)* scheduling order, but the court may handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others such as the damages and insurance information called for by *Fed. R. Civ. P. 26(a)(1)(A)(iii)*, *(iv)*, may continue to be appropriate. *See Fed. R. Civ. P. 26(a)*, Committee Note of 2000.

[c] Party Joined After Rule 26(f) Conference Must Make Disclosures Within 30 Days

Any party first served or otherwise joined after the *Fed. R. Civ. P. 26(f)* conference must make the disclosures required under *Fed. R. Civ. P. 26(a)(1)* within 30 days after being served or joined, unless a different time is set by stipulation or court order. *Fed. R. Civ. P. 26(a)(1)(D)*. "First served or otherwise joined" refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervener. *See Fed. R. Civ. P. 26(a)*, Committee Note of 2000.

[7] Each Party Must Disclose Information About Witnesses

[a] Names and Addresses Must Be Disclosed

A party must, without awaiting a discovery request, provide to other parties the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment. *Fed. R. Civ. P. 26(a)(1)(A)(i). See Biltrite Corp. v. World Rd. Markings, Inc., 202 F.R.D. 359, 362 (D. Mass. 2001)* (disclosure requirement gives opposing party information on identification and location of persons with knowledge so that they can be contacted, either for purposes of serving a proposed amended complaint, or for being interviewed, or being deposed, or for doing background investigation); *Chalick v. Cooper Hospital/University Med. Ctr., 192 F.R.D. 145, 150 (D.N.J. 2000)* .

[b] Description of Topics of Witness's Knowledge Must Be Disclosed

The disclosing party must identify the subjects of the information known by each witness. *Fed. R. Civ. P. 26(a)(1)(A)(i).* It is not necessary to provide a detailed narrative of all of the facts known to each witness; a brief description of the general topics of each witness's knowledge will suffice. *Bick v. Harrah's Operating Co., 2000 U.S. Dist. LEXIS 1764, at *8-*11 (N.D. Ill. 2000)* .

The prudent course is to produce information for all individuals that counsel anticipates he or she will use:

1. To support its own allegations, claims, or defenses;

2. To question a witness during a deposition;

3. During a pretrial conference;

4. During discovery (other than merely to frame a response to a discovery request);

5. On motion practice, at least motions bearing on the merits (e.g., summary judgment, preliminary injunction);

6. To support a claim;

7. To support a denial or rebuttal of the allegations, claims, or defenses of another party; or

8. If "the need [otherwise] arises."

See Fed. R. Civ. P. 26(a)(1), Committee Note of 2000.

[c] Disclosure Not Required for Impeachment Witnesses

Parties are not required to disclose identifying information as to persons whose knowledge extends only to matters of impeachment. *Fed. R. Civ. P. 26(a)(1)(A)(i)*; *see Newsome v. Penske Truck Leasing Corp., 437 F. Supp. 2d 431, 434 (D. Md. 2006)* (impeachment evidence defined).

[8] Parties Must Disclose Documents, Electronically Stored Information, and Tangible Things

[a] Copy or Description and Location Required

A party must, without awaiting a discovery request, provide other parties with a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party, and that the disclosing party may use to support its claims or defenses, unless solely for impeachment. *Fed. R. Civ. P. 26(a)(1)(A)(ii).*

The term "electronically stored information" has an expansive meaning and includes any type of information that is stored electronically in any medium. The term is broad enough to cover all current types of computer-based information and flexible enough to encompass future changes and developments. *Fed. R. Civ. P. 26(a)(1)*, Committee Note of 2006; *Fed. R. Civ. P. 34(a)*, Committee Note of 2006.

[b] Itemized Listing Not Required

Although an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including electronically stored information, sufficiently to enable opposing parties: (1) to make an informed decision concerning which documents might need to be examined, at least initially; and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. *See Fed. R. Civ. P. 26(a)*, Committee Note of 1993.

[c] Information Used for Impeachment Need Not Be Disclosed

Fed. R. Civ. P. 26(a)(1) requires counsel to provide to all other parties a description by category and location of all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party, and that the disclosing party may use to support its claims or defenses, unless solely for impeachment. Alternatively, counsel can produce these materials rather than describe them. *See Fed. R. Civ. P. 26(a)(1)(A)(ii).*

Warning:

Counsel should be careful not to construe narrowly the disclosure obligations under Rule 26 and, in particular, not to rely on the "impeachment" exception if there is any prospect that the nondisclosed item will be needed to support a claim or defense. *See, e.g., Fed. R. Civ. P. 26(a)(1)(A)(i), (ii). See Klonoski v. Mahlab, 156 F.3d 255, 270 (1st Cir. 1998)* (evidence with partial substantive value must be disclosed); *Newsome v. Penske Truck Leasing Corp., 437 F. Supp. 2d 431, 436-439 (D. Md. 2006)* (party erroneously designating evidence as "impeachment evidence" does so at its own peril).

Even after a case has proceeded through other forms of discovery, a court may "look back" to see if disclosure should have been made under Rule 26 at the outset.

[9] Detailed Computation of Damages Required

A detailed computation of any category of claimed damages is required. *Fed. R. Civ. P. 26(a)(1)(A)(iii).* Each party claiming damages must make available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, on which its computation is based, including materials bearing on the nature and extent of injuries suffered. *Fed. R. Civ. P. 26(a)(1)(A)(iii)*; *see, e.g., Clayman v. Starwood Hotels & Resorts Worldwide, 343 F. Supp. 2d 1037, 1047 (D. Kan. 2004)* (plaintiff precluded from presenting damages calculations regarding future medical expenses for failure to provide defendant with computations before trial).

Damages computations must be as complete as possible. *Stairmaster Sports/Med. Prods., Inc. v. Groupe Procycle, Inc., 182 F.R.D. 117, 119 (D. Del. 1998)* (disclosing party asserted certain affirmative defenses of patent invalidity without independent evidence to support them). Moreover, plaintiff must update its disclosure and provide greater detail as to its calculations as discovery progresses. *City & County of San Francisco v. Tutor-Saliba Corp., 218 F.R.D. 219, 220-222 (N.D. Cal. 2003)* (nature and extent of any personal injuries suffered must be disclosed, including amounts claimed for pain, suffering or disfigurement, as well as medical bills, lost wages, cost of repairing damaged property).

Parties need not disclose as part of their computations of damages disclosures of information already possessed by other

parties or privileged or otherwise protected materials. *Fed. R. Civ. P. 26(a)(1)(A)(iii)*.

[10] Disclosure of Insurance Agreements Required

Disclosure of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy the judgment, or indemnify or reimburse payment of the judgment is required. This information must be made available for inspection and copying as under Rule 34. *Fed. R. Civ. P. 26(a)(1)(A)(iv)*. Only an insurance policy or other agreement that gives rise to an insurer's obligation to indemnify or hold its insured harmless for a judgment must be disclosed under *Fed. R. Civ. P. 26(a)(1)(A)(iv)*, which does not require the production of all agreements relating to insurance. *Excelsior College v. Frye, 233 F.R.D. 583, 585 (S.D. Cal. 2006)* ; *see also Resolution Trust Corp. v. Grant Thornton, 41 F.3d 1539, 1541-1548 (D.C. Cir. 1994)* (subpoena seeking malpractice and liability policies was overly broad request).

The disclosure of insurance information under Rule 26(a)(1)(A)(iv) does not render that information admissible in evidence. *See Fed. R. Evid. 411*; *see also Fed. R. Civ. P. 26(a)*, Committee Note of 1993.

[11] Reasonable Inquiry Into Facts Required

A party must make its initial disclosures based on all information then reasonably available to it and is not excused from making its disclosures because it has not yet completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures. *Fed. R. Civ. P. 26(a)(1)(E)*.

[12] Disclosures Must Be Made in Writing, Signed, and Served

Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served on all other parties. *Fed. R. Civ. P. 26(a)(4)*.

The signature on the initial or pretrial disclosure is a certification under *Fed. R. Civ. P. 26(g)(1)* that it is complete and correct as of the time when made.

[13] Disclosures Should Not Be Filed

Disclosures under *Fed. R. Civ. P. 26(a)(1)* must not be filed until they are used in the proceeding or the court orders filing. *Fed. R. Civ. P. 5(d)(1)*. The term "used in the proceeding" refers to proceedings in court, including motions and Rule 16 pretrial conferences. *Fed. R. Civ. P. 5(d)* Committee Note of 2000.

[14] Parties Must Supplement Disclosures

A party who has made a Rule 26(a)(1) disclosure is under a duty to supplement or correct the disclosure to include later-acquired information as it becomes available. *Fed. R. Civ. P. 26(e)(1)*; *see, e.g., City & County of San Francisco v. Tutor-Saliba Corp., 218 F.R.D. 219, 222 (N.D. Cal. 2003)* (as discovery proceeds, plaintiffs must supplement their initial damages disclosure to reflect the information obtained through discovery).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 5.33, 16.03 -16.13, 26.20 -26.22, 26.130 -26.132*.
- *Bender's Federal Practice Forms* Form Nos. 16:1-16:22, 26:1-26:20, 26:50-26:52.

- *Fed. R. Civ. P. 5(a)* (required service).
- *Fed. R. Civ. P. 5(d)(1)* (filing disclosures).
- *Fed. R. Civ. P. 16(a)* (pretrial conference).
- *Fed. R. Civ. P. 26(a)* (required disclosures).
- *Fed. R. Civ. P. 26(b)* (discovery scope and limits).
- *Fed. R. Civ. P. 26(f)* (conference of the parties; planning for discovery).
- *Fed. R. Civ. P. 26(g)* (signing disclosures and discovery requests).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART B: RULE 26(f) CONFERENCE AND INITIAL DISCLOSURES

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.05

§ 5.05 Making Initial Disclosures Under Rule 26(a)(2)

[1] Parties Must Disclose Expert Witnesses

In addition to the initial disclosures required by Rule 26(a)(1), each party must disclose to other parties the identity of any person who may be used at trial to present evidence under *Fed. R. Evid. 702*, *703*, or *705*, that is, expert witnesses. *Fed. R. Civ. P. 26(a)(2)(A)*; *Musser v. Gentiva Health Servs., 356 F.3d 751, 757 (7th Cir. 2004)* (trial court properly excluded expert testimony from witness who was not included on expert witness list even though he was included on list of fact witnesses).

[2] Disclosures Must Be Made 90 Days Before Trial Date

The disclosures required under Rule 26(a)(2) must be made at the times and in the sequence directed by the court. *Fed. R. Civ. P. 26(a)(2)(D)*; *see, e.g., Continental Lab. Prods., Inc. v. Medax Int'l, Inc., 195 F.R.D. 675, 676 (S.D. Cal. 2000)* . In the absence of other directions from the court or stipulation by the parties, the disclosures must be made at least 90 days before the date set for trial or the date the case is to be ready for trial. *Fed. R. Civ. P. 26(a)(2)(D)(i)*; *see also Sims v. Great American Life Ins. Co., 469 F.3d 870, 894-895 (10th Cir. 2006)* (district court properly excluded defendant's accident reconstruction expert as untimely disclosed under scheduling order, even though expert was disclosed more than 90 days before trial).

[3] Disclosure of Contradiction or Rebuttal Evidence Must Be Made Within 30 Days After Other Party's Disclosure

If the expert-witness evidence required to be disclosed under Rule 26(a)(2) is intended solely to contradict or rebut evidence on the same subject matter identified by another party under *Fed. R. Civ. P. 26(a)(2)(B)* (expert witness report), a party must disclose it within 30 days after the disclosure made by the other party. *Fed. R. Civ. P. 26(a)(2)(D)(ii)*; *see Yeti by Molly Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001)* .

[4] Expert Witness Reports Are Required From Retained or Employee Expert

[a] Expert Witnesses Must Prepare and Sign Reports

Except as otherwise stipulated or ordered by the court, the identification of certain experts who may testify must be accompanied by a written report prepared and signed by the witness. *Fed. R. Civ. P. 26(a)(2)(B)*; *see Musser v. Gentiva Health Servs., 356 F.3d 751, 757 (7th Cir. 2004)* (trial court properly excluded expert testimony from witness who was not included on expert witness list); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1105-1106 (9th Cir. 2001)* .

Specifically, this report is required from the following:

1. A witness who is retained or specially employed to provide expert testimony in the case.

2. A witness whose duties as an employee of the party regularly involve giving expert testimony.

Fed. R. Civ. P. 26(a)(2)(B).

For purposes of the Rule 26 disclosure requirement, a witness who is retained or specially employed to provide expert testimony includes any expert witness who will receive consideration, whether monetary or otherwise, different than the statutory fees and allowances ordinarily prescribed by law. *Smith v. State Farm Fire & Cas. Co., 164 F.R.D. 49, 56 (S.D. W. Va. 1995)* (expert witness not receiving consideration of some kind would not be required to prepare and sign report); *see also Navajo Nation v. Norris, 189 F.R.D. 610, 613 (E.D. Wash. 1999)* (plaintiffs not required to provide expert witness reports for five employees, none of whom had been regularly used as expert witnesses in past, and none of whom were retained or specially employed to provide expert testimony in the case); *28 U.S.C. § 1821* (statutory fees and allowances); *Fed. R. Evid. 702* (testimony by experts).

Warning:

Fed. R. Civ. P. 37(c) gives teeth to this requirement by forbidding the use of any information required to be disclosed by Rule 26(a) that is not properly disclosed. *See Reed v. Binder, 165 F.R.D. 424, 430 (D.N.J. 1996)* (court must first consider whether there is substantial justification for failure and then consider whether failure is harmless); *see also* § 8.75 *below*.

[b] Report Must Contain Opinions, Bases for Opinions, Facts or Data, Exhibits, Qualifications, and Previous Cases

Each expert-witness report must contain the following:

1. A complete statement of all opinions the witness will express and the basis and reasons for them;

2. The facts or data considered by the witness in forming the opinions;

3. Any exhibits to be used to summarize or support them;

4. The witness's qualifications, including a list of all publications authored by the witness in the previous 10 years;

5. A list of all other cases in which the witness testified as an expert at trial or by deposition within the last four years; and

6. A statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B)(i)-(vi); *see, e.g., Sierra Club Lone Star Chap. v. Cedar Point Oil Co., 73 F.3d 546, 571 (5th Cir. 1996)* (expert report must be detailed and complete); *Pomales v. Bridgestone Firestone, Inc., 217 F.R.D. 290,*

293 (D.P.R. 2003) (witness's qualifications required); *Reed v. Binder, 165 F.R.D. 424, 429 (D.N.J. 1996)* (test of report is whether it is sufficiently complete, detailed, and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced).

Exception:

Parties need not provide a report if the parties have stipulated, or a court order directs an exception to the disclosure requirement. *Fed. R. Civ. P. 26(a)(2)(B)*.

Warning:

Former versions of Rule 26 created uncertainty as to whether the work product protection is waived when an attorney provides work product materials to an expert witness. The uncertainty was based on an apparent conflict in the language of Rule 26. A former version of Rule 26(a)(2)(B) required that an expert report contain a complete statement of all of the "data or other information" considered by the expert in forming the opinions, without express limitation. Based on this language, many courts held that work product protection was waived for any document or information provided to a testifying expert, whether or not the expert relied on the information in preparing the expert report. *See, e.g., In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001)* . In 2010, Rule 26(a)(2)(B) was amended to replace the term "data or other information" with the term "facts or data." This amendment was intended to disapprove of cases that relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. In addition, Rule 26(b)(4) was amended at the same time to provide work-product protection for draft reports and communications between a party's attorney and expert witnesses. *Fed. R. Civ. P. 26(a)(2)(B)* advisory committee's note (2010). The amendments to Rule 26(b)(4) were designed to protect work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to discovery. *Fed. R. Civ. P. 26(b)(4)(C)* advisory committee's note (2010).

Strategic Point--Demonstrative Evidence:

Demonstrative evidence, such as graphics, that an expert witness may present at trial must be disclosed under Rule 26(a)(2)(B)(iii). Be sure that all such material is contained in the relevant expert report. Failure to do so may result in exclusion of the evidence at trial.

Strategic Point--Assistance to Experts:

Fed. R. Civ. P. 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports; indeed, with some experts, such assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and must be signed by the witness. *See Fed. R. Civ. P. 26(a)*, Committee Note of 1993. Although most communications between a party's attorney and expert witnesses are entitled to work product protection, when assisting expert witnesses, keep in mind that facts or data provided to an expert and considered in forming the opinions to be expressed are not protected. In addition, work product protection does not extend to assumptions that the attorney provided and that the expert relied on in forming the opinions to be expressed. *See Fed. R. Civ. P. 26(b)(4)(C)*.

[c] Expert Report Must Be Detailed Statement of Direct Examination Testimony

The expert report must be a detailed and complete statement of the testimony of the expert on direct examination. *Salgado v. GMC, 150 F.3d 735, 742 (7th Cir. 1998)* ; *Sierra Club Lone Star Chap. v. Cedar Point Oil Co., 73 F.3d*

546, 571 (5th Cir. 1996) (one and one-half page outline listing "points of testimony" was inadequate); *Smith v. State Farm Fire and Cas. Co., 164 F.R.D. 49, 53-54 (S.D. W. Va. 1995)* (no exhibits, opinions in vague terms, and referral to large number of documents as basis of the opinions was inadequate).

[d] Expert Testimony Is Limited to Opinions and Bases Disclosed in Report

As a general rule, an expert may not extend his or her direct testimony beyond the opinions and bases disclosed in the report. *Atmel Corp. v. Information Storage, 189 F.R.D. 410, 411 (N.D. Cal. 1999)* .

[e] Treating Physician May Not Be Required to File Report

Application of the written report requirement to treating physicians has generated some uncertainty. When the written report requirement was enacted, the advisory committee stated that a treating physician "can be deposed or called to testify at trial without any requirement for a written report." *see Fed. R. Civ. P. 26(a)* advisory committee's note (1993). Nevertheless, some courts drew a distinction between treating physicians who were solely fact witnesses and those who crossed the line, by virtue of the substance of their proposed testimony, into specially retained experts who were required to provide an expert witness report. These courts reasoned that when the testimony of a treating physician goes beyond the scope of treatment, observation, and diagnosis, and includes opinions on causation, prognosis, or the future impact of the injury, the treating physician must provide an expert report. *See, e.g., Krischel v. Hennessy, 533 F. Supp. 2d 790, 795 (N.D. Ill. 2008)* (when treating physician's testimony goes beyond what physician saw and did and why he or she did it, treating physician must provide expert report).

2010 amendments to Rule 26(a)(2)(C) were intended to resolve this "tension that sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement." *See Fed. R. Civ. P. 26(a)(2)(C)* advisory committee's note (2010). The amended rule requires summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B). *See Fed. R. Civ. P. 26(a)(2)(C)*; *see also § 5.05[4A]*, *below*. Although the Rule still does not specifically mention treating physicians, the advisory committee note cites as examples of fact witnesses who may also provide expert testimony, "physicians or other health care professionals and employees of a party who do not regularly provide expert testimony." Parties must identify these witnesses under Rule 26(a)(2)(A) and provide the summary disclosures required under Rule 26(a)(2)(C), but do not need to furnish a formal written report. *See Fed. R. Civ. P. 26(a)(2)(C)* advisory committee's note (2010).

[4A] Disclosures From Witnesses Who Do Not Provide Written Reports

Unless otherwise stipulated or ordered by the court, if an expert witness is not required to provide a written report, the party employing that witness must make certain summary disclosures. This disclosure must state the subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*. *Fed. R. Civ. P. 26(a)(2)(C)(i)*. This disclosure also must state a summary of the facts and opinions to which the witness is expected to testify. *Fed. R. Civ. P. 26(a)(2)(C)(ii)*.

This disclosure is considerably less extensive than the written report required from retained experts under Rule 26(a)(2)(B), and the advisory committee has cautioned the courts against requiring "undue detail." *See Fed. R. Civ. P. 26(a)(2)(C)* advisory committee's note (2010).

This summary disclosure requirement is intended to include fact witnesses who also provide expert testimony, such as treating physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. *See Fed. R. Civ. P. 26(a)(2)(C)* advisory committee's note (2010).

[5] Disclosures Must Be Made in Writing, Signed, and Served

Unless the court orders otherwise, expert-witness disclosures must be made in writing, signed, and served. *Fed. R. Civ.*

P. 26(a)(4); *see Nguyen v. IBP, Inc., 162 F.R.D. 675, 679 (D. Kan. 1995)* (plaintiff submitted signed as well as unsigned documents).

The attorney's signature on the disclosures is a certification that it is complete and correct as of the time when made. *See Fed. R. Civ. P. 26(g)(1)*.

[6] Disclosures Should Not Be Filed

Disclosures made under *Fed. R. Civ. P. 26(a)(2)* must not be filed until they are used in the proceeding or the court orders filing. *Fed. R. Civ. P. 5(d)*.

[7] Parties Must Supplement Disclosures

The parties must supplement the disclosures made pursuant to Rule 26(a)(2) when required under *Fed. R. Civ. P. 26(e)*. *Fed. R. Civ. P. 26(a)(2)(E)*. Rule 26(e) requires a party who has made a disclosure under Rule 26(a) to supplement or correct its disclosure in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, or if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. *Fed. R. Civ. P. 26(e)(1)(A)*. In addition, the disclosing party must supplement or correct its disclosure when ordered by the court. *Fed. R. Civ. P. 26(e)(1)(B)*.

With respect to testimony of an expert from whom a report is required under *Fed. R. Civ. P. 26(a)(2)(B)* (*see § 5.05[4][a] above*), the duty extends both to information contained in the report and to information provided through a deposition of the expert. *Fed. R. Civ. P. 26(e)(2)*. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under *Fed. R. Civ. P. 26(a)(3)* are due. *Fed. R. Civ. P. 26(e)(2)*. Unless otherwise directed by the court, disclosures under Rule 26(a)(3) must be made at least 30 days before trial. *Fed. R. Civ. P. 26(a)(3)(B)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.03 -16.13*; *26.23*, *26.130 -26.132*, *26.150 -26.155*.
- *Bender's Federal Practice Forms* Form Nos. 26:1-26:20, 26:50-26:52.
- *Fed. R. Civ. P. 16(a)* (pretrial conference).
- *Fed. R. Civ. P. 26(a)* (required disclosures).
- *Fed. R. Civ. P. 26(b)* (discovery scope and limits).
- *Fed. R. Civ. P. 26(f)* (conference of the parties; planning for discovery).
- *Fed. R. Civ. P. 26(g)* (signing disclosures and discovery requests).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory Disclosures



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART B: RULE 26(f) CONFERENCE AND INITIAL DISCLOSURES

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.06

§ 5.06 Sanctioning Failure to Make Required Disclosures

[1] Moving to Compel

If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. *Fed. R. Civ. P. 37(a)(1)*; *City & County of San Francisco v. Tutor-Saliba Corp., 218 F.R.D. 219, 222 (N.D. Cal. 2003)* (court granted defendant's motion to compel further supplementation of disclosures regarding damages, specifying that the supplemental damages disclosures be completed within 30 days of its order and the production of documents supporting those computations be made within 45 days of the order); *Intercargo Ins. Co. v. Burlington N. Santa Fe R.R., 185 F. Supp. 2d 1103, 1107 (C.D. Cal. 2001)* (defendants' remedy for an inadequate expert report is to seek an order compelling adequate discovery).

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. *Fed. R. Civ. P. 37(a)(1).*

For coverage of motions to compel, *see §§ 8.66 -8.70 below*.

[2] Failing to Comply With Disclosure Requirements May Result in Sanctions

[a] Evidence May Be Excluded

A party that without substantial justification fails to disclose information required by *Fed. R. Civ. P. 26(a)* is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. *Fed. R. Civ. P. 37(c)(1)*; *see Cuffee v. Dover Wipes Co., 334 F. Supp. 2d 565, 572 (D. Del. 2004)* (plaintiff's expert witness reports excluded because no disclosure prior to scheduling order deadline nor within discovery period); *Ebewo v. Martinez, 309 F. Supp. 2d 600, 608 (S.D.N.Y. 2004)* (excluded examining physician's affidavit submitted in opposition to summary judgment).

Warning:

If a disclosing party fails to supplement its disclosures as required by *Fed. R. Civ. P. 26(e)*, that supplemental evidence may be subject to the sanction of exclusion under *Fed. R. Civ. P. 37(c)(1)*; *see,*

e.g., Adams v. Teck Cominco Alaska, Inc., 231 F.R.D. 578, 581 (D. Alaska 2005) .

[b] "Substantially Justified" or "Harmless" Failure to Comply May Not Be Sanctioned

Two express exceptions ameliorate the effects of Rule 37(c)(1): the information may be introduced if the parties' failure to disclose the required information is substantially justified or harmless. *Fed. R. Civ. P. 37(c)(1).*

The burden is on the party facing sanctions to prove substantial justification or harmlessness. *See, e.g., Grajales-Romero v. American Airlines, Inc., 194 F.3d 288, 297 (1st Cir. 1999)* (no reason offered by nondisclosing party).

[c] Court May Require Prompt Notification of Failure to Disclose

Counsel should move to compel and, if appropriate, for sanctions as soon as the failure to properly disclose is discovered. *Intercargo Ins. Co. v. Burlington N. Santa Fe R.R., 185 F. Supp. 2d 1103, 1107 (C.D. Cal. 2001)* (because defendants did not seek to compel a more adequate disclosure within a reasonable time of service of the expert reports, court denied defendants' motions to strike expert witness designation); *Cash v. State Farm Fire & Cas. Co., 125 F. Supp. 2d 474, 477 (M.D. Ala. 2000)* (party may not "sleep on its rights" and wait until summary judgment to object to use of materials that it has made no prior reasonable efforts to obtain).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.27, 37.02 -37.06, 37.60 -37.63.*
- *Bender's Federal Practice Forms* Form Nos. 37:1, 37:200, 37:300.
- *Fed. R. Civ. P. 26(a)* (required disclosures).
- *Fed. R. Civ. P. 37(a)* (motion for order compelling disclosure or discovery).
- *Fed. R. Civ. P. 37(c)* (failure to disclose, to supplement an earlier response, or to admit).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMotions to Compel



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART C: CASE MANAGEMENT CONFERENCES

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.07

§ 5.07 Checklist for Case Management Conferences

☐ If proceeding is not exempt from Rule 16 scheduling conferences and orders, determine when time scheduling order is due. *See § 5.08 below*.

☐ Determine if case might benefit from interim pretrial conference or if required under the local rules or judge's rules, and prepare proposed interim pretrial conference order. *See § 5.09 below*.

☐ Determine if settlement conference is beneficial even if settlement is not achieved and if so, prepare and file settlement conference statement. *See § 5.09 below*.

☐ Consult local rules and individual judge's rules regarding assignment of cases to magistrate judges. *See § 5.10 below*.

☐ **Search by Topic:** Civil Procedure > Pretrial Matters > Conferences > Scheduling Conferences

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART C: CASE MANAGEMENT CONFERENCES

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.08

§ 5.08 Using Scheduling Conferences and Orders

[1] Rule 16 Is Primary Source of Court's Case Management Authority

Rule 16 is the principal source of authority for district courts to achieve the fundamental purpose stated in Rule 1 of securing "the just, speedy, and inexpensive determination of every action and proceeding." *Fed. R. Civ. P. 1*; *see Fed. R. Civ. P. 16*; *see also FMC Corp. v. Vendo Co., 196 F. Supp. 2d 1023, 1030 (E.D. Cal. 2002)* .

Rule 16 reflects a concept of active judicial management of the case development process in most civil actions to reach a swift, inexpensive, and just resolution of litigation, with the participation and cooperation of counsel and the parties. *See In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1012 n.3 (1st Cir. 1988)* (Rule 16 gives district court greater responsibility over scheduling and planning of discovery); *Pfeiffer v. Eagle Mfg. Co., 137 F.R.D. 352, 354 (D. Kan. 1991)* (scheduling order encourages careful pretrial management).

[2] General Use of Pretrial Conferences

Rule 16 authorizes and regulates the use of a wide range of case management tools and powers, most notably through pretrial conferences, and authorizes a wide range of sanctions for violations of pretrial orders. *Fed. R. Civ. P. 16*.

A federal court has discretion to direct the attorneys for the parties and any unrepresented parties to appear for a pretrial conference or conferences for case management purposes, including the following:

1. Expediting the disposition of the action, including narrowing issues and defenses;

2. Establishing early and continuing control so that the case will not be protracted because of lack of management;

3. Discouraging wasteful pretrial activities, including unnecessary discovery;

4. Improving the quality of the trial by requiring more thorough preparation; and

5. Facilitating the settlement of the case or the use of alternative dispute resolution mechanisms.

See Fed. R. Civ. P. 16(a).

[3] Importance of Local Rules and Individual Judges' Practices

To allow judges to fashion case development plans that are tailored to the needs to individual cases, Rule 16 necessarily confers a great deal of discretion on the individual judges who apply it. *See Zivkovic v. Southern Cal. Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002)* (district courts have broad discretion in supervising pretrial activities); *see also Navellier v. Sletten, 262 F.3d 923, 941 (9th Cir. 2001)* (trial courts have broad authority to set time limits to prevent undue delay, waste, or needless introduction of cumulative evidence).

In addition, Rule 16 recognizes the authority of district courts, by local rule, to create specialized sets of procedures for various categories of actions. Responding to this invitation, many courts have adopted specialized provisions that apply only to certain kinds of cases.

Warning:

At the outset, counsel must consult the local rules of the particular district, and also the individual judge's rules. The variety of practices under Rule 16 among sitting federal judges can be complex.

[4] Courts Differ in Pretrial Conference Terminology

Different district courts use different labels to describe pretrial conferences. The initial "meet and confer" contact between counsel is variously referred to as the Rule 26(f) conference or the discovery planning conference. *See §§ 5.02, 5.03 above.*

Further, district courts use different terms to refer to the first conference conducted by the judge or magistrate judge. Some districts label the conference a scheduling conference, while others call it an initial status conference, an initial pretrial conference, an initial case management conference, a Rule 16 conference, or a first discovery conference. This chapter uses the term scheduling conference in the general text, but uses each district's specific term in the local practice discussions.

District courts also use different labels to describe periodic, interim pretrial conferences authorized by *Fed. R. Civ. P. 16(c).* District courts use the following terms: interim pretrial conferences, status conferences, discovery planning conferences, Rule 16 conferences, interim or intermediate case management conferences, and, as appropriate, settlement conferences. This chapter uses the term interim pretrial conference to refer to all pretrial conferences other than the scheduling conference and the final pretrial conference.

Finally, courts use varying terms to refer to the final pretrial conference. *See §§ 5.12 -5.15.*

[5] Determining Whether Local Rule Exempts Scheduling Order Requirement

Local district court rules provide a means for exempting categories of cases from the scheduling order requirement. *Fed. R. Civ. P. 16(b)(1).* Rule 16 precludes individual judges, acting on their own initiative and their own authority, from issuing standing orders that would exempt certain categories of their cases from the scheduling order requirement.

The fact that a particular category of cases is properly exempted from the scheduling order requirement does not mean that the case is to be left in management limbo. Rather, courts, through their rules, establish an appropriate alternative system for managing, monitoring, and disposing of each category of exempted case.

In cases involving a pro se litigant, counsel should keep in mind that most judges are reluctant to impose some

procedural rules on pro se parties, other than what the Federal Rules of Civil Procedure require.

Warning:

Counsel should check any special provisions that apply to their matters in local rules, general orders, or standing orders.

[6] Preparing and Filing Scheduling Order

[a] Scheduling Order Mandatory

Except in categories of actions expressly exempted by local district court rule (*see § 5.08[5] above)*, the judge or magistrate judge must enter a pretrial scheduling order, after receiving the Rule 26(f) proposed discovery report from the parties or after consulting with the attorneys for the parties and any unrepresented parties by conference, telephone, mail, or other suitable means. *Fed. R. Civ. P. 16(b)(1)*; *see §§ 5.02 -5.06 above*.

The scheduling order is the court's primary method to control its calendar, assert control over the case management process, and define the parameters of the case. *See Navellier v. Sletten, 262 F.3d 923, 941 (9th Cir. 2001)* . The requirement of a scheduling order permits the court to intervene early to set realistic deadlines for discovery and other aspects of pretrial case development, as well as to position the case for settlement, alternative dispute resolution, or trial.

[b] Judge and Litigants Must Have Contact Before Issuance of Scheduling Order

A federal judge may not issue a scheduling order without having first either received from the litigants the proposed discovery plan report or consulted with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means. *Fed. R. Civ. P. 16(b)(1)*; *see § 5.08[10] below*.

This preliminary contact serves the following purposes:

1. The court may assert control over the litigation and the parties from the outset;

2. The parties have an opportunity, at the outset, to inform the court of potential procedural, evidentiary, and substantive problems, as well as personal scheduling conflicts, that might affect the pretrial schedule; and

3. The court may tailor the scheduling order to the needs of the individual case.

[c] Manner of Initial Contact Not Prescribed

Fed. R. Civ. P. 16 does not require that the initial contact between the judge and the litigants be in person or by telephone. The manner of contact is discretionary, and it is sufficient to solicit and receive input from counsel in writing or electronically. The receipt of a written report outlining the discovery plan is one method to satisfy this requirement. *Fed. R. Civ. P. 26(f)*.

[d] Scope of Consultation Varies

The scope and the nature of the matters on which the court seeks the parties' input varies considerably from court to court, judge to judge, and case to case. Some judges solicit only the most skeletal of input, simply asking for three proposed deadlines: to join parties and amend pleadings, to file motions, and to complete discovery. Other judges solicit detailed submissions not only on all mandatory and discretionary matters covered by Rule 16(b), but also on most of the subjects that are identified in Rule 16(c) as possible agenda items in any pretrial conference. *Fed. R. Civ. P. 16(b), (c)*.

Warning:

Practices as to the initial contact between the judge and the litigants vary between courts, between individual judges in the same court, and between types of cases. Counsel should consult the pertinent local rules, as well as any individual judges' rules and general or standing orders.

[7] Time for Order

Regardless of whether a district court holds a formal scheduling conference, the scheduling order must be issued as soon as practicable, and in any event is due within 90 days of the date any defendant first enters its appearance (whether by answer or motion) or, if earlier, within 120 days of the date of service of the complaint on any defendant. *Fed. R. Civ. P. 16(b)(2).*

Timing:

The timing of the scheduling order may present problems in multidefendant litigation. The trial court may issue the scheduling order before all defendants have been served and appear in the action. Local rules may permit a party, including a party added later in the case, to seek relief from an obligation imposed by *Fed. R. Civ. P. 16* or *26* or the Order Setting Initial Case Management Conference. As an alternative approach, it is always wise to request a stipulation of opposing counsel as to the scheduling order in the first instance.

[8] Addressing Topics in Scheduling Order

The scheduling order must limit the time to join other parties, to amend the pleadings, complete discovery, and to file motions. *Fed. R. Civ. P. 16(b).*

In addition, the scheduling order may:

1. Modify the timing of disclosures under *Fed. R. Civ. P 26(a)* and *26(e)(1)*;

2. Modify the extent of discovery;

3. Set dates for pretrial conferences and for trial; and

4. Include other appropriate matters.

Fed. R. Civ. P. 16(b)(3)(B).

A schedule may be modified only for good cause and with the judge's consent. *Fed. R. Civ. P. 16(b)(4).*

Warning:

Counsel should consult local district court rules, as well as the individual judge's rules, for any provisions regarding topics to be addressed in the scheduling order.

[9] Scheduling Order Controls Course of Litigation Unless Modified

The scheduling order controls the course of the litigation unless modified by the court. *Fed. R. Civ. P. 16(b)*; *Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609-610 (9th Cir. 1992)* (scheduling order is not idly entered, and should not be cavalierly ignored by counsel).

Scheduling orders are generally binding through the subsequent course of the litigation. Unless the party requests modification of the scheduling order (*see § 5.08[12] below*), motions filed after the relevant deadlines may be denied solely on the basis that the motion was untimely. *Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609-610 (9th Cir. 1992)* . Nevertheless, trial courts should not so rigidly adhere to time limits as to sacrifice justice in the name of judicial efficiency. *Navellier v. Sletten, 262 F.3d 923, 941 (9th Cir. 2001)* .

[10] Scheduling Conference Is Discretionary Unless Required by Local Rule

Federal judges may, but are not required to, hold a scheduling conference before issuing a scheduling order. *Fed. R. Civ. P. 16(b)*. Although the court and the parties must communicate, that communication may be by:

1. Scheduling conference;

2. Report outlining the proposed discovery plan;

3. Telephone communication;

4. Mail communication; and

5. Other suitable means.



Warning:

Consult the local rules of the particular district, as well as the individual judge's rules, regarding any scheduling conference requirements.

[11] Attending Scheduling Conference

Both parties' counsel and unrepresented parties should attend the scheduling conference. *See Fed. R. Civ. P. 16(b)(1)* (court must consult with parties' counsel and unrepresented parties before issuing a scheduling order).

[12] Seeking Modification of Scheduling Order Based on Good Cause

[a] Party Seeking Modification Must Show Good Cause

A scheduling order may not be modified except by leave of court on a showing of good cause. *Fed. R. Civ. P. 16(b)(4)*; *Andretti v. Borla Performance Indus., 426 F.3d 824, 830 (6th Cir. 2005)* (court applied good cause standard in allowing late filing because defendant demonstrated diligence in attempting to meet pretrial order and plaintiffs failed to show prejudice); *Julian v. Equifax Checking Servs., Inc., 178 F.R.D. 10, 15 (D. Conn. 1998)* (good cause means schedule cannot be met reasonably despite moving party's diligence).

The Rule 16(b) "good cause" standard, rather than the more liberal standard of *Fed. R. Civ. P. 15(a)*, governs a motion to amend pleadings filed after the deadline set in the scheduling order for amending the pleadings. *See In re Milk Prods. Antitrust Litig., 195 F.3d 430, 437 (8th Cir. 1999)* (when scheduling order filed under Rule 16, court may properly require good cause be shown for leave to file amended pleading); *Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1419 (11th Cir. 1998)* (if "we considered only Rule 15(a) without regard to Rule 16(b), we would render scheduling orders meaningless").



Strategic Point:

A court is far more likely to respond favorably to a motion seeking an extension if counsel files the motion promptly on discovering scheduling difficulties and does not wait until the last minute to file the request. A request filed after the passage of the relevant deadline may even violate local rules.

[b] Good Cause Requires Due Diligence

The good cause standard primarily measures the diligence of the party seeking modification. *Andretti v. Borla Performance Indus., Inc., 426 F.3d 824, 830 (6th Cir. 2005)* (primary measure of good cause standard is moving party's diligence in attempting to meet case management order's requirements); *Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000)* (good cause depends on diligence of moving party).

Modification will only be permitted if the party seeking the extension demonstrates that the schedule cannot reasonably be met even with the exercise of due diligence. *Denmon v. Runyon, 151 F.R.D. 404, 407 (D. Kan. 1993)* .

If the party was not diligent, the inquiry ends and the motion to modify should be denied. *Zivkovic v. Southern Cal. Edison Co., 302 F.3d 1080, 1087-1088 (9th Cir. 2002)* . Carelessness is not a basis for granting relief. *North Star Mut. Ins. Co. v. Zurich Ins. Co., 269 F. Supp. 2d 1140, 1145 (D. Minn. 2003)* ("carelessness, inadvertence, or inattention" is not compatible with finding of diligence).



Strategic Point:

Keep in mind that a party that was well prepared and cooperative at the initial conference stands a better chance of a favorable response when seeking a modification. The party seeking modification should file the request for modification as soon as possible and demonstrate diligence in working with the court in crafting a new scheduling order. *See Jackson v. Laureate, Inc., 186 F.R.D. 605, 608 (E.D. Cal. 1999)* .

[13] Appellate Review of Scheduling Orders

[a] Immediate Appellate Review Ordinarily Unavailable

Most scheduling orders are interlocutory in nature, rather than final. *See Miera v. First Sec. Bank, N.A., 776 F.2d 902, 906 (10th Cir. 1985)* , *appeal after remand, 925 F.2d 1237 (10th Cir. 1991)* . Because scheduling orders deal with preliminary matters, they may still be modified by the court during the pretrial period. *See Fed. R. Civ. P. 16(b), (e).* Appellate review ordinarily is available only after final judgment; however, a timely objection must be registered with the trial court. *See In re Recticel Foam Corp., 859 F.2d 1000, 1003 (1st Cir. 1988)* (when case management order reviewable).

[b] Extraordinary Circumstances May Permit Immediate Review

In rare circumstances, a scheduling order may be immediately reviewable either by direct appeal or by writ of mandamus. *See Miera v. First Sec. Bank, N.A., 776 F.2d 902, 906 (10th Cir. 1985)* , *appeal after remand, 925 F.2d 1237 (10th Cir. 1991)* (citing **Moore's,** pretrial orders that effectively resolve all triable issues are reviewable).

[c] Scheduling Order Decisions Reviewed for Abuse of Discretion

Challenges to a trial court's management of a case are reviewed for abuse of discretion. *Zivkovic v. Southern Cal. Edison Co., 302 F.3d 1080, 1087-1088 (9th Cir. 2002)* . Decisions as to the preclusive effect of a pretrial order will not be disturbed unless they evidence a clear abuse of discretion. *Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-609 (9th Cir. 1992)* .

[d] Modification Ruling Reviewed for Abuse of Discretion

District courts have broad discretion to supervise the pretrial phase of litigation, including setting reasonable time limits. The decision to modify a scheduling order is within the trial court's broad discretion to expedite the completion of trials. *Tower Ventures, Inc. v. City of Westfield, 296 F.3d 43, 46 (1st Cir. 2002)* (disgruntled litigant bears heavy burden to show abuse of discretion). However, even though trial courts have discretion to expedite trials, they cannot so rigidly adhere to time limits as to sacrifice justice in the name of judicial efficiency. *Navellier v. Sletten, 262 F.3d 923, 941 (9th Cir. 2001)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.03 -16.05, 16.10 -16.16, 16.30 -16.38.*
- *Bender's Federal Practice Forms* Form Nos. 16:1-16:22, 16:100-16:114.
- *Fed. R. Civ. P. 16(a)* (purposes of pretrial conference).
- *Fed. R. Civ. P. 16(b)* (scheduling).
- *Fed. R. Civ. P. 16(c)* (attendance and matters for consideration at a pretrial conference).
- *Fed. R. Civ. P. 26(a)* (required disclosures).
- *Fed. R. Civ. P. 26(f)* (conference of parties; planning for discovery).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesScheduling Conferences



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART C: CASE MANAGEMENT CONFERENCES

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.09

§ 5.09 Interim Pretrial Conferences and Settlement Conferences

[1] Interim Pretrial Conferences Offer Opportunity to Review Pretrial Developments and Streamline Case

An interim pretrial conference provides an opportunity for the presiding judicial officer and counsel to revisit the issues in the case; to determine whether the case is progressing as scheduled; and to refine the operative scheduling or interim pretrial order. Judges and counsel are encouraged not to assume that the case will develop as fashioned in the scheduling order. As disclosures, discovery, motion activity, and developments external to the litigation present the parties with new information or change the litigation circumstances, judges and counsel may make adjustments to the original plan, or move the pretrial process in a different direction.

Interim pretrial conferences may cover virtually any procedural or substantive issue relevant to the case. In particular, developments in the discovery process will most likely be relevant to the parties' views about settlement. Therefore, settlement is almost always discussed at interim pretrial conferences.

Warning:

The Federal Rules of Civil Procedure rules do not prescribe specific procedures for interim pretrial conferences. Rather, local rules, and more typically, individual judge's rules may specify conference procedures.

[2] Interim Pretrial Conferences Discretionary Unless Required by Local Rule

The assigned judge or magistrate judge has discretion to hold one or more interim pretrial conferences. *See Fed. R. Civ. P. 16(a)*. Whether any interim pretrial conferences will be held is a matter committed to the sound discretion of the assigned district judge or magistrate judge. *See Mescal v. United States, 161 F.R.D. 450, 451-452 (D.N.M. 1995)* .

Factors relevant to the decision to hold one or more interim pretrial conferences include:

1. The case management philosophy of the assigned judge;

2. The complexity of the case;

3. The expertise or experience of counsel; and

4. The level of cooperation or friction between counsel or across party lines.

Warning:

Local district court rules may require judges to hold interim pretrial conferences in specified categories of cases, or in specified circumstances. Counsel should consult the individual judge's rules, which often contain provisions regarding interim pretrial conferences, as well as any general or standing orders.

[3] Requesting Interim Pretrial Conference

If a case might benefit from an interim pretrial conference, counsel should consider making a request to the assigned judge. A request for an interim pretrial conference signifies that counsel are taking pretrial responsibilities seriously.

Counsel often are better able than the judge to observe developing pretrial matters. Counsel should inform the court about any changed circumstances that give rise to the need for a conference, explain how a conference would contribute to the pretrial case development process, and propose an agenda.

[4] Attending Interim Pretrial Conference

[a] Mandatory Participants

Rules and practices related to participation in interim case management conferences are not materially different from the rules and practices for initial case management conferences. *See § 5.08[11] above*. At a minimum, every unrepresented party and at least one attorney for each represented party must participate in every interim pretrial conference unless otherwise ordered by the court. Attendance requirements for interim pretrial conferences are ordinarily determined by the nature of the conference and the topics to be addressed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement of the dispute. *Fed. R. Civ. P. 16(c)(1)*.

At least one of the participating attorneys for each represented party must have authority to enter stipulations and make admissions with respect to any matter that he or she should reasonably anticipate may be discussed at the conference. *Fed. R. Civ. P. 16(c)(1)*. Courts may impose a broad range of sanctions if no appearance is made on behalf of a party at an interim pretrial conference. *Fed. R. Civ. P. 16(f)*.

[b] Judicial Authority to Compel Attendance

Federal courts may require a party or the party's representative to be present or reasonably available by telephone to discuss settlement when appropriate. *See Fed. R. Civ. P. 16(c)*. Courts may direct the appearance of corporate officers with settlement authority. *See Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 769 (9th Cir. 2001)* .

[5] Considering Topics at Interim Pretrial Conference

[a] Rule 16(c) Lists Broad Range of Conference Topics

All subjects listed in Rule 16 (b) and (c) may appear on the agenda at an interim conference. *See § 5.08[8] above* for *Fed. R. Civ. P. 16(b)* topics. At any pretrial conference, the court may consider and take appropriate action on the following matters:

1. Formulating and simplifying the issues, and eliminating frivolous claims and defenses;

2. Amending the pleadings if necessary or desirable;

3. Obtaining admissions and stipulations about fact and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

4. Avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under *Fed. R. Evid. 702*;

5. Determining the appropriateness and timing of summary adjudication under Rule 26;

6. Controlling and scheduling discovery, including orders affecting disclosures and discovery under *Fed. R. Civ. P. 26* and *Fed. R. Civ P. 29-37*;

7. Identifying witnesses and documents;

8. Scheduling the filing and exchange of any pretrial briefs;

9. Setting dates for further conferences and for trial;

10. Referring matters to a magistrate judge or a special master;

11. Settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

12. Determining the form and content of the pretrial order;

13. Disposing of pending motions;

14. Adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

15. Ordering a separate trial under *Fed. R. Civ. P. 42(b)* of a claim, counterclaim, crossclaim, or third-party claim, or particular issue;

16. Ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under *Fed. R. Civ. P. 50(a)*, or a judgment on partial findings under *Fed. R. Civ. P. 52(c)*;

17. Establishing a reasonable limit on the time allowed for presenting evidence; and

18. Facilitating in other ways the just, speedy, and inexpensive disposition of the action.

Fed. R. Civ. P. 16(c)(2).

[b] Case-Specific Developments Dictate Topics

Although Rule 16(c) broadly describes the topics that may be addressed at the interim pretrial conferences over the course of the litigation, topics such as the identification of disputed legal and factual issues and the control and

scheduling of disclosures and discovery, are more likely to be addressed at the beginning and interim stages of the pretrial period. Other items, such as reviewing remaining claims and defenses, are more likely to be considered at the final pretrial conference. *See §§ 5.12 -5.15 below*.

Usually developments specific to an individual case dictate which subjects are actually considered at the conference. For example, the conference might address whether to change the motion schedule or the sequence in which specified motions will be filed. *See, e.g., Tran v. Captain Glyn, Inc., 909 F. Supp. 727, 731 (D. Haw. 1995)* (deadline to file summary judgment motion addressing court's subject matter jurisdiction extended).

In addition, counsel and unrepresented parties may suggest agenda items for a conference.



Warning:

Because individual judges' rules often set forth additional interim pretrial conference topics, counsel must consult these rules as well as local rules.

[c] Using Court-Appointed Experts

A judge may consider and propose the use of a court-appointed expert at a scheduling or interim pretrial conference. *See Fed. R. Evid. 706*. A court-appointed expert may help provide an early foundation for stipulations, reduce the scope of discovery, facilitate early settlement, reduce the adversarial nature of the proceedings and conflicts between the parties' experts, and potentially identify, clarify, and narrow the disputed issues.

Before the appointment of a court-appointed expert, the judge must issue an order to show cause why expert witnesses should not be appointed. *Fed. R. Evid. 706(a)*. The judge may solicit nominations for the appointment from the parties. *See Fed. R. Evid. 706(a)*. When one of the primary purposes of an appointment is to encourage an early settlement, the appointment of an expert who enjoys the confidence of all of the parties may be particularly beneficial. The court may consider specifying a date by which the expert must complete the investigation and file a report.



Strategic Point:

Although the use of court-appointed experts is relatively rare, it can be an effective tool for counsel to propose, particularly if the proponent is confident regarding an appropriate issue.

[6] Interim Pretrial Conference Orders

[a] Court May Enter Interim Pretrial Conference Order

After any Rule 16 pretrial conference, the court should issue an order reciting the action taken. *Fed. R. Civ. P. 16(d)*. *See also Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 432-433 n.9, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995)* (rule authorizes, but does not compel, judicial action).

[b] Drafting Proposed Interim Pretrial Conference Order

Counsel should consult the local rules, as well as the individual judge's rules, to determine whether interim pretrial conference orders are required, and if so, the requirements of the order and whether it is counsel's responsibility to draft a proposed order. Even when an order is not required, counsel should nevertheless consider requesting the opportunity to present a proposed order, or at least a memorandum summarizing the results of the conference. An order (or memorandum) stating the decisions and stipulations made at the pretrial conference assists the parties in keeping track of the litigation; reduces the risk of confusion, friction between parties, inefficiency, and unfairness; and provides a

record for appellate review.

[c] Order Controls Litigation Until Modified

Interim pretrial conference orders control the course of the action unless modified by subsequent order. *Fed. R. Civ. P. 16(d)*; *see Eagle v. American Tel. & Tel. Co., 769 F.2d 541, 548 (9th Cir. 1985)* (claim is barred unless implicitly included in pretrial order); *see also § 5.09[7] below*.

[7] Modification of Interim Pretrial Conference Orders

Interim pretrial conference orders are subject to modification. The standard judges apply in deciding whether to grant a party's request to modify an interim pretrial conference order is the same standard used when determining whether to modify the scheduling order. *See Fed. R. Civ. P. 16*, Committee Note of 1993. Accordingly, a party must show good cause before the court will grant a request to modify an interim pretrial conference order. *Julian v. Equifax Check Servs., Inc., 178 F.R.D. 10, 15 (D. Conn. 1998)* (good cause for modification means that schedule cannot reasonably be met despite moving party's diligence); *see Andretti v. Borla Performance Indus., Inc., 426 F.3d 824, 830 (6th Cir. 2005)* (district court correctly analyzed late motion for summary judgment as request to modify scheduling order and correctly applied good cause standard in allowing late filing because defendant demonstrated diligence in attempting to meet pretrial order and plaintiffs failed to show prejudice from late filing); *see also § 5.13[12] below*.



Strategic Point:

A showing of good cause ordinarily requires that counsel establish an inability to meet the scheduled deadlines despite exercising due diligence. Accordingly, counsel should describe with specificity the actions that have been taken to comply with the order. Counsel should also propose a new schedule that will make the case trial-ready as quickly as possible under the changed circumstances. The proposed new dates should be as close to the dates originally fixed as feasible, and that fact should be pointed out in the request.

[8] Appellate Review

[a] Appellate Review Is Ordinarily Deferred

In general, interim pretrial conference orders are interlocutory in nature, rather than final. They deal with preliminary and procedural matters, leading up to, but not including, trial, and may still be modified by the court on a showing of good cause. *Fed. R. Civ. P. 16(b)(4), (e)*. Because the court is able to make adjustments as needed, no irreversible legal consequences flow from these orders. Therefore, appellate review of most interim pretrial conference orders must await a final judgment in the action. *See In re Recticel Foam Corp., 859 F.2d 1000, 1002 (1st Cir. 1988)* (final pretrial order).

[b] Trial Management Decisions Reviewed for Abuse of Discretion

Challenges to the trial court's management of a case are reviewed for abuse of discretion. For example, trial courts have broad authority to impose and enforce reasonable time limits for each side's presentation of the case. *See Navellier v. Sletten, 262 F.3d 923, 941 (9th Cir. 2001)* . In determining abuse of discretion, a circuit court may consider prejudice or surprise to the opposing party, the ability of a party to cure any prejudice, the disruption to orderly and efficient trial of case by inclusion of new issue, bad faith by a party seeking to modify an order, and whether an amendment to the pretrial order was formally and timely requested. *Palace Exploration Co. v. Petroleum Dev. Co., 316 F.3d 1110, 1117 (10th Cir. 2003)* ; *see also General Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1509 (9th Cir. 1995)* (trial courts may not rigidly adhere to time limits as to "sacrifice justice in the name of efficiency").

For discussion of application of abuse of discretion standard, *see § 5.08[13][c], [d] above*.

[9] Settlement Conferences

[a] Settlement Conferences Are Discretionary Unless Mandated by Local Rule

Although settlement may be discussed at any pretrial conference, courts also may hold conferences specifically for the purpose of discussing and encouraging settlement. *Fed. R. Civ. P. 16(c)(2)(I).*

Counsel should consult the local rules, as well as the individual judge's rules, to determine whether settlement conferences are mandatory or discretionary, and whether counsel may initiate a request for a settlement conference.



Strategic Point:

If not required by local rule, counsel should consider requesting a judicially hosted settlement conference. Settlement conferences can help the parties understand their respective positions, the evidence, and reasoning that supports those positions, and identify what the parties must do by way of disclosures, discovery, or motion to favorably position the case. Settlement prospects may be enhanced when the person hosting the negotiations is a sitting judge other than a judge assigned to try the case.

For discussion of settlements, see Ch. 10 *below*.

[b] Courts Cannot Coerce Settlement

Federal jurisprudence encourages pretrial settlement discussions and favors the settlement of civil actions. However, although the presiding judge has discretion in determining the applicable settlement conference procedure, judges may not coerce settlement. *See Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)* .

[c] Evaluating Benefits of Settlement Conferences

Settlement conferences may be beneficial to the litigants even if an early settlement is not achieved. The advantages of settlement conferences include the following:

1. Assisting the parties in understanding the factual and legal issues in the case, including identifying the strengths and weaknesses of their own positions;

2. Highlighting remaining disclosure, discovery, or motion practice needed to position the case for settlement or trial;

3. Providing an opportunity for extended dialogue across party lines regarding the pertinent evidence and law; and

4. Offering the litigants an opportunity to present the equities of their case to a representative of the court system.

[d] Referring Settlement Conference to Magistrate Judge or Special Master

Federal district court judges typically refer the settlement conference to a magistrate judge, special master, or other neutral mediator, particularly in nonjury cases. *See §§ 5.10, 5.11 below*.



Strategic Point:

If the district judge volunteers involvement in settlement discussions, and seeks the consent of all parties to that involvement, counsel should make every possible effort to find others who have participated in settlement conferences with the assigned judge, in an effort to gain as much insight as possible into the judge's settlement approach.

[e] Preparing and Filing Settlement Conference Statement

Settlement conference statements, if required, ordinarily outline the facts of the case, the contentions of the parties, and the damages. Counsel should consult the individual judge's rules to determine whether settlement conference statements must be filed.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.53, 16.60-16.63.*
- *Bender's Federal Practice Forms* Form Nos. 16:1-16:22, 16:100-16:114, 16:600-16:602.
- *Weinstein's Federal Evidence (2d ed.) § 706.02.*
- *Fed. R. Civ. P. 16(a)* (purposes of pretrial conference).
- *Fed. R. Civ. P. 16(b)* (scheduling).
- *Fed. R. Civ. P. 16(c)* (attendance and matters for consideration at a pretrial conference).
- *Fed. R. Civ. P. 16(d)* (pretrial orders).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Conferences



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART C: CASE MANAGEMENT CONFERENCES

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.10

§ 5.10 Referring Cases to Magistrate Judges

[1] Judges May Appoint Magistrate Judges

[a] Magistrate Judge May Handle Significant Pretrial Activity

As a result of the congested dockets in district courts, and the need to allocate judicial resources, district judges may appoint magistrate judges to handle significant pretrial activity, particularly with respect to scheduling and planning. *See 28 U.S.C. § 636*.

[b] Scope of Assignments Varies

The types of assignments that may be given to magistrate judges vary significantly, even within the same court. Some district judges assign all responsibility for handling all discovery disputes in all their cases to magistrate judges, while others almost never refer discovery matters to magistrate judges, and others selectively refer particular discovery disputes to magistrate judges. Further, some judges assign substantial case management responsibilities to magistrate judges, whereas others seldom assign substantial case management responsibilities.

Counsel should consult the local rules of the particular district, as well as the individual judge's rules, regarding assignment of cases to magistrate judges.



Strategic Point:

Referring case management, discovery, or settlement work to magistrate judges can be advantageous because the magistrate judge may be able to devote substantially more time to the matter than district judges. The magistrate judge may be better able to learn the details of the pertinent evidence and law and provide closer supervision and more detailed guidance concerning the development of the case. However, the referral may also result in delay stemming from requests for review of the magistrate judge's findings, proposed findings, or recommendations.

[2] Seeking Review of Magistrate Judge's Ruling

Procedures for reviewing a magistrate judge's ruling are ordinarily prescribed by local rule.

When reviewing a magistrate judge's ruling or report and recommendation, the standard applied by a district court varies with the type of decision made, and the basis for the decision. Interlocutory scheduling orders issued by a magistrate judge, for example, may be reviewable by a district judge under the clearly erroneous or the abuse of discretion standard. The clearly erroneous standard is applied to findings of fact made by magistrate judges that support rulings on non-dispositive motions, or the exercise of case-management discretion. *See 28 U.S.C. § 636(b)(1)(A).*

When reviewing aspects of a magistrate judge's decision that involve interpretations of applicable law, district courts apply the contrary-to-law standard, meaning de novo review. District judges must also apply the de novo standard when ruling on objections to a magistrate judge's report and recommendation on a potentially dispositive motion. *See 28 U.S.C. § 636(b)(1), (c)(4); Fed. R. Civ. P. 72.*



Strategic Point:

Parties may ask the assigning judge to reconsider a scheduling order entered by a magistrate judge by filing a challenge within 14 days after being served with a copy of the order. Any objections not timely filed are waived. *Fed. R. Civ. P. 72(a).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.04, 16.36, 72.02 -72.04, 72.10 -72.12.*
- *Practice Before Federal Magistrates* Chs. 12, 13.
- *28 U.S.C. § 636* (jurisdiction, powers, and temporary assignment of magistrate judges).
- *Fed. R. Civ. P. 16(b)* (scheduling).
- *Fed. R. Civ. P. 72(a)* (nondispositive matters referred to magistrate judge).
- *Oracle USA, Inc. v. SAP AG, 264 F.R.D. 541, 546 (N.D. Cal. 2009)* (discovery sanctions are nondispositive unless imposition of sanction would be dispositive of party's claim or defense).
- *Doe v. Kamehameha Sch., 596 F.3d 1036, 1041 n.4 (9th Cir. 2010)* (motion to proceed anonymously is nondispositive matter).
- *PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10, 14 (1st Cir. 2010)* (in case of first impression in courts of appeal, court found that motion to stay litigation pending resolution of parallel arbitration proceedings is nondispositive because stay order is "merely suspensory").
- *SEC v. Merrill Scott & Assocs., Ltd., 600 F.3d 1262, 1269 (10th Cir. 2010)* (magistrate judge may not issue final order directly appealable to court of appeals; properly filed objections resolved by district court are prerequisite to court of appeals review).

Legal Topics:

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

Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureJudicial OfficersMagistratesPretrial OrdersCivil ProcedurePretrial MattersGeneral Overview

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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
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1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.11

§ 5.11 Appointing Master for Case Management

[1] Referring Case to Master Is Exception

Relying on their inherent authority and *Fed. R. Civ. P. 53*, district judges may appoint a master to perform a wide range of pretrial functions, including assigning responsibility for case management, discovery, settlement, and ADR processes; and conducting evidentiary hearings on pretrial motions.

Referrals are most often made in complex or unusually contentious jury cases, in nonjury actions for matters of account or involving difficult computation of damages, in nonjury actions on a showing that the appointment is required by some exceptional condition, and when the parties consent to the appointment of a magistrate judge to serve as master. *See Fed. R. Civ. P. 53(a)*. A magistrate judge is subject to the Rule 53 only when the order referring a matter to the magistrate judge expressly provides that the reference is made under the Rule. *Fed. R. Civ. P. 53(h)*.

Referrals to a master are the exception rather than the rule, and occur with less frequency than referrals to magistrate judges. *See Fed. R. Civ. P. 53(a)*.

Strategic Point:

Referring case management, discovery, or settlement work to masters can be advantageous because the special master may be able to devote substantially more time to the matter than a district judge. The master may be better able to learn the details of the pertinent evidence and provide closer supervision and more detailed guidance concerning the development of the case. However,a referral may cause additional costs and delay. The district court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay. *Fed. R. Civ. P. 53(a)(3)*.

[2] Prior Notice and Hearing Required

The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment. *Fed. R. Civ. P. 53(b)(1)*.

[3] Authority of Master

Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to fairly and efficiently perform the assigned duties. The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45 and may recommend a contempt sanction against a party and sanctions against a nonparty. *Fed. R. Civ. P. 53(c)(2). See Fed. R. Civ. P. 37, 45.* A master conducting an evidentiary hearing may exercise the appointing court's power to compel, take, and record evidence, unless the appointing order expressly directs otherwise. *Fed. R. Civ. P. 53(c)(1)(C).* A master is not required to follow the Federal Rules of Evidence or Federal Rules of Civil Procedure, absent a reference order that requires the master to do so. *See United States v. Clifford Matley Family Trust, 354 F.3d 1154, 1161 (9th Cir. 2004)* .

[4] Compensation

In general, the court fixes the master's compensation before or after judgment on the basis and terms stated in the order of appointment. However, the court may set a new basis and terms after notice and an opportunity to be heard. *Fed. R. Civ. P. 53(g)(1).* The court determines whether the master's compensation is to be charged to a party, the parties, or paid out of a fund or subject matter of the action that is in the court's custody or control. *See Fed. R. Civ. P. 53(g)(2).*

[5] Seeking Review of Master's Determination

After the master files a report or recommendation, or enters and files an order, any party may, within 21 days of service, object to it, or move to adopt or modify it. *Fed. R. Civ. P. 53(f)(2)*; *see Sea Coast Foods, Inc. v. Lu-Mar Lobster & Shrimp, Inc., 260 F.3d 1054, 1058 (9th Cir. 2001)* (party required to pay special master's fee over objection to appointment of master).

In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard, may receive evidence, and may take any of the following actions:

1. Adopt or affirm;

2. Modify;

3. Wholly or partly reject or reverse; or

4. Resubmit to the master with instructions.

Fed. R. Civ. P. 53(f)(1).

The trial court ordinarily must decide de novo any party's timely objections to findings of fact made or recommended by the master. 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 posttrial 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.) §§ 16.04[2], 16.53[8], 53.02, 53.10, 53.12, 53.20, 53.30, 53.40*

-53.42.

- *Bender's Federal Practice Forms* Form Nos. 53:1-53:21, 53:30-53:36, 53:50, 53:120-53:121.
- *Practice Before Federal Magistrates* Ch. 22.
- *Fed. R. Civ. P. 16(b)* (scheduling).
- *Fed. R. Civ. P. 53(a)* (appointment of master).
- *Fed. R. Civ. P. 53(b)* (order appointing master).
- *Fed. R. Civ. P. 53(c)* (master's authority).
- *Fed. R. Civ. P. 53(f)* (action on master's order, report, or recommendations).
- *Fed. R. Civ. P. 53(g)* (compensation).
- *Hofmann v. EMI Resorts, Inc., 689 F. Supp. 2d 1361, 1374 (S.D. Fla. 2010)* (special master appointed by court assumes duties and obligations of judicial officer, and is generally subject to Code of Conduct for United States Judges).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersMastersAppointmentsCivil ProcedurePretrial MattersConferencesCase Management



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§ 5.12 Checklist for Final Pretrial Conferences

☐ Ascertain applicable procedure for final pretrial conference, consulting local rules, general orders, individual judge's standing orders and plans. *See § 5.13 below*.

☐ Ascertain whether opposing parties have engaged in any sanctionable conduct and if so, consider appropriateness and availability of bringing a motion for sanctions. *See § 5.14 below*.

☐ Prepare, serve, and file pretrial disclosures at least 30 days before trial unless otherwise ordered by the court. *See § 5.15 below*.

☐ Serve and file objections to another party's pretrial disclosures within 14 days, unless court specifies different time. *See § 5.15 below*.

☐ **Search by Topic:**

- ○ Civil Procedure > Pretrial Matters > Conferences > Final Pretrial Conferences
- ○ Civil Procedure > Discovery > Disclosures

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial Conferences



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
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1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.13

§ 5.13 Participating in Final Pretrial Conference

[1] Determining Whether Final Pretrial Conference Will Be Held

A federal district court judge may, but is not required to, hold a final pretrial conference. *See Fed. R. Civ. P. 16(e).* District court judges have discretion to determine whether to hold the conference and to set the conference agenda. *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1169 (7th Cir. 1983)* (Rule 16 gives court discretion to hold final pretrial conference).

Warning:

Counsel must consult the district's local rules, as well as the individual judge's standing orders, to determine whether a conference will be required and to ascertain the applicable procedures and agenda. *G.J.B. & Assoc. v. Singleton, 913 F.2d 824, 831 (10th Cir. 1990)* (counsel duty bound to know court's practices).

Different district courts use different labels to describe pretrial conferences. Courts use the terms pretrial conference, final pretrial conference, or case management conference. Local rules may prescribe the appropriate terminology.

[2] At Least One Attorney for Each Party Attends Final Pretrial Conference

The final pretrial conference must be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties. *Fed. R. Civ. P. 16(e).* At least one of the participating attorneys for each party must have authority to enter into stipulations, and to make admissions regarding all matters that might reasonably be anticipated to be discussed. *Fed. R. Civ. P. 16(c)(1)*; *Lucien v. Breweur, 9 F.3d 26, 28 (7th Cir. 1993)* .

Warning:

Additional attendance requirements may be imposed by local rules, or by the individual judge's standing orders.

[3] Final Pretrial Conference Is Held Near Time of Trial

The final pretrial conference is held as close to the start of trial as is reasonable. *Fed. R. Civ. P. 16(e)*. How close to the trial date is reasonable is left to the sound discretion of the assigned judge. *See Fed. R. Civ. P. 16*, Committee Note of 1983; *see also Fort Howard Paper Co. v. Standard Havens, Inc., 119 F.R.D. 397, 400 (E.D. Wis. 1988) , aff'd, 901 F.2d 1373 (7th Cir. 1990)* (final pretrial conference less than three weeks before trial date).

Relevant factors in setting the conference date include:

1. The complexity of the case;

2. The number of parties;

3. The amount and nature of the evidence likely to be proffered at trial;

4. The number, difficulty, and importance of unresolved issues;

5. The relative clarity or obscurity of the applicable law; and

6. The need for specialized jury instructions.

A key variable that can affect a judge's decision about when to hold the final pretrial conference is the status of the pretrial disclosures required by *Fed. R. Civ. P. 26(a)(3)*; *see also § 5.15 below*. The court coordinates the timing of the final pretrial disclosures and the listing of objections mandated by the rule. In most circumstances, the court will need to give counsel at least three weeks between the time they make their final pretrial disclosures and the time they file their final pretrial conference statements. It is likely to take counsel that long to digest what they learn through the disclosures, to develop lists of possible objections, to confer in an effort to resolve as many disputes as possible without judicial intervention, to prepare any necessary motions in limine, and to frame oppositions to those motions.



Strategic Point:

Counsel who conclude that the date fixed by the court for the final pretrial conference is appreciably too close to or too far in advance of the trial date can propose an alternative schedule. Such a proposal is likely to receive the best reception if made jointly, in writing, and if the proposal describes with particularity why the change is necessary.



Timing:

Most judges have their own formula and work backwards from the trial date to set the schedule. Time is allocated to allow for all anticipated motions and other matters. If there is a particular need to deviate from the judge's schedule, the need should be raised at the conference.

[4] Agenda Items for Final Pretrial Conference

[a] Formulation of Trial Plan

The primary purpose of a final pretrial conference is to formulate a specific plan for trial, including a program to facilitate the admission of evidence. *Fed. R. Civ. P. 16(e)*. A detailed plan might address the following matters:

1. When opening statements will be made (a defendant may elect to give some or all of its opening statement after the plaintiff has presented its case in chief), and the scope, content, and time allotted for the opening statements;

2. The order in which each witness will testify (except those called solely for impeachment or rebuttal) or each deposition excerpt will be read, and the time allotted for each direct and cross-examination;

3. The sequence in which documentary and other exhibits will be introduced, and identification of the witnesses who will sponsor the exhibits;

4. When any demonstrations will be performed or site visits made;

5. When, if at all, interim summarizations or arguments may be presented by counsel; and

6. The scope, content, and time allotted for the closing arguments, and the order in which they will be presented.

A judge may impose reasonable time limits on the trial, and reasonable limits on the time each party has to present his or her case. These limits will be enforced at trial and upheld on appeal unless their enforcement would deny a party due process. *General Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1508 (9th Cir. 1995)* ; *Monotype Corp. PLC v. International Typeface Corp., 43 F.3d 443, 451 (9th Cir. 1994)* (time limits were reasonable even though less than parties' estimates).

[b] Substantive Issues

Although the primary purpose of a final pretrial conference is to formulate a specific plan for the trial of the action, counsel should consult the local rules and the individual judge's standing orders for any specific final pretrial conference agenda requirements.

Counsel should anticipate that the following topics will be discussed at the final pretrial conference:

1. Remaining or renewed prospects for settlement;

2. Remaining claims and defenses, to ensure that the parties agree as to the nature of the claims and defenses to be tried, to ascertain whether any pleadings require amendment, and to determine whether any claims or defenses can be eliminated voluntarily or by order;

3. Clarification of remaining parties, particularly if parties have been added to or dismissed from the case;

4. Bifurcation of trial issues, such as liability and damages, or sequencing the trial of a particular claim or defense, a related cluster of claims or defenses, or a specific issue or set of issues (*see §§ 5.19 -5.21 below*);

5. The resolution of any remaining discovery or disclosure disputes, and if appropriate, the need for any orders mandating the prompt completion of any unfinished but clearly necessary discovery activity;

6. Identifying any factual, evidentiary, and procedural matters that can be resolved by stipulation (particularly regarding foundational evidentiary issues) or additional admissions;

7. Rulings on the admissibility of evidence and motions in limine;

8. Identification and marking of proffered documents and other exhibits;

9. Remaining disputes about demonstrative evidence, visual aids, summaries, charts, or other graphics, including the submission and exchange of all proposed items;

10. The scope, purposes, form, and projected duration of each witness's testimony, including testimony to be read to the jury or into the record from deposition transcripts;

11. Any time limits imposed on the parties for particular parts of the trial or for all trial purposes;

12. Whether and how to present input from special masters or any court-appointed neutral experts;

13. What the law governing the case is (and, in a jury trial, what the jury will be told about it);

14. For jury trials, the composition and voir dire of the jury (including degree of attorney input and possible use of jury questionnaire), the number of alternate jurors, proposed jury instructions, as well as court policy toward jurors regarding written copies of instructions, taking and using notes, and whether and how jurors may ask questions;

15. For nonjury trials, any disputes regarding proposed findings of fact and conclusions of law submitted to the court; and

16. Resolving any disputes regarding verdict forms and previously submitted special interrogatories.

Warning:

Counsel should consider that any subject listed in *Fed. R. Civ. P. 16(c)(2)* is fair game at the conference. These matters will be addressed from the perspective of organizing, streamlining, and expediting the trial rather than discovery.

[c] Logistical Matters

Counsel and the court should review logistical matters at the final pretrial conference, such as the following:

1. The dates and times for trial;

2. The hours each day that the court will keep the trial in session, including lunch breaks;

3. Whether the trial will be interrupted because of other court responsibilities, such as a motion calendar;

4. Any arrangements for special equipment or facilities, such as video-monitors, slide projectors, software, displays for large graphics, or equipment and space for demonstrations, and the prospect of sharing equipment or operators;

5. Security for sensitive trial materials and access to the courtroom when trial is not in session;

6. Arrangements for expedited transcripts; and

7. Arrangements for interpreters.

Timing:

Unless previously set, the trial will ordinarily be set at the earliest date permitted by the court's calendar.

[5] Preparing Final Pretrial Order

[a] Determining Who Will Draft Proposed Final Pretrial Order

After any Rule 16 pretrial conference, including a final pretrial conference, the court should issue an order reciting the actions taken. *Fed. R. Civ. P. 16(d)*; *see, e.g., Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 432-433 n.9, 115 S. Ct. 2227, 132 L. Ed.2d 375 (1995)* (rule authorizes, but does not compel, judicial action). Rule 16 does not specify who must prepare the order. Counsel should consult the local rules, as well as the individual judge's standing orders, to determine whether a final pretrial conference order is required, and if so, the requirements of the order, and whether it is counsel's responsibility to draft the proposed order.



Strategic Point:

Most federal judges require a final pretrial order. Even if a final pretrial conference order is not required, counsel should nevertheless consider requesting the opportunity to present a proposed order. An order stating the decisions and stipulations made at the final pretrial conference reduces the risk of confusion, and provides a record for appellate review.

[b] Form of Order

Some local rules require the use of a specified form. Counsel should consult the local rules, as well as the judge's standing orders to determine proper procedure.

[c] Illustrative Contents

Before preparing the order, counsel should consult the applicable local rules and the trial judge's standing orders. For illustrative purposes, a final pretrial order should clearly address the following topics:

1. Facts establishing jurisdiction and venue;

2. A statement of the case;

3. The date and time that the trial will commence;

4. All rulings made at the final pretrial conference, and any earlier rulings that will govern ongoing proceedings;

5. A summary of all factual and legal issues to be tried, and any issues to be severed and tried separately;

6. A final list of witnesses to be called, identifying the subject of their testimony and any deposition excerpts to be read;

7. Expert witnesses to be called, and a summary of their qualifications;

8. Exhibits and visual aids to be presented at trial; identification of exhibits to be admitted without objection, and summary of any objections;

9. Discovery excerpts from stenographic and video depositions, responses to interrogatories, and requests

for admission;

10. Undisputed facts and judicially noticed facts;

11. Order of proof, including procedures for presenting testimony and exhibits;

12. Whether additional or specified evidence is precluded;

13. If jury trial, procedures for selection, management, and instruction of jury, including deadlines for submitting proposed voir dire questions and jury instruction;

14. If non-jury trial, proposed findings of fact and conclusions of law;

15. Any objections that are sustained, denied, or deemed waived;

16. Status of discovery, disclosure, and motions;

17. Procedures for consolidation, severance, or transfer of cases;

18. Estimated length of trial;

19. Verdict stipulations; and

20. Statement that the order may not be modified except to prevent manifest injustice (*see Fed. R. Civ. P. 16(e)*).

Manual for Complex Litigation, Fourth, §§ 11.61-11.67; Civil Litigation Management Manual, Pt. VI (Federal Judicial Center) (3d ed.).

[6] Final Pretrial Order Defines Scope of Trial

[a] Final Pretrial Order Supersedes the Pleadings

The court will issue an order after the final pretrial conference, reciting all actions taken at the conference. *Fed. R. Civ. P. 16(d)*.

This final pretrial order supersedes the pleadings. *See In re Hunt, 238 F.3d 1098, 1101-1102 (9th Cir. 2000)* (issues included in the final pretrial order can be raised at trial even though not raised by pleadings); *Eagle v. American Tel. & Tel. Co., 769 F.2d 541, 548 (9th Cir. 1985)* (claims raised in pleadings but omitted from final order are precluded).

[b] Final Pretrial Order Guides and Controls Subsequent Course of Action Unless Modified

The final pretrial order guides and controls the subsequent course of the action unless modified by a subsequent order. *Fed. R. Civ. P. 16(d)*; *see also DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd., 268 F.3d 829, 841 (9th Cir. 2001)* ; *Sousa v. Unilab Corp. Class II (Non-Exempt) Members Group Benefit Plan, 252 F. Supp. 2d 1046, 1058 (E.D. Cal. 2002)* .

Warning:

The importance of the final pretrial order cannot be overemphasized. The final pretrial order supersedes the pleadings, and governs who may be called as witnesses (and possibly impeachment witnesses and

rebuttal witnesses); may contain binding stipulations; and may limit the questions, evidence, exhibits, and legal theories to be presented at trial. *See Southern Cal. Retail Clerks Union v. Bjorklund, 728 F.2d 1262, 1264 (9th Cir. 1984)* . In other words, the parties are bound by the order's contents and cannot assert at trial claims raised in the pleadings but omitted from the order. *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd., 268 F.3d 829, 842 (9th Cir. 2001)* .

[c] Order May Relieve Party of Need to Prove Certain Matters at Trial

If a matter has been agreed to in the final pretrial order, the proponent need not offer proof on the issue at trial. *United States v. First Nat'l Bank of Circle, 652 F.2d 882, 886-887 (9th Cir. 1981)* .

[d] Stipulations in Pretrial Order Are Binding at Trial

Stipulations embodied in the order are binding at trial. *Malhiot v. Southern Cal. Retail Clerks Union, 735 F.2d 1133, 1136-1137 (9th Cir. 1984)* .

[e] Issues Resolved by Agreement at Pretrial Conference May Not Be Raised Again at Trial

Issues resolved by agreement at the conference and set forth in the order may not be raised again at trial. *Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1290-1291 (9th Cir. 1985)* .

[7] Final Pretrial Order Has Preclusive Effect

In general, a party may not offer evidence or advance theories at trial that are not included in the final pretrial order or that contradict its terms. In other words, matters not preserved in the final pretrial order are eliminated from the case. *See Southern Cal. Retail Clerks Union v. Bjorklund, 728 F.2d 1262, 1264 (9th Cir. 1984)* . This rule serves to encourage timely and orderly litigation and to prevent unfair surprise. *Sousa v. Unilab Corp. Class II (Non-Exempt) Members Group Benefit Plan, 252 F. Supp. 2d 1046, 1058 (E.D. Cal. 2002)* .

Exception:

If an issue omitted from the final pretrial order is tried without objection, the objection is waived and the pretrial order is deemed amended to conform to the proof. *Fed. R. Civ. P. 15(b)*; *see Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 515 (9th Cir. 1985)* ; *Sauers v. Alaska Barge & Transp., Inc., 600 F.2d 238, 244 (9th Cir. 1979)* (litigated issue omitted from final pretrial order presented to jury; pretrial order conformed to proof).

[8] Scope of Final Pretrial Order

The final pretrial order typically disposes of all pending motions. The order may dispose of frivolous claims or defenses. Further, the order may address trial issues, such as identifying who may be called as witnesses (and possibly impeachment witnesses and rebuttal witnesses), and issues remaining. The order may contain binding stipulations and limit the questions, evidence, exhibits, and legal theories to be presented at trial. *See Southern Cal. Retail Clerks Union v. Bjorklund, 728 F.2d 1262, 1264 (9th Cir. 1984)* ; *see also Higgins v. Harden, 644 F.2d 1348, 1353 (9th Cir. 1981)* .

A court may sua sponte grant partial or full summary judgment in appropriate cases without the need for formal motion. *See Portsmouth Square, Inc. v. Shareholders Protective Comm., 770 F.2d 866, 869 (9th Cir. 1985)* (particularly close scrutiny when summary judgment granted without motion).

If a party has raised an issue of foreign law, the foreign law issue must be incorporated into the final pretrial order. *See Fed. R. Civ. P. 44.1*; *DP Aviation v. Smiths Indus. Aerospace & Def. Sys., Ltd., 268 F.3d 829, 848 (9th Cir. 2001)* .

[9] Final Pretrial Orders Should Be Liberally Construed

A final pretrial order should be liberally construed to permit any issues at trial that are reasonably embraced within its language. *DP Aviation v. Smiths Indus. Aerospace & Def. Sys., Ltd., 268 F.3d 829, 841 (9th Cir. 2001)* ; *Sousa v. Unilab Corp. Class II (Non-Exempt) Members Group Benefit Plan, 252 F. Supp. 2d 1046, 1058 (E.D. Cal. 2002)* . However, the theories raised at trial must at least be implicit in the order. *Eagle v. American Tel. & Tel. Co., 769 F.2d 541, 548 (9th Cir. 1985)* . Particular evidence or theories that are not at least implicitly included in the order are barred unless the final order is modified before trial. *DP Aviation v. Smiths Indus. Aerospace & Def. Sys., Ltd., 268 F.3d 829, 841 (9th Cir. 2001)* ; *United States v. First Nat'l Bank of Circle, 652 F.2d 882, 886-887 (9th Cir. 1981)* .

District courts have broad discretion to determine the preclusive effect of a final pretrial order on the determination of issues of law and fact at trial. *Miller v. Safeco Title Ins. Co., 758 F.2d 364, 369 (9th Cir. 1985)* ; *see, e.g., El-Hakem v. BJY Inc., 415 F.3d 1068, 1076-1077 (9th Cir. 2005)* (in employment discrimination case, district court had discretion to implicitly modify pretrial order to allow "same decision" defense to be asserted to wage retaliation claim when that defense was listed in pretrial order, albeit with respect to different claim, and no prejudice resulted to plaintiff).

[10] Order May Be Modified to Prevent Manifest Injustice

The court should modify the pretrial order only to prevent manifest injustice. *See Fed. R. Civ. P. 16(e)*; *Byrd v. Guess, 137 F.3d 1126, 1132 (9th Cir. 1998)* .

[11] Determining Manifest Injustice Factors

Rule 16 does not define manifest injustice. However, the manifest injustice standard is more stringent than the standards applied when deciding whether to grant motions to modify orders entered after earlier pretrial conferences. *See Fed. R. Civ. P. 16*, Committee Note of 1983; *see, e.g., Galdamez v. Potter, 415 F.3d 1015, 1020 (9th Cir. 2005)* (Ninth Circuit applies a four-factor test to determine whether to modify a final pretrial order: (1) degree of prejudice or surprise to the nonmoving party if the order is modified; (2) ability of the nonmoving party to cure any prejudice; (3) impact of the modification on the orderly and efficient conduct of the case; and (4) any degree of willfulness or bad faith on the part of the party seeking the modification).

The court may consider the following factors:

1. Whether the moving party should have anticipated the circumstances that give rise to the need for modification;

2. Whether granting the modification would unfairly impair the opposing party's ability to litigate the merits of the case;

3. Whether the modification would impose unjustifiable expense or disruption on another party;

4. Whether the nonmoving party should have known that the movant intended to proceed in the manner proposed in the motion;

5. Whether the need for the modification is the result of a good faith oversight;

6. Prejudice to the movant if the motion were denied; and

7. Whether the proposed changes are extensive or modest.

Acorn v. City of Phoenix, 798 F.2d 1260, 1272-1273 (9th Cir. 1986) .



Warning:

Judges rarely modify a final pretrial order.

[12] Party Seeking Modification Has Burden of Proof

The party seeking to modify the order bears the burden of establishing the manifest injustice that will occur if the order is not modified. *Byrd v. Guess, 137 F.3d 1126, 1132 (9th Cir. 1998)* .



Strategic Point:

Manifest injustice may be difficult to establish. If feasible, counsel should consider crafting the argument in terms of seeking clarification of the final pretrial conference order.

[13] Appellate Review Is Ordinarily Deferred

Final pretrial orders, like other pretrial orders, are interlocutory in nature, rather than final. They may still be modified by the court on a showing of manifest injustice. *Fed. R. Civ. P. 16(e)*; *see § 5.14[10], [11] above*.

Although a final pretrial order has important effects in narrowing issues, clarifying factual contentions, and structuring the trial, such an order is a procedural step. Because the court is able to reassess the content of a final pretrial order and make adjustments as needed, no irreversible legal consequences flow from these orders. Therefore, appellate review of such orders ordinarily must await a final judgment in the action. *See In re Recticel Foam Corp., 859 F.2d 1000, 1002 (1st Cir. 1988)* (pretrial orders not final because because they do not resolve parties' rights in any definitive way).

[14] Trial Management Decisions Reviewed for Abuse of Discretion

The court of appeals reviews a district court's case management decisions under the "abuse of discretion" standard. The court of appeals may reverse a district court's case management decision if the district court relied on an erroneous view of the law, made a clearly erroneous assessment of the evidence, or struck an unreasonable balance of the relevant factors. *Doe v. Advanced Textile Corp., 214 F.3d 1058, 1069 (9th Cir. 2000)* .

Trial courts have broad authority to impose and enforce reasonable time limits for each side's presentation of the case. *See Navellier v. Sletten, 262 F.3d 923, 941 (9th Cir. 2001)* . However, trial courts may not rigidly adhere to time limits as to "sacrifice justice in the name of efficiency." *General Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1509 (9th Cir. 1995)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.70 -16.79.*
- *Bender's Federal Practice Forms* Form Nos. 16:200, 16:210-16:222, 16:300-16:400, 16:500.
- *Fed. R. Civ. P. 16(c)* (attendance and matters for consideration at pretrial conference).
- *Fed. R. Civ. P. 16(d)* (pretrial orders).

- *Fed. R. Civ. P. 16(e)* (final pretrial conference and orders).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial Conferences



Moore's AnswerGuide: Federal Pretrial Civil Litigation

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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART D: FINAL PRETRIAL CONFERENCES

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.14

§ 5.14 Seeking Sanctions for Failure to Comply With Pretrial Duties

[1] Sanctionable Conduct

[a] Failing to Attend or Substantially Prepare for Conference

Courts may impose sanctions if a party or party's attorney fails to attend a scheduled pretrial conference, or fails to substantially prepare for the conference without sufficient excuse. *Fed. R. Civ. P. 16(f)(1)*; *see Fed. R. Civ. P. 37(b)(2)(A)(ii)-(vii)*; *see also Lucien v. Breweur, 9 F.3d 26, 28-29 (7th Cir. 1993)* (pro se plaintiff's action dismissed for refusal to attend mandatory pretrial conference); *Ayers v. City of Richmond, 895 F.2d 1267, 1270 (9th Cir. 1990)* (sanctions may be imposed for failing to attend a settlement conference); *Ha-Lo Indus., Inc. v. Your Favorite Producers, Inc., 164 F.R.D. 233, 234 (N.D. Ill. 1995)* (sanctions may be imposed if lead counsel does not attend final pretrial conference, but instead sends a substantially unprepared attorney).

[b] Failing to Participate in Good Faith in Pretrial Conference

Courts have broad authority to sanction a party or an attorney who fails to participate in good faith in a pretrial conference. *Fed. R. Civ. P. 16(f)(1)(B)*; *see Fed. R. Civ. P. 37(b)(2)(A)(ii)-(vii)*; *Guillory v. Domtar Indus., Inc., 95 F.3d 1320, 1334 (5th Cir. 1996)* (court has authority to impose sanctions against party that never intended to settle but participated in settlement conference without informing court of its position). Courts also may impose sanctions for failing to participate in good faith in the development and submission of a proposed discovery plan. *Fed. R. Civ. P. 26(f)*, *37(e)*.

[c] Failing to Obey Pretrial Order

Courts may impose sanctions if a party or party's attorney fails to obey a pretrial order without sufficient excuse. *Fed. R. Civ. P. 16(f)(1)(C)*; *see Fed. R. Civ. P. 37(b)(2)(A)(ii)-(vii)*; *Media Duplications Servs. Ltd v. HDG Software, Inc., 928 F.2d 1228, 1241-1242 (1st Cir. 1991)* (noncompliance with pretrial order by failing to prepare and appear to present client's position).

[d] Violating Local Rules

Local rules may authorize the imposition of sanctions for failing to comply with local rules. *See Eash v. Riggins Trucking Co., 757 F.2d 557, 565-568 (3d Cir. 1985)* (sanction for violating standing orders).

[2] Bad Faith Not Required

The imposition of sanctions under Rule 16 does not require that the party was acting (failing to act) in bad faith. *See Rabb v. Amatex Corp., 769 F.2d 996, 999-1000 (4th Cir. 1985)* . Thus, sanctions are possible for negligently failing to appear as required. *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 769 (9th Cir. 2001)* ; *O. Ahlborg & Sons, Inc. v. United States, 233 F.R.D. 224, 226 (D. Mass. 2005)* (cost of plaintiff's failure to attend status conference should be borne by plaintiff rather than defendant).

[3] Sanctions May Be Imposed on Motion or Sua Sponte

Sanctions for failing to comply with a pretrial order or other pretrial conference obligation may be imposed on motion, or on the judge's own initiative. The court may sanction a party or its attorney, or both. *Fed. R. Civ. P. 16(f)(1).*

[4] Offending Party Must Have Notice and Opportunity to Show Cause

The offending party must be afforded notice and an opportunity to show cause why sanctions should not be imposed before sanctions may be imposed. *Ayers v. City of Richmond, 895 F.2d 1267, 1270 (9th Cir. 1990)* .

[5] Court Has Broad Discretion to Select Appropriate Sanction

[a] Selection of Sanction Is Discretionary

Rule 16(f) leaves courts with broad discretion in fashioning a remedy by making "any just orders." *Fed. R. Civ. P. 16(f)(1), 37(b)(2)(A)(ii)-(vii); see, e.g., National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976)* ; *In re Baker, 744 F.2d 1438, 1440 (10th Cir. 1984)* (broad range of sanctions). The remedies listed in Rule 16(f) are neither mandatory nor exhaustive. *See Mallinckrodt, Inc. v. Masimo Corp., 254 F. Supp. 2d 1140, 1156 (C.D. Cal. 2003)* .

In exercising its discretion, the court will typically examine the following factors:

1. The nature and consequences of the violation;

2. The extent and nature of the alleged violation, and its effect on the other parties (e.g., prejudice);

3. The mental state or degree of culpable behavior; willfulness, recklessness, negligence, or bad faith is not required, but may affect the severity of the sanction;

4. Who is responsible for the violation; counsel, party, or both;

5. Whether the violation resulted from forces beyond the party's control;

6. Whether the violation is an isolated incident, or part of a pattern of conduct; and

7. Public interest matters, such as the effect of the violation on the administration of justice, the public policy favoring expeditious resolution of litigation, docket management, and the availability of less drastic sanctions.

See Thompson v. Housing Auth. of L.A., 782 F.2d 829, 831-832 (9th Cir. 1986) .

In lieu of or in addition to any other sanction, Rule 16 provides that the judge shall require the party or the attorney representing that party or both to pay the reasonable expenses incurred because of any noncompliance with Rule 16, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust. *Fed. R. Civ. P. 16(f)(2).*



Strategic Point:

To ensure an adequate record for appellate review, counsel should request that the court memorialize its findings and reasons on the record, or in a written order. *See In re Eisen, 31 F.3d 1447, 1451 (9th Cir. 1994)* .

[b] Broad Range of Available Sanctions

The range of sanctions available for failing to comply with a pretrial order or other pretrial conference obligation is extremely broad, and includes:

1. Reprimand;

2. Imposition of costs, including attorney's fees, caused by the violation;

3. Exclusion of evidence, witnesses, or a claim or defense;

4. Striking pleadings or parts of pleadings;

5. Granting or denying additional time for discovery;

6. Continuing or staying the proceedings;

7. Contempt;

8. Dismissal of a claim or the action; and

9. Default judgment.

See Fed. R. Civ. P. 16(f), 37(b)(2).



Strategic Point:

Courts do not impose sanctions frequently. In determining the appropriate sanction, the specific facts are very important, including how much prejudice has been caused, both to the other parties and to the court. Courts sometimes will impose a monetary sanction rather than dismissal or default judgment, so as not to punish a client for counsel's misconduct.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.15, 16.90 -16.94, 37.40 -37.44, 37.50, 37.51, 37.110, 37.111.*

- *Bender's Federal Practice Forms* Form Nos. 16:501, 37:100-37:104.
- *Fed. R. Civ. P. 16(f)* (sanctions).
- *Fed. R. Civ. P. 26(f)* (conference of parties; planning for discovery).
- *Fed. R. Civ. P. 37(b)* (failure to comply with court order).
- *Fed. R. Civ. P. 37(e)* (failure to participate in framing a discovery plan).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesSanctionsCivil ProcedureSanctionsGeneral Overview



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART D: FINAL PRETRIAL CONFERENCES

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.15

§ 5.15 Making Pretrial Disclosures Under Rule 26(a)(3)

[1] Information Related to Evidence to Be Presented at Trial

In addition to the disclosures required by *Fed. R. Civ. P. 26(a)(1)* and *(2)*, a party must provide to other parties and promptly file with the court information about the evidence that it may present at trial other than solely for impeachment. *Fed. R. Civ. P. 26(a)(3)*; *see DeBiasio v. Illinois Cent. R.R., 52 F.3d 678, 686 (7th Cir. 1995)* (testimony regarding witness's actions in retrieving exhibit from railroad car did not need to be disclosed because it was used only to impeach testimony that exhibit must have been broken in particular manner).

[2] Identification of Witnesses

A party must provide to other parties and promptly file with the court the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises. *Fed. R. Civ. P. 26(a)(3)(A)(i)*.

[3] Deposition Testimony to Be Used

A party must provide to other parties and promptly file with the court the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition. *Fed. R. Civ. P. 26(a)(3)(A)(ii)*.

[4] Identification of Documents and Exhibits

A party must provide to other parties and promptly file with the court an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those items the that the party expects to offer and those it may offer if the need arises. *Fed. R. Civ. P. 26(a)(3)(A)(iii)*.

[5] Impeachment Information Excluded

Pretrial disclosure of information solely for impeachment is not required. *Fed. R. Civ. P. 26(a)(3)*. If information is both substantive and impeaching, it must be disclosed. *Klonoski v. Mahlab, 156 F.3d 255, 270 (1st Cir. 1998)* .

[6] Disclosures Must Be Made 30 Days Before Trial

Unless the court orders otherwise, Rule 26(a)(3) disclosures must be made at least 30 days before trial. *Fed. R. Civ. P. 26(a)(3)(B).*

[7] Objections to Certain Evidence Must Be Filed Within 14 Days

Within 14 days after a party makes disclosures under Rule 26(a)(3), unless the court sets a different time, a party may serve and promptly file a list of the following objections:

> 1. Any objections to the use under *Fed. R. Civ. P. 32(a)* of a deposition designated by another party under *Fed. R. Civ. P. 26(a)(3)(A)(ii)*; and
>
> 2. Any objection, together with the grounds for it, that may be made to the admissibility of materials identified under *Fed. R. Civ. P. 26(a)(3)(A)(iii)* (regarding identification of documents and other exhibits).

Fed. R. Civ. P. 26(a)(3)(B).

Objections not so disclosed, other than objections under *Fed.R. Evid. 402* and *403*, are waived unless excused by the court for good cause. *Fed. R. Civ. P. 26(a)(3)*B).

[8] Disclosures Must Be Made in Writing, Signed, and Served

Unless the court orders otherwise, all disclosures under Rule 26(a) must be made in writing, signed, and served. *Fed. R. Civ. P. 26(a)(4).*

The signature on the pretrial disclosure is a certification that it is complete and correct as of the time it is made. *Fed. R. Civ. P. 26(g)(1).*

Warning:

Certification made without substantial justification is subject to sanctions, including an order to pay the reasonable expenses, including attorney's fees. *Fed. R. Civ. P. 26(g)(3).*

[9] Parties Must Supplement or Correct Rule 26(a) Disclosures to Include Later-Acquired Information

[a] Duty Applies to Pretrial Disclosures

A party who has made a pretrial disclosure under *Fed. R. Civ. P. 26(a)(3)* is under a duty to supplement or correct the disclosure to include later-acquired information. *Fed. R. Civ. P. 26(e)(1)(A)*; *Klonoski v. Mahlab, 156 F.3d 255, 272 (1st Cir. 1998)* (under duty to supplement, defense counsel should have put plaintiff on notice of new evidence).

Warning:

This duty with regard to later-acquired information continues even after the trial has started.

[b] Changes to Expert Witness Disclosures Must Be Disclosed by Time Pretrial Disclosures Are Due

With respect to testimony of an expert from whom a report is required, the duty extends to both information contained in the report and to information provided through a deposition of the expert. Any additions or changes to this information must be disclosed by the time the Rule 26(a)(3) disclosures are due. *Fed. R. Civ. P. 26(e)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.24, 26.28.*
- *Bender's Federal Practice Forms* Form Nos. 26:20, 26:400.
- *Fed. R. Civ. P. 26(a)(3)* (required pretrial disclosures).
- *Fed. R. Civ. P. 26(e)* (supplementing disclosures and responses).
- *Fed. R. Civ. P. 26(g)* (signing disclosures and discovery requests, responses, and objections).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersGeneral Overview



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART E: CONSOLIDATION

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.16

§ 5.16 Checklist for Moving for Consolidation

☐ Determine if motion for consolidation appropriate. *Fed. R. Civ. P. 42(a). See § 5.17 below .*

- ○ Determine common questions of law or fact.
- ○ Ensure cases are properly pending before same court.
- ○ Determine whether to seek consolidation of entire cases or to move for limited consolidation of particular issues.

☐ If consolidation sought, draft motion and requested order. *Fed. R. Civ. P. 7, 42(a). See § 5.17 below .*

- ○ Prepare to meet burden of proof.
- ○ Calendar response and hearing dates.

☐ If opposing motion for consolidation. *Fed. R. Civ. P. 42(a). See § 5.18 below .*

- ○ Review grounds for opposing consolidation.
- ○ Determine whether objection can be based on procedural posture of cases.
- ○ Consider asking for consolidation of only part of the proceedings, such as consolidation for pretrial purposes only, for discovery only, etc.

○ If cases are consolidated over objection, draft appropriate jury instructions to minimize juror confusion.

☐ **Search by Topic:** Civil Procedure > Pretrial Matters > Consolidation of Actions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJoinder of Claims & RemediesClaimsCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConsolidation of Actions



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART E: CONSOLIDATION

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.17

§ 5.17 Moving for Consolidation

[1] Determine Whether Common Questions of Law or Fact Exist

When two or more actions involving a common question of law or fact are pending before the court, the court may order a joint hearing or trial of any or all the matters in issue in the actions, or order the actions consolidated. *Fed. R. Civ. P. 42(a).*

The key is that the cases 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 common question of insurance coverage under statute, now superseded by Rule 42); *In re Adams Apple, Inc., 829 F.2d 1484, 1486-1487 (9th Cir. 1987)* (consolidating bankruptcy petitions).

Common questions of law and fact need not predominate; individual questions of law and fact may well predominate over common ones. *Saudi Basic Indus. Corp. v. ExxonMobil Corp., 194 F. Supp. 2d 378, 416 (D.N.J. 2002)* (citing **Moore's**).

[2] Seek Consolidation Early

Rule 42(a) does not require that a motion for consolidation be brought at any particular time during the proceedings. However, *Fed. R. Civ. P. 16* specifies that consideration should be given at pretrial conferences to matters that may facilitate the just, speedy, and inexpensive disposition of the action. *Fed. R. Civ. P. 16(c)(2)(P).*

[3] Consider Consolidating Less than Entire Action

The court may limit consolidation to particular issues and order a joint trial of those issues only. *Fed. R. Civ. P. 42(a)*; *see, e.g., Wang Labs., Inc. v. Mitsubishi Elecs. Am., Inc., 1993 U.S. Dist. LEXIS 21372, at *6-*8 (C.D. Cal. 1993)* (court granted plaintiff's motion for partial consolidation of actions involving patent infringement, over another plaintiff's argument that full consolidation would be a preferable alternative); *In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 393-395 (E.D. Mich. 1989)* (multidistrict cases transferred for trial). Consolidation may be expressly limited to pretrial proceedings, including pleadings and discovery. *Katz v. Realty Equities Corp., 521 F.2d 1354, 1358-1359 (2d Cir. 1975)* (consolidation for pretrial proceedings).



Strategic Point:

Consolidation for specified purposes can have advantages. For example, parties may want to consolidate cases for discovery purposes but conduct separate trials. Further, parties may want consolidated proceedings on one issue, such as liability, but separate proceedings on others, such as damages and punitive damages. One disadvantage to partial consolidation is that it does not always offer the savings and efficiency of full consolidation, and so is not as likely to be granted by the court.

[4] Moving for Consolidation

The motion for consolidation must be filed in both lawsuits. The motion should argue the following:

1. The cases proposed for consolidation are pending either before the same court for all purposes or before two different courts within the same judicial district;

2. The cases involve a common party;

3. The cases involve common issues of law;

4. The cases involve common issues of fact;

5. There is no risk of prejudice or possible confusion if the cases are consolidated, or if there is any risk, it is outweighed by the risk of inconsistent adjudications of factual and legal issues if the cases are tried separately;

6. Consolidation will not result in an unfair advantage;

7. Consolidation will conserve judicial resources;

8. Consolidation will reduce the time for resolving the cases when compared to separate trials; and

9. Consolidation will reduce the expense of trying the cases separately.

See, e.g., In re Repetitive Stress Injury Litig., 11 F.3d 368, 373 (2d Cir. 1993) ; *Frazier v. Garrison ISD, 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, at *6 (W.D. Tex. 2003)* .

For discussion of pretrial motion practice generally, see Ch. 9 *below*.

[5] Court Will Consider Certain Factors

[a] Risk of Delay

The court may decline to consolidate cases involving common questions of law or fact when the cases are at different stages and consolidation would delay disposition of the more advance case or cases. *Zacky Farms v. FMC Corp., 2001 U.S. Dist. LEXIS 24255, at *14 (E.D. Cal. 2001)* .

[b] Risk of Prejudice and Jury Confusion

The risk of prejudice and confusing the jury from consolidating separate cases must be weighed against the risk of

inconsistent adjudications if they are not consolidated. *Johnson v. Manhattan Ry. 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)* .

A consolidated trial that confuses the jury does not serve its essential purpose, and should be avoided. *See In re Consolidated Parlodel Litig., 182 F.R.D. 441, 447 (D.N.J. 1998)* .

[c] Burden on Parties, Witnesses, and Judicial Resources

In deciding whether to consolidate cases, the court must consider whether consolidation will economize the resources of the parties and the court. *Katz v. Realty Equities Corp., 521 F.2d 1354, 1359 (2d Cir. 1975)* (consolidation avoids merging of rights or defenses of various parties).

[6] Moving Party Has Burden of Proof

The party moving for consolidation bears the burden of proving that consolidation is desirable. *In re Repetitive Stress Injury Litig., 11 F.3d 368, 373-374 (2d Cir. 1993)* (insufficient commonality of fact or law to justify consolidation). The movant must prove that the actions to be consolidated are based on common questions of law and fact and that considerations of efficiency outweigh any prejudice or confusion that might result from consolidation. *Ocean Ships v. Stiles, 2003 U.S. Dist. LEXIS 20876, at *3-*4 (S.D.N.Y. 2003)* .

[7] Cases Must Be Properly Before Same Court

If the cases to be consolidated are not properly before the same court, they cannot be consolidated. *Fed. R. Civ. P. 42*; *In re Air Crash Disaster, 737 F. Supp. 391, 392-393 (E.D. Mich. 1989)* (actions filed in another forum may be transferred to court that then may consolidate them); *Oregon Egg Producers v. Andrew, 458 F.2d 382, 383 (9th Cir. 1972)* (plaintiff could not invoke Rule 42 to seek consolidation with the antitrust action because original action was not properly in the federal court).

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 the Cent. Dist. of Cal., 877 F.2d 777 (9th Cir. 1989)* .

Exception:

For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division, where it might have been brought. *28 U.S.C. § 1404(a)*; *see § 1.81 above*.

[8] Actions Remain Separate

Actions do not lose their separate identity merely because of consolidation. *International Soc'y for Krishna Consciousness, Inc. v. Los Angeles, 611 F. Supp. 315, 319 (C.D. Cal. 1984)* (consolidation did not save the city's action from dismissal because consolidated actions retain their separate identities). Consolidation is permitted as a matter of convenience and economy in administration, but 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 Ry. 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).

[9] Meeting Jurisdictional Requirements

Consolidation does not relieve parties to separate actions from the need to independently satisfy the requisite subject

matter jurisdiction requirements for each action. *International Soc'y for Krishna Consciousness, Inc. v. Los Angeles, 611 F. Supp. 315, 319 (C.D. Cal. 1984)* ; *see also* Ch. 1 *above*.

Each action must be analyzed independently when determining whether there is diversity jurisdiction, and the court many not remand both consolidated cases for lack of subject matter jurisdiction simply because one of the cases lacks diversity. *See Cella v. Togum Constructeur Ensemleier en Industrie Alimentaire, 173 F.3d 909, 912-913 (3d Cir. 1999)* (district court erred in remanding both consolidated cases for lack of subject matter jurisdiction when it had diversity jurisdiction over one case).

[10] Right to Jury Trial Is Not Affected

Consolidation under *Fed. R. Civ. P. 42* does not alter a party's right to a jury trial. *In re U.S. Financial Sec. Litigation, 609 F.2d 411, 428 n.58 (9th Cir. 1979)* . When two cases are consolidated for all purposes, including trial, the right to jury trial attaches to all claims, even those in the lawsuit in which a jury trial was waived. *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").

[11] Court May Appoint Lead Counsel

When consolidating two or more actions, the court may need to appoint lead counsel for the consolidated cases. *In re Wirebound Boxes Antitrust Litig., 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); *see also In re Ivan Boesky Sec. Litig., 948 F.2d 1358, 1364-1368 (2d Cir. 1991)* (broad powers of lead counsel examined). This is most commonly done when many separate actions are consolidated. *See, e.g., Baystate Health Sys. v. Thompson, 254 F. Supp. 2d 80, 82 (D.D.C. 2003)* (in consolidating 246 Medicare reimbursement actions, court ordered four law firms to coordinate with all other counsel to reach agreements on briefing schedules, number and lengths of briefs, and other matters that concern the core issues, to communicate and coordinate with government counsel, and to attempt to negotiate any disagreements with government before filing any motions).



Strategic Point:

An advantage to being lead counsel is having the ability to direct the course of the litigation, including depositions, pretrial proceedings, and trial. Disadvantages include having to maintain a fiduciary relationship with individual litigants while representing the group, and maintaining communication with the entire group. In addition, attorney's fees issues can arise between lead counsel and other counsel.

[12] Court May Require Consolidated Pleadings

The court may order that the plaintiffs file a consolidated complaint. *Katz v. Realty Equities Corp., 521 F.2d 1354, 1358 (2d Cir. 1975)* ; *see Bowman v. Legato Sys., Inc., 195 F.R.D. 655, 656-657 (N.D. Cal. 2000)* (consolidation of 31 securities class actions alleging that defendants disseminated a series of false and misleading statements concerning a company's operations and financial performance).



Strategic Point:

A consolidated complaint eliminates the need for multiple answers, and may streamline discovery and pretrial motions. However, it may be difficult to effectively combine each individual party's facts into one document and to reach agreement on the pleadings among all the parties.

[13] Only One Set of Witness Fees Allowed As Costs

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)* .

[14] Consolidation Is Encouraged in Securities Litigation

The Private Securities Litigation Reform Act of 1995 dictates that the district court should consolidate securities actions when they assert "substantially the same claim." *15 U.S.C. § 78u-4(a)(3)(B)(ii)*. The cases need not be identical. *Takeda v. Turbodyne Techs., Inc., 67 F. Supp. 2d 1129, 1133 (S.D.N.Y. 2003)* .

For discussion of proceedings in securities class actions, see *§ 7.09 below*.

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.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 11.
- *Fed. R. Civ. P. 42(a)* (consolidation).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJoinder of Claims & RemediesClaimsCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConsolidation of Actions



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART E: CONSOLIDATION

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.18

§ 5.18 Opposing Motion for Consolidation

[1] Any Party May Oppose Consolidation

Any party in any action proposed for consolidation can oppose to 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).

For discussion of responses to motions, *see § 9.11 below*.

[2] Reviewing Grounds for Opposing Motion

[a] Existence of Common Issues Does Not Require Consolidation

The existence of common issues does not require consolidation; the court must evaluate each case on its own facts with close attention to 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)* .

[b] Consolidation Will Cause Prejudice

In deciding whether to consolidate separate actions, the court must ensure that parties' rights are not adversely affected. *Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496-497, 53 S. Ct. 721, 77 L. Ed. 1331 (1933)* (landmark case). A party may be prejudiced its claims or defenses are substantially different from the other consolidated claims and management of the consolidated case is vested in lead counsel who is likely to focus on the interests of the majority, to the prejudice of the minority. *See Garber v. Randell, 477 F.2d 711, 714-716 (2d Cir. 1973)* .

[c] Consolidation Will Cause Jury Confusion

A likelihood of jury confusion outweighs any efficiency that might be achieved through consolidation. *Molever v. Levenson, 539 F.2d 996, 1003 (4th Cir. 1976)* (4500 pages of transcript for 15-day jury trial in complex consolidated cases too overwhelming for jury); *In re Consolidated Parlodel Litig., 182 F.R.D. 441, 447 (D.N.J. 1998)* (consolidation

unfair to jury and parties when it requires juries to assimilate and analyze complicated testimony in each case and apply factual finding to host of complex legal principles within each issue and each case).

[d] Consolidation Will Cause Delay

The court may decline to consolidate cases when there is a considerable difference in trial readiness. *See Mills v. Beech Aircraft Corp., 886 F.2d 758, 762 (5th Cir. 1989)* (one party ready for trial but one not ready).

[e] Consolidation Will Cause Burden on Parties, Witnesses, and Judicial Resources

In deciding whether to consolidate cases, the court must consider whether added time will be required in trying multiple lawsuits consolidated for trial, with greater inconvenience and expense to all concerned. *Zacky Farms v. FMC Corp., 2001 U.S. Dist. LEXIS 24255, at *14-*15 (E.D. Cal. 2001)* ; *see also In re Repetitive Stress Injury Litig., 11 F.3d 368, 371-373 (2d Cir. 1993)* (administrative difficulties).

[3] Drafting Jury Instructions to Minimize Risk of Prejudice and Confusion

If cases are consolidated over counsel's opposition, counsel should propose jury instructions that seek to minimize or eliminate any prejudice or confusion. *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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 42.10 -42.14.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 11.
- *Fed. R. Civ. P. 42(a)* (consolidation).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART F: MOVING FOR SEPARATE TRIALS (BIFURCATION)

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.19

§ 5.19 Checklist for Moving for Bifurcation

☐ Determine if motion for bifurcation appropriate. *Fed. R. Civ. P. 42(b). See § 5.20 below.*

- ○ Determine whether there are separate claims with separate issues.
- ○ Determine whether separate trials will further convenience, avoid prejudice, or be conducive to expedition and economy.
- ○ Prepare to request bifurcation at Case Management conference.
- ○ If counsel will not agree to bifurcation, prepare notice of motion and motion and proposed order.

☐ If opposing motion. *Fed. R. Civ. P. 42(b). See § 5.21 below.*

- ○ Review grounds for objecting to opponent's motion for separate trial.
- ○ Check local rules for timing and case management requirements.
- ○ Timely respond to bifurcation motion.

☐ **Search by Topic:** Civil Procedure > Pretrial Matters > Separate Trials

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate Trials



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART F: MOVING FOR SEPARATE TRIALS (BIFURCATION)

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.20

§ 5.20 Moving 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 a proper case for bifurcation.

Whether to bifurcate a trial rests with the sound discretion of the trial court. *Rodin Props.-Shore Mall, N.V. v. Cushman & Wakefield, Inc., 49 F. Supp. 2d 709, 721 (D.N.J. 1999)* .

Factors the court will consider when ruling on a motion for separate trials include:

1. Judicial efficiency.

2. Possibility of needless delay.

3. The risk of jury confusion.

4. The timing of the request for bifurcation.

5. Whether any filing delay was tactical.

6. The overlap of evidence and witnesses between the two trials.

7. Prejudice to each party.

See, e.g., Trading Techs. Int'l v. eSpeed, Inc., 431 F. Supp. 2d 834, 837 (N.D. Ill. 2006) .

[2] Court Can Order Bifurcation Sua Sponte

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 in the exercise of reasonable discretion determines that bifurcation would save trial time or effort

or make the trial of other issues unnecessary. *In re Beverly Hills Fire Litigation, 695 F.2d 207, 216 (6th Cir. 1982)* (causation bifurcated for separate trial); *see also Treece v. Hochstetler, 213 F.3d 360, 365 (7th Cir. 2000)* (upholding separate trials in § 1983 case).

[3] Requests for Separate Trials Will Be Considered at Pretrial Conferences

At a pretrial conference, the court may consider an order for a separate trial pursuant to *Fed. R. Civ. P. 42(b)* with respect to a claim, counterclaim, crossclaim, or third-party claim, or with respect to any particular issue in the case. *Fed. R. Civ. P. 16(c)(2)(M).*

[4] Move for Bifurcation As Soon As Possible

Counsel should move for bifurcation as soon as possible. *See, e.g., Spectra-Physics Lasers, Inc. v. Uniphase Corp., 144 F.R.D. 99, 101 (N.D. Cal. 1992)* (defendant's motion for separate trials, which involved a stay of discovery, was too late; the action had been pending for almost a year, and the factual discovery cut-off date had already passed); *but see ACS Communications, Inc. v. Plantronics, Inc., 1995 U.S. Dist. LEXIS 22188, at *3-*6 (N.D. Cal. 1995)* (district court denied a motion to bifurcate, emphasizing that because no discovery had taken place at the time of motion, it was difficult to ascertain complexity of claims and stating that while patent and antitrust claims are typically technical and complex, separating the issues at that point could cause unnecessary expenses and delay in conducting discovery).

[5] Right to Jury Trial Must Be Preserved

In deciding whether to grant separate trials, the court must always preserve inviolate the right of trial by jury as declared by *U.S. Const., amend. VII* or as given by a 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 at one hearing. As long as the form of trial adopted by the trial court affords the opportunity provided at common law for the 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. Thus, in actions 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 can 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. *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] Not All Rule 42(b) Factors Need Be Present to Bifurcate

Only one of Rule 42(b)'s requirements (convenience, avoidance of prejudice, or expediting and economizing) must be satisfied for the court to bifurcate a trial. *United States v. Shell Oil, Co., 1992 U.S. Dist. LEXIS 3947, at * 11 (C.D. Cal. 1992)* ; *Pinal Creek Group v. Newmont Mining Corp., 218 F.R.D. 652, 654 (D. Ariz. 2003) .*

[7] Moving Party Has Burden of Proof

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)* (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 its 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)* .

[8] Power to Separate Trials Includes Power to Stay Proceedings

Implicit in the grant of discretion in *Fed. R. Civ. P. 42(b)* to grant separate trials is the power to stay proceedings, including discovery, on the deferred issues until the end of the first trial. *Ellingson Timber Co. v. Great Northern Ry. Co., 424 F.2d 497, 499 (9th Cir. 1970)* .

[9] Bifurcation Is Effective in Particular Types of Cases

[a] Tort Actions

In tort actions it often efficient to separate liability from damages. *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)* (decision to bifurcate in medical malpractice case affirmed because no prejudice shown); *Pinal Creek Group v. Newmont Mining Corp., 218 F.R.D. 652, 654 (D. Ariz. 2003)* (defendant's motion to bifurcate liability and damages in a CERCLA action granted); *Bates v. UPS, 204 F.R.D. 440, 448-449 (N.D. Cal. 2001)* (decision to bifurcate in civil rights action would promote judicial economy and reduce the risk of confusion).

[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 proper where punitive damages evidence would be prejudicial to jury's consideration of liability or compensatory damages).

[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., Inc. v. View Eng'g, Inc., 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 and labor and expenditure of unnecessary monies in determining and reviewing and discovering the issues of damages prior to settling liability. *EEOC v. Lucky Stores, Inc., 1982 U.S. Dist. LEXIS 16864, at *3 (E.D. Cal. 1982)* .

[10] Right to Jury Trial Implications

In deciding whether to order separate trials, the court must always preserve inviolate the right of trial by jury as declared by *U.S. Const., amend. VII* or as given by a federal statute. *Fed. R. Civ. P. 42(b)*.

A constitutional concern may arise when the district court orders that some portions of the case be tried to the judge and others to a jury. The *Seventh Amendment* preserves the right to jury trial of legal claims, but there is no right to a jury for equitable claims. *Ross v. Bernhard, 396 U.S. 531, 537-538, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* . Difficulties

may arise when the legal and equitable issues overlap and the evidence is intertwined. *Danjaq LLC v. Sony Corp., 263 F.3d 942, 962 (9th Cir. 2001)* . When there are issues common to both the equitable and legal claims, the legal claims must be determined prior to any final court determination of the equitable claims. *Danjaq LLC v. Sony Corp., 263 F.3d 942, 962 (9th Cir. 2001)* .

Fed. R. Civ. P. 42(b) does not sanction switching the separated issue in a jury case from the jury to the judge unless the very stating of the separated issue shows it to be frivolous. *Marks Food Corp. v. Barbara Ann Baking Co., 274 F.2d 934, 936 (9th Cir.1959)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.77[4][iv], 42.20 -42.24.*
- *Bender's Federal Practice Forms* Form Nos. 42:20-42:28, 42:40-42:44.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 11.
- *Fed. R. Civ. P. 42(b)* (separate trials).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersSeparate Trials



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Chapter 5 REQUIRED CONFERENCES AND CASE MANAGEMENT
PART F: MOVING FOR SEPARATE TRIALS (BIFURCATION)

1-5 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 5.21

§ 5.21 Opposing Motion for Bifurcation

For discussion of responses to motions, see *§ 9.11 below*.

Arguments that can be presented in opposition to a motion for bifurcation include the following:

(1) Opposing party will be prejudiced by bifurcation. *See, e.g., Fuji Mach. Mfg. Co. v. Hover-Davis, Inc., 982 F. Supp. 923, 924 (W.D.N.Y. 1997)* (courts should not order separate trials when bifurcation would result in unnecessary delay, additional expense, or some other form of prejudice).

(2) Bifurcation would result in exclusion of important evidence from the jury. *See, e.g., In re Bendectin Litig, 857 F.2d 290, 309 (6th Cir. 1988)* (plaintiffs raised objections to limitation of evidence as result of trifurcation; plaintiffs argued that trial of liability and causation separately would prevent introduction of evidence of multiple possible causes of birth defects).

(3) Separate trials will not defer costly and possibly unnecessary proceedings. *See, e.g., Nicoletti v. Gates, 2002 U.S. Dist. LEXIS 13199, at *6-*7 (C.D. Cal. 2002)* (bifurcation would not be conducive to expedient resolution and judicial economy and would involve unnecessary costs and consumption of more time).

(4) When issues overlap, bifurcation would result in presenting the same evidence twice, which does not serve judicial economy. *Willemijn Houdstermaatschaapij BV v. Apollo Computer, 707 F. Supp. 1429, 1433-1434 (D. Del. 1989)* (citing **Moore's**) (court found overlap of issues a significant factor in decision not to bifurcate).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 42.20 -42.24*.
- *Bender's Federal Practice Forms* Form 42:30.

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 11.
- *Fed. R. Civ. P. 42(b)* (separate trials).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersSeparate Trials



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Chapter 6 PROVISIONAL REMEDIES

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation 6.syn

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Chapter 6 PROVISIONAL REMEDIES
PART A: PROCEDURAL CONTEXT

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.01

§ 6.01 Procedural Context--Provisional Remedies

A provisional remedy is a temporary form of relief intended to ensure that defendants to an action do not dispose of, or otherwise affect, property necessary to satisfy a judgment.

Provisional remedies can have several added benefits, such as making the defendant take the case more seriously at the outset, expediting the litigation, and encouraging the defendant to settle. However, the additional costs of seeking provisional remedies, the possibility of enforcement difficulties or an appeal if they are granted, and the potential to impede settlement if they are denied should be weighed against the benefits when considering them as an option.

The Federal Rules of Civil Procedure provide for the following provisional remedies:

1. Injunctive relief, including preliminary injunctions and temporary restraining orders (TROs), *Fed. R. Civ. P. 65*;

2. Seizure of property before judgment through writs of attachment or possession, *Fed. R. Civ. P. 64*;

3. Appointment of receivers, *Fed. R. Civ. P. 66*;

4. Proceeding against a surety, *Fed. R. Civ. P. 65.1*; and

5. Deposit of money or property into court, *Fed. R. Civ. P. 67*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesCivil ArrestsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesProvisional RemediesSequestrations



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Chapter 6 PROVISIONAL REMEDIES
PART B: SEEKING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.02

§ 6.02 Checklist for Seeking Preliminary Injunctive Relief

☐ Determine whether to seek provisional relief. *See § 6.03 below*.

○ Assess potential tactical benefits of provisional relief, e.g., preventing harm, expediting litigation. *See § 6.03[1] below*.

○ Determine whether benefits are outweighed by potential drawbacks of injunctive relief, e.g., increased costs, premature disclosure of facts or legal theories. *See § 6.03[2] below*.

☐ Determine whether preliminary injunction is necessary. See *§ 6.04 below*.

○ If preliminary injunction necessary, determine whether movant can satisfy standards for preliminary injunctive relief. *See § 6.05[1] below*.

○ Commence action if it is not already pending. *See § 6.05[2] below*.

○ Draft notice of motion and motion or order to show cause. *See § 6.05[2] below*.

○ Consider requesting expedited discovery, in order to heighten urgency with which parties and court treat matter and take adverse party by surprise, to elicit more complete and accurate version of facts. *See § 6.05[2] below*.

○ Draft supporting affidavits and supporting memorandum of law. *See § 6.05[3] below*.

- ○ Consult local rules and individual judge's rules with respect to submitting proposed orders and submit proposed order, if required. *See §§ 6.05[3], 6.09 below.*
- ○ Submit other papers supporting motion. *See § 6.05[3] below.*
- ○ Notice hearing on motion for preliminary injunction. *See § 6.05[2] below.*
- ○ Prepare to provide required security. *See § 6.08 below.*
- ○ Determine whether TRO is necessary. *See § 6.06 below.*
- ○ Evaluate utility of obtaining short-term device, which may not exceed 14 days' duration, to restrain party's actions and preserve status quo until court holds hearing to determine whether to issue preliminary injunction.
- ○ Consider whether additional 14-day extension period is necessary.

☐ Determine whether to seek temporary restraining order (TRO). *See § 6.06 below.*

- ○ Commence an action if it is not already pending. *See § 6.07[2] below.*
- ○ Provide notice, if possible, of application for TRO. *See § 6.07[2] below.*
- ○ Prepare supporting papers. *See § 6.07[2] below.*
- ○ Draft proposed order if required. *See § 6.09 below.*
- ○ Prepare attorney's certification if TRO is sought ex parte. *See § 6.07[3] below.*
- ○ TRO granted ex parte must meet certain requirements. *See § 6.07[3] below.*
- ○ Security is required. *See § 6.08 below.*
- ○ In copyright action, consider seeking impoundment of all copies or recordings allegedly made or used in violation of the copyright owner's exclusive rights, and all articles that could reproduce those copies or recordings. *See § 6.10 below.*

☐ **Search by Topic:** Civil Procedure > Remedies > Injunctions

Legal Topics:

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

Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsMandatory InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions



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Chapter 6 PROVISIONAL REMEDIES
PART B: SEEKING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.03

§ 6.03 Assessing Tactical Benefits of Provisional Relief

[1] Determining Potential Benefits

In addition to any benefit provided by court order (e.g., the preservation of property needed to satisfy a judgment while litigation is pending), a party granted provisional relief can enjoy tactical benefits, as well, including the following:

1. Accelerating the litigation, so that discovery and the trial are expedited;

2. Increasing costs for the opposing party, thus providing incentive to settle;

3. Increasing the urgency of the matter and forcing opposing parties to mount a defense before they are ready; and

4. Providing an early reading on the court's view of the plaintiff's case.

[2] Weighing Benefits Against Potential Drawbacks

The benefits of provisional relief should be weighed against the possible drawbacks, including the following:

1. Increasing costs for the plaintiff, not only of seeking provisional relief, but of providing posting security and possibly defending an appeal of the relief granted;

2. Forcing plaintiff to reveal facts and legal theories before the case is fully analyzed;

3. Revealing that the court's initial view of the case is unfavorable, which may be reflected in the court's decisions throughout the litigation and provide a disincentive for the opposing party to settle; and

4. Encountering enforcement difficulties.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.)* Chs. 64-67.
- *Federal Litigation Guide P 8.01 et seq.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesCivil ArrestsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureRemediesProvisional RemediesReplevins



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Chapter 6 PROVISIONAL REMEDIES
PART B: SEEKING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.04

§ 6.04 Determining Whether Preliminary Injunction Necessary

[1] Assessing Need to Preserve Status Quo Between Parties Pendente Lite

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 principles 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).

[2] Deciding Between Mandatory or Prohibitory Injunctive Relief

A party may seek either a mandatory or prohibitory injunction, 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. Consolidated Edison Co. of New York, 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 disfavored. If a party seeks mandatory preliminary relief that goes beyond maintaining the status quo pendente lite, the court may be extremely cautious about issuing a preliminary injunction.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.20.*

- *Federal Litigation Guide PP 7.01, 7.03, 7.05.*

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.

- *Porter v. Lee, 328 U.S. 246, 251, 66 S. Ct. 1096, 90 L. Ed. 1199 (1946)* (when defendant with notice in injunction proceeding completes acts sought to be enjoined, court may by mandatory injunction restore status quo).

- *SEC v. Cavanagh, 445 F.3d 105, 120 (2d Cir. 2006)* (because chancery courts possessed the power to order equitable disgorgement in the 18th century, contemporary federal courts are vested with the same authority by the United States Constitution and the Judiciary Act).

- *Brennan's, Inc. v. Brennan's Restaurant, LLC, 360 F.3d 125, 129 (2d Cir. 2004)* (a court can grant a preliminary prohibitive injunction if it finds irreparable injury and either a likelihood of success on the merits or sufficiently serious questions on the merits and a balance of hardships tipping decidedly in the movant's favor).

- *United States v. Criminal Sheriff, 19 F.3d 238, 240 (5th Cir. 1994)* (court has broad discretion to fashion injunction that restores injured party to status he or she would have occupied were it not for the defendant's discriminatory behavior).

- *Cohen v. Brown University, 991 F.2d 888, 906 (1st Cir. 1993)* (district court has broad discretionary power to take provisional steps restoring status quo pending conclusion of trial).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsMandatory InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions



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Chapter 6 PROVISIONAL REMEDIES
PART B: SEEKING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.05

§ 6.05 Seeking Preliminary Injunction

[1] Tests for Preliminary Injunction

Under the traditional test for obtaining a preliminary injunction, the party seeking relief must demonstrate:

1. Irreparable injury if the relief is denied;

2. Probability of success on the merits;

3. The balance of potential harm favors the moving party; and

4. The public interest favors the injunction.

See Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) (per curiam) (outlining traditional test for a 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).

Circuit Split:

Circuits vary as to how to weigh factors and some circuits (e.g., the Ninth and the Second) recognize alternative tests. *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 of case, rather than strong likelihood of success); *Sonesta International Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973)* (traditional four-prong test for preliminary injunction reformulated into two-prong test).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 65.03, 65.05 -65.07.*
- *Bender's Federal Practice Forms* Form No. 65:100 et seq.

- *Federal Litigation Guide PP 7.10 -7.35.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Munaf v. Geren, 553 U.S. 674, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008)* (district court may not issue a preliminary injunction based solely on the presence of difficult jurisdictional questions, without considering whether the party seeking the injunction has demonstrated a likelihood of success on the merits).

[2] Procedure for Seeking Relief

The party seeking injunctive relief may initiate an action by filing a complaint and must provide notice of intent to seek the preliminary injunction in the complaint or may serve the opposing party with a motion, order to show cause, or other reasonable type of notice. *See Fed. R. Civ. P. 65(a)(1).* An order to show cause will permit an expedited hearing of the motion.



Warning:

Consult local rules and individual judges' rules for any additional notice requirements.



Strategic Point:

Consider requesting expedited discovery, in order to heighten the urgency with which the parties and court treat the matter and take the adverse party by surprise, to elicit a more complete and accurate version of the facts.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.21.*
- *Bender's Federal Practice Forms* Form No. 65:120 et seq.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *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)(1)* (notice required for preliminary injunctions).
- *United States Dep't of Labor v. Wolf Run Mining Co., 452 F.3d 275, 281 (4th Cir. 2006)* (no preliminary injunction will be issued without notice to adverse party).
- *FTC v. Enforma Natural Products, 362 F.3d 1204, 1217 (9th Cir. 2004)* (no preliminary injunction will be issued without notice to adverse party).
- *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003)* (for preliminary injunction to issue, nonmoving party must have notice and opportunity to present its opposition).

[3] Drafting Papers to be Filed With Motion

Motions for preliminary injunction should be filed with affidavits that support the need for injunctive relief, a memorandum of law, and a draft order, if required. The affidavits should address each factor for required for injunctive relief.

Other papers that may be submitted to support the motion include:

1. Discovery documents;

2. Documentary exhibits attached to declarations; and

3. Charts summarizing exhibits.

Warning:

Consult local rules and individual judge's rules with respect to submitting proposed orders.

Affidavits in support of motion for preliminary injunction may serve as the sole basis for the court's ruling if parties waive hearing or submit the matter on papers; however, if there is a disputed factual issue, the court must hold a hearing before deciding whether 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). Even if a memorandum is not required, it can be invaluable and should be submitted.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.23.*
- *Bender's Federal Practice Forms* Form No. 65:140 et seq.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *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(a)* (preliminary injunctions).
- *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 basis of affidavits).
- *Asseo v. Pan American Grain Co., 805 F.2d 23, 26 (1st Cir. 1986)* (affidavits and other hearsay materials are often received in preliminary injunction proceedings).
- *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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions



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Chapter 6 PROVISIONAL REMEDIES
PART B: SEEKING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.06

§ 6.06 Determining Whether TRO Is Necessary

A TRO is an extraordinary remedy and can only be obtained if the requesting party can show the court must act immediately to prevent irreparable harm. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 438-439, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* (TROs are only used to preserve the status quo and prevent irreparable harm as long as necessary to hold a hearing and no longer). It is only intended to preserve the status quo until the court can hold a hearing, so it may not exceed 14 days' duration. The applicant may seek court approval to extend the time limit. *See Fed. R. Civ. P. 65(b).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 65.30 -65.31.*
- *Federal Litigation Guide PP 7.40, 7.41.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 65(b)* (TROs).
- *Sampson v. Murray, 415 U.S. 61, 88, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)* (basis of injunctive relief in federal courts has always been irreparable harm and inadequacy of legal remedies).
- *Geneva Assurance v. Medical Emergency Services, 964 F.2d 599, 600 (7th Cir. 1992)* (essence of TRO is its brevity, its ex parte character, and its informality).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining Orders



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Chapter 6 PROVISIONAL REMEDIES
PART B: SEEKING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.07

§ 6.07 Seeking TRO

[1] Showing of Irreparable Harm Required

A TRO is only appropriate if the moving party can show that irreparable harm is imminent and the status quo must be maintained until the court can decide on whether to issue a preliminary injunction, along with the other factors necessary to obtain preliminary injunctive relief. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 438-439, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* (TROs are only used to preserve the status quo and prevent irreparable harm as long as necessary to hold a hearing and no longer).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 65.30 -65.31, 65.36.*
- *Bender's Federal Practice Forms* Form No. 65:10 et seq.
- *Federal Litigation Guide P 7.42.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 65(b)* (TROs).
- *Winter v. Natural Res. Def. Council, -- U.S. --, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)* (Court held that a party seeking a preliminary injunction must establish that irreparable injury is *likely* in the absence of an injunction; a *possibility* of such injury is not sufficient, even when the party seeking the injunction demonstrates a strong likelihood of prevailing on the merits).

[2] Procedure for Seeking Relief

The plaintiff must initiate an action by filing a complaint and generally must give the adverse party whatever notice of the request is feasible, given the emergency. Parties seeking a TRO usually do so at the time they move for a

preliminary injunction, and the same attachments usually support both requests. In rare instances, courts can grant ex parte restraining orders, but only if applicant makes a very strong showing of need for ex parte relief. *See Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175, 180, 89 S. Ct. 347 21 L. Ed. 2d 325 (1968)* (TRO should not be issued ex parte unless showing is made that it is impossible to serve or to notify the opposing parties and to give them opportunity to participate); *see also Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 433, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* (informal notice and a hastily arranged hearing on a TRO are to be preferred to no notice or hearing at all).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 65.30 -65.32*.
- *Bender's Federal Practice Forms* Form No. 65:10 et seq.
- *Federal Litigation Guide PP 7.43, 7.44*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 65(b)* (TROs).

[3] Special Requirements for Seeking TRO Ex Parte

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 that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition; and

2. The applicant's attorney certification to the court in writing concerning the efforts, if any, that were made to give the notice and the reasons supporting the claim that notice should not be required.

See Fed. R. Civ. P. 65(b)(1).

Warning:

Except in cases in which notice will clearly result in irreparable harm, the chances of obtaining a TRO are lessened 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)* .

An ex parte TRO must:

1. State the date and hour it was issued.

2. Describe the injury and state why it is irreparable.

3. State why the order was issued without notice.

4. Be promptly filed in the clerk's office and entered in the record.

Fed. R. Civ. P. 65(b)(2).

The order expires at the time after entry, not to exceed 14 days, that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record. *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 Nos. 65:12, 65:50 et seq.
- *Federal Litigation Guide PP 7.45, 7.46.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 11(b)* (attorney certifies bona fides of all papers signed and submitted to court).
- *Fed. R. Civ. P. 65(b)(1)* (issuing TROs without notice).
- *Fed. R. Civ. P. 65(b)(2)* (contents and expiration of TROs).
- *Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 438-439, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* (TROs are only used to preserve status quo and prevent irreparable harm as long as necessary to hold hearing and no longer).
- *Reno Air Racing Association v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006)* (courts recognize very few circumstances justifying the issuance of an ex parte TRO, such as when notice to adverse party is impossible because identity of adverse party is unknown or known party cannot be located in time for hearing).
- *First Technology Safety Systems, Inc. v. Depinet, 11 F.3d 641, 650 (6th Cir. 1993)* (ex parte restraining orders should be limited to preserving the status quo only for so long as is necessary to hold a hearing).
- *Levas & Levas v. Antioch, 684 F.2d 446, 448 (7th Cir. 1982)* (for TRO to be issued ex parte and without notice, applicant must show that immediate and irreparable injury, loss, or damage will result to applicant before adverse party's opposition can be heard and that applicant has tried to give notice or has special reasons why notice should be excused).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders



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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.08

§ 6.08 Providing Security for Preliminary Injunction or TRO

An applicant for a preliminary injunction or TRO must provide a bond as security, in an amount to be determined in the court's discretion, 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 can be nominal or 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 No. 65:220 et seq.
- *Federal Litigation Guide PP 7.47, 7.73*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 65(c)* (security).
- *Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1125-1126 (9th Cir. 2005)* ($50,000 bond for preliminary injunction suspending development during pendency of environmental litigation not abuse of discretion).
- *Doctor's Associates, Inc. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996)* (affirming district court's decision not to require bond).
- *Moltan Co. v. Eagle-Picher Industries, Inc., 55 F.3d 1171, 1176 (6th Cir. 1995)* (district court has

discretion to require posting of security).

- *Stockslager v. Carroll Electric Cooperative Corp., 528 F.2d 949, 951 (8th Cir. 1976)* (amount of bond required on issuance of preliminary injunction vests within sound discretion of trial court and will not be reversed on appeal unless there is clear abuse of discretion).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders



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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.09

§ 6.09 Including Provisions Required in Draft Injunction Order or TRO

Every order granting an injunction or TRO must:

1. State the reasons it was issued;

2. State its terms specifically; and

3. Describe in reasonable detail--and not with reference to the complaint or other document--the act or acts to be restrained.

See Fed. R. Civ. P. 65(d)(1).

Circuit Split:

Circuits are divided between those (e.g., the Seventh Circuit) that do not allow incorporation by reference into injunctions and TROs at all and those (e.g. the Ninth Circuit) that allow it, as long as the enjoined party has adequate notice of the acts prohibited. *Se, e.g., Blue Cross & Blue Shield Association v. American Express Co., 467 F.3d 634, 636-637 (7th Cir. 2006)* (criticizing courts' failure to follow the plain language of Rule 65(d) regarding not incorporating by reference); *Reno Air Racing Association v. McCord, 452 F.3d 1126, 1132-1134 (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.) § 65.60.*
- *Bender's Federal Practice Forms* Form No. 65:50 et seq.
- *Federal Litigation Guide P 7.71.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.

- *Fed. R. Civ. P. 65(d)(1)* (required contents and scope of injunction or TRO).

- *Schmidt v. Lessard, 414 U.S. 473, 476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974)* (Rule 65(d) intended to prevent uncertainty and confusion on part of those faced with injunctive orders and to avoid possible contempt citation on decree too vague to be understood).

- *Fortyune v. American Multi-Cinema, Inc., 364 F.3d 1075, 1087 (9th Cir. 2004)* (court will not set aside injunction unless it is so vague it has no reasonably specific meaning).

- *D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455, 461 (7th Cir. 1993)* (Rule 65(d) requires injunction to be self-contained document rather than incorporate by reference materials in other documents, to minimize disputes over what has been enjoined).

- *American Can Co. v. Mansukhani, 742 F.2d 314, 333 (7th Cir. 1984)* (injunction must provide plaintiffs with appropriate level of protection while still placing defendants on notice of prohibited conduct).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders



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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.10

§ 6.10 Seeking Impoundment in Copyright Proceedings Under Rule 65(f)

Rule 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*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Nimmer on Copyright* Ch. 35.
- *17 U.S.C. § 503* (remedies for copyright infringement).
- *Fed. R. Civ. P. 65(f)* (copyright impoundment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCopyright LawCivil Infringement ActionsGeneral Overview



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Chapter 6 PROVISIONAL REMEDIES
PART C: OPPOSING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.11

§ 6.11 Checklist for Opposing Preliminary Injunctive Relief

☐ Determine whether grounds for opposing preliminary injunctive relief exist. *See § 6.12 below*.

- ○ Adequate remedy at law available.
- ○ Anti-injunction statute applies to case.
- ○ Injunctive relief barred by laches.
- ○ Injunctive relief barred by unclean hands doctrine.
- ○ Lack of jurisdiction to issue injunction.

☐ Raise any applicable objections. *See § 6.13 below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Injunctions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions



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Chapter 6 PROVISIONAL REMEDIES
PART C: OPPOSING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.12

§ 6.12 Determining Grounds for Opposing Injunctive Relief

Injunctive relief can be opposed on the following grounds:

1. An adequate remedy exists 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 from federal court must show that it does not have adequate remedy at law);

2. An 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 (must show lack of diligence by the party against whom the defense is asserted and prejudice to the party asserting the defense). *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. The 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 and unclean hands can bar a preliminary injunction in trademark infringement case); or

5. The court lacks jurisdiction to issue an injunction. *See Grupo Mexicano De Desarrollo 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.*

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.

- *28 U.S.C. § 2283* (Anti-Injunction Act).

- *Harvey Specialty & Supply, Inc. v. Anson Flowline Equip., Inc., 434 F.3d 320, 323 (5th Cir. 2005)* (with certain exceptions, Anti-Injunction Act prohibits federal courts from enjoining proceedings in state courts).

- *Burr & Forman v. Blair, 470 F.3d 1019, 1027-1028 (11th Cir. 2006)* (Anti-Injunction Act serves as a check on the broad authority recognized by the All Writs Act).

- *Shondel v. McDermott, 775 F.2d 859, 868 (7th Cir. 1985)* (usually clean hands doctrine only bars injunctive relief when there is direct nexus between bad conduct and activities sought to be enjoined).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.13

§ 6.13 Raising Objections

If an order to show cause has issued, review the order to ascertain the time for filing opposition papers. If injunctive relief is requested by motion, review local rules and order for the time limit on response. Affidavits opposing a motion generally must be filed no later than one day before a hearing on the motion, unless the court permits otherwise. *See Fed. R. Civ. P. 6(d).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 65.06 -65.07, 65.22, 65.36.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 6(d)* (time for motions--affidavits).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions



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Chapter 6 PROVISIONAL REMEDIES
PART D: DISSOLVING OR MODIFYING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.14

§ 6.14 Checklist for Dissolving or Modifying Preliminary Injunctive Relief

☐ Determine grounds to dissolve or modify preliminary injunctive relief. *See § 6.15 below*.

- ○ Injunction vague, overbroad, or ambiguous.
- ○ New facts support dissolution or modification.
- ○ Cessation of conduct does not render injunction moot.

☐ Move to dissolve or modify TRO. *See § 6.16 below*.

- ○ On two days' notice, or such shorter notice as court may prescribe.
- ○ At hearing where preliminary injunction can be sought.

☐ Move to dissolve or modify preliminary injunction. *See § 6.17 below*.

☐ Determine whether to seek recovery on bond for wrongful restraint or enjoinment. *See § 6.18 below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Injunctions

Legal Topics:

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

Civil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions



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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.15

§ 6.15 Determining Grounds for Dissolving or Modifying Preliminary Injunctive Relief

A preliminary injunction can be challenged on the grounds of overbreadth or vagueness, and the court can modify a preliminary injunction based on new facts. *See Hughey v. JMS Development Corp., 78 F.3d 1523, 1531 (11th Cir. 1996)* (injunction must set forth reasons for its issuance, be specific in terms, and describe in reasonable detail, and not by reference to complaint or other document, act or acts sought to be restrained); *J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1297-1298 (9th Cir. 1992)* (court found some terms of a permanent injunction overbroad and modified it accordingly).

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").

Courts are especially attuned to correcting injunctions that run afoul of *First Amendment* guarantees. *See J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1297 (9th Cir. 1992)* (discussing *First Amendment* issue but deciding against defendant).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.60.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 65(d)* (required contents and scope of injunction or TRO).
- *Blue Cross & Blue Shield Ass'n v. American Express Co., 467 F.3d 634, 636-637 (7th Cir. 2006)* (injunction must describe in reasonable detail, and not by reference to complaint or other document, act or acts sought to be restrained).

- *Federal Election Commission v. Furgatch, 869 F.2d 1256, 1263-1264 (9th Cir. 1989)* (court remanded case for the district court to specify precise conduct prohibited by injunction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.16

§ 6.16 Moving to Dissolve or Modify TRO

[1] Providing Two Days' or Shorter Notice

On two days' notice to the party who obtained a TRO without notice, or on shorter court-prescribed notice, the adverse party may move to dissolve or modify the TRO. *See Fed. R. Civ. P. 65(b)(4).*

[2] Seeking Preliminary Injunction at Hearing on Dissolving or Modifying TRO

At the time of the hearing on the motion to dissolve the restraining order, the court can proceed as if it were a hearing on an application for a preliminary injunction, if the parties are in a position to present their evidence and legal arguments for or against a preliminary injunction. *See Brotherhood of Railroad Carmen, Local No. 429 v. Chicago & North Western Railway Co., 354 F.2d 786, 797 (8th Cir. 1965)* (party who obtains TRO must proceed with application for preliminary injunction and, if he or she does not do so, court will dissolve the TRO).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.40.*
- *Bender's Federal Practice Forms* Form No. 65:80 et seq.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 65(b)(4)* (motion to dissolve TRO).
- *Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 433, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* (discussing notice requirements for TRO).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining Orders



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PART D: DISSOLVING OR MODIFYING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.17

§ 6.17 Moving to Dissolve or Modify Preliminary Injunction

A motion to modify or dissolve a preliminary injunction may be brought 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 any changes in injunction that are equitable in light of subsequent changes in facts, law, or for any other good reason).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.40.*
- *Bender's Federal Practice Forms* Form No. 65:210 et seq.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 54(b)* (judgment upon multiple claims).
- *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 was not subject to then-applicable ten-day time limit in Rule 59(e)).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.18

§ 6.18 Seeking Recovery on Bond for Wrongful Restraint or Enjoinment

A party wrongfully restrained or enjoined may seek recovery on the bond posted under Rule 65(c). *See Fed. R. Civ. P. 65.1.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.53.*
- *Bender's Federal Practice Forms* Form No. 65:230 et seq.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 65(c)* (security).
- *Fed. R. Civ. P. 65.1* (proceedings against a surety).
- *Slidell, Inc. v. Millennium Inorganic Chemicals, Inc., 460 F.3d 1047, 1059 (8th Cir. 2006)* (party that has incurred or suffered costs and damages because it was wrongfully enjoined may recover on injunction bond).
- *Milan Express, Inc. v. Averitt Express, Inc., 254 F.3d 966, 981 (11th Cir. 2001)* (injunction bond provides security for costs and damages as may be incurred or suffered by any party found to have been wrongfully enjoined or restrained).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewTortsIntentional TortsGeneral Overview



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Chapter 6 PROVISIONAL REMEDIES
PART E: ENFORCING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.19

§ 6.19 Checklist for Enforcing Preliminary Injunctive Relief

- ☐ Determine persons against whom injunctive relief can be enforced. *See § 6.20 below*.
- ☐ Move for contempt of court against noncomplying party. *See § 6.21 below*.
- ☐ **Search by Topic:** Civil Procedure > Remedies > Injunctions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions



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Chapter 6 PROVISIONAL REMEDIES
PART E: ENFORCING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.20

§ 6.20 Determining Persons Against Whom Injunctive Relief Can Be Enforced

Persons bound by an injunction or TRO include parties to the action, their officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them who receive actual notice of the order. An injunction or TRO is also binding on those in privity with the parties. *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 the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.80.*
- *Bender's Federal Practice Forms* Form No. 65:270 et seq.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 65(d)(2)* (persons bound by injunction or TRO).
- *GTE Sylvania v. Consumers Union of United States, 445 U.S. 375, 386, 100 S. Ct. 1194, 63 L. Ed. 2d 467 (1980)* (persons subject to injunctive order issued by court with jurisdiction are expected to obey that decree until it is modified or reversed).
- *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).
- *Vuitton et Fils S. A. v. Carousel Handbags, 592 F.2d 126, 129-130 (2d Cir. 1979)* (injunction may not bind world at large, but whether one not named in injunctive decree may nevertheless be bound by it

depends on facts of each case).

Legal Topics:

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



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PART E: ENFORCING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.21

§ 6.21 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, Ltd., 65 F.3d 1051, 1058 (2d Cir. 1995)* (party may be held in civil contempt for failure to comply with a court order if the order is clear and unambiguous, the proof of noncompliance is clear and convincing, and the contemnor has not diligently attempted to comply in a reasonable manner). For discussion of contempt, see Ch. 11 *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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.81.*
- *Bender's Federal Practice Forms* Form No. 65:270 et seq.
- *Federal Litigation Guide PP 7.80, 7.81.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Riccard v. Prudential Insurance Co., 307 F.3d 1277, 1298 (11th Cir. 2002)* (citing *McGregor v. Chierico, 206 F.3d 1378, 1383 (11th Cir. 2000))* (finding of civil contempt must be supported by clear and convincing evidence that defendant allegedly violated an order that valid and lawful, the order was clear and unambiguous, and alleged violator had ability to comply with order).
- *Reynolds v. Roberts, 207 F.3d 1288, 1298 (11th Cir. 2000)* (summarizing civil contempt procedure

for failure to comply with preliminary injunction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureSanctionsContemptCivil Contempt



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Chapter 6 PROVISIONAL REMEDIES
PART F: APPEALING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.22

§ 6.22 Checklist for Appealing Preliminary Injunctive Relief

- ☐ Determine whether order can be appealed. *See § 6.23 below*.
- ☐ Appeal extended ex parte TRO or preliminary injunction. *See §§ 6.24, 6.25 below*.
- ☐ Seek stay or other relief from injunction pending appellate review. *See § 6.26 below*.
- ☐ Appeal amount of security bond. *See § 6.27 below*.
- ☐ **Search by Topic:** Civil Procedure > Remedies > Injunctions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureAppealsGeneral Overview



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Chapter 6 PROVISIONAL REMEDIES
PART F: APPEALING PRELIMINARY INJUNCTIVE RELIEF

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.23

§ 6.23 Determining Whether Order Can Be Appealed

Except as otherwise provided in *28 U.S.C. § 1292(c)* and *(d)* and except when a direct review may be had in the Supreme Court, the courts of appeals 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.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *28 U.S.C. § 1292(a)(1)* (courts of appeal generally have jurisdiction to hear appeals of district courts' interlocutory orders).
- *Pimentel & Sons Guitar Makers, Inc. v. Pimentel, 477 F.3d 1151, 1153 (10th Cir. 2007)* (order expressly granting or denying injunctive relief is appealable as interlocutory order).
- *Sahu v. Union Carbide Corp., 475 F.3d 465, 467 (2d Cir. 2007)* (court of appeals can exercise appellate jurisdiction over interlocutory orders of district courts granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions).
- *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 880 (9th Cir. 2000)* (denial of preliminary injunction is appealable as interlocutory order).

Legal Topics:

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

Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.24

§ 6.24 Appealing Preliminary Injunction

Generally, an appeals court reviews a district court's 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 circuit court of appeals reviews district court's determination only for abuse of discretion).

In reviewing the grant of a preliminary injunction, the court of appeals determines only whether the district court used the appropriate legal standards governing the issuance of a preliminary injunction, and whether the court correctly apprehended the law with respect to the underlying issues in litigation. The appeals court does not, however, decide whether the district court applied the legal principles correctly or substitute its own decision for the district court's. *See Joelner v. Village of Washington Park, 378 F.3d 613, 619-620 (7th Cir. 2004)* (in reviewing district court's denial or grant of a preliminary injunction, 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).

Generally, the appeal of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter. *See 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)* (if party is found to be entitled to permanent injunction, then even if the preliminary injunction was wrongly issued, court properly enjoined offending conduct and it is reasonable to regard the preliminary injunction as merging into the final one).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 206.05[1].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *28 U.S.C. § 1292(a)(1)* (courts of appeal generally have jurisdiction to hear appeals of district courts' interlocutory orders).

- *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 874 (9th Cir. 2000)* (district court's grant of preliminary injunction is subject only to limited review and will be reversed only if district court abused its discretion by basing its decision on erroneous legal standard or on clearly erroneous factual findings).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsStandards of ReviewGeneral Overview



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.25

§ 6.25 Appealing Extended TRO

Generally, a TRO is 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 immediately 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 Rule 65 must be treated as preliminary injunction and should not be shielded from appellate review).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 203.10[5] et seq.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 65(b)(2)* (TRO's basic duration not to exceed 14 days from entry; court may extend for another 14 days, for total of 28 days).
- *28 U.S.C. § 1292(a)(1)* (courts of appeal generally have jurisdiction to hear appeals of district courts' interlocutory orders).
- *AT&T Broadband v. Tech Communications, Inc., 381 F.3d 1309, 1314 (11th Cir. 2004)* (order granting TRO may be appealable as order granting preliminary injunction when TRO is in effect longer than 10 (now 14) days, notice and hearing sought or afforded suggest that relief sought was preliminary injunction, and requested relief seeks to change status quo).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureAppealsGeneral Overview



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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.26

§ 6.26 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 and until an appeal is taken or during the pendency of an appeal.

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, 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 the security of the adverse party's rights. *See Fed. R. Civ. P. 62(c).*

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)* (circuit court of appeals has power to suspend, modify, restore, or grant injunction during the pendency of appeal).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 62.01 et seq.*
- *Federal Litigation Guide P 48.60.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 62(c)* (allows modification, suspension, grant, or restoration of injunction pending appeal).
- *Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623, 625 (2d Cir. 1962)* (Rule 62(c) permits modification of injunction orders pending an appeal).

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureAppealsGeneral Overview



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.27

§ 6.27 Appealing Amount of Security Bond

A district court's decision as to the amount of a security bond is reviewed for an 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 court may elect to require no security at all).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.50.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 65(c)* (security bond is set in the amount court considers proper).
- *Jorgensen v. Cassiday, 320 F.3d 906, 919 (9th Cir. 2003)* (district court has wide discretion in setting amount of security required, if any).
- *Gulf Oil Corp. v. Federal Power Commission, 563 F.2d 588, 609 (3d Cir. 1977)* (amount fixed by the district court for security bond will not be disturbed absent abuse of discretion).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsStandards of ReviewAbuse of Discretion



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Chapter 6 PROVISIONAL REMEDIES
PART G: SEIZING PROPERTY BEFORE JUDGMENT OR OPPOSING PREJUDGMENT SEIZURE

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.28

§ 6.28 Checklist for Seizing Property Before Judgment or Opposing Prejudgment Seizure

☐ Determine whether state or federal law governs prejudgment seizure. *See § 6.29 below*.

- ○ Seizure remedies are generally allowed according to state law.
- ○ Seizure remedies in cases brought under certain federal statutes are governed by federal law.

☐ Determine types of available remedies: *See § 6.30 below*.

- ○ Attachment.
- ○ Garnishment.
- ○ Replevin.
- ○ Sequestration.
- ○ Other corresponding or equivalent remedies.

☐ Satisfy procedural requirements for prejudgment seizure. *See § 6.31 below*.

☐ Consider seeking preliminary injunction if prejudgment seizure not available. *See § 6.32 below*.

☐ Oppose, modify, or quash prejudgment seizure order:

- ○ Determine whether requirements for seizure satisfied. *See § 6.33 below*.
- ○ Determine whether property to be seized exempt. *See §§ 6.33, 6.34 below*.
- ○ File and serve notice of opposition and/or exemption claim in form and manner required by law. *See § 6.34 below*.

☐ Seek damages caused by improper seizure. *See § 6.35 below*.

☐ Appeal prejudgment seizure as collateral order. *See § 6.36 below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Provisional Remedies

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.29

§ 6.29 Determining Whether Federal or State Law Governs Prejudgment Seizure

Prejudgment seizure remedies are generally available under the law of the state where the federal court is located. *See Fed. R. Civ. P. 64(a)*. However, federal statutes govern seizure remedies in certain cases. Usually, this involves property seized by the United States under any revenue law, attached by the United States, or owned by the United States. Property of nationally chartered banks, the Federal Reserve Bank, and the FDIC is also not subject to state law provisional remedies.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 64.13*.
- *Federal Litigation Guide P 8.03*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *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).

- *Fed. R. Civ. P. 64(a)* (prejudgment seizure remedies generally provided under state law).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.30

§ 6.30 Determining Type of Relief Available

Prejudgment seizure remedies available under Rule 64 include the following: arrest; attachment; garnishment; replevin; sequestration; and other corresponding or equivalent remedies. *See Fed. R. Civ. P. 64(b).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 64.01.*
- *Federal Litigation Guide P 8.05.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 64(b)* (types of prejudgment seizure remedies available).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesCivil ArrestsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesProvisional RemediesSequestrations



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.31

§ 6.31 Meeting Procedural Requirements for Prejudgment Seizure

For a prejudgment seizure remedy to be available, an action must be started by filing a complaint. *See Fed. R. Civ. P. 64(a).* These 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 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 Insurance Co., 361 F.2d 838, 839 (5th Cir. 1966)* (when federal district court issued writ of garnishment as permitted by state law, writ should have been served by United States Marshal as provided by federal civil procedure rules, and not by county sheriff as provided by state civil procedure rules).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 64.10 -64.14, 69.03.*
- *Bender's Federal Practice Forms* Form Nos. 64:1, 64:10-64:13, 64:20-64:47, 64:100-64:115, 64:150 et seq., 64:200-64:211, 64:250, 64:251.
- *Federal Litigation Guide PP 8.01, 8.02, 8.10.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *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).
- *Goya Foods, Inc. v. Wallack Management Co., 290 F.3d 63, 70 (1st Cir. 2002)* (Rule 64 allows

federal court to borrow provisional remedies created by state law).

- *United States v. Cohen, 152 F.3d 321, 325 (4th Cir. 1998)* (Rule 64 provides for attachment under circumstances and in manner provided by law of the state in which the district court is held).

- *Baxter v. United Forest Products Co., 406 F.2d 1120, 1125-1126 (8th Cir. 1969)* (federal courts are required to apply state law in providing provisional remedies, subject to any existing federal statute that might apply).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.32

§ 6.32 Considering Preliminary Injunction if Prejudgment Seizure Not Available

When requirements for attachment cannot be met, consider seeking a preliminary injunction to achieve the same result. *See FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1112 (9th Cir. 1982)* ; *see also §§ 6.02 -6.10.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 64.13, 65.20.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *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).
- *Reebok Int'l, Ltd. v. Marnatech Enters., Inc., 970 F.2d 552, 559 (9th Cir. 1992)* (court has power to issue preliminary injunction in order to prevent defendant from dissipating assets in order to preserve possibility of equitable remedies).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesProvisional RemediesGeneral Overview



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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.33

§ 6.33 Opposing, Modifying, or Quashing Prejudgment Seizure Order

In opposing a prejudgment seizure remedy:

1. Determine if the party seeking a prejudgment seizure remedy has met the procedural statutory requirements;

2. Determine whether any exemptions apply; and

3. Determine the likelihood that plaintiff will prevail on the merits, because usually the plaintiff must establish that it is more likely than not that it will obtain a judgment.

If the plaintiff is seeking the prejudgment seizure remedy ex parte, focus on refuting the contention that the plaintiff could not have brought the application on proper notice.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 64.13*.
- *Bender's Federal Practice Forms* Form Nos. 64:14, 64:15, 64:50-64:55, 64:120-64:132, 64:220 et seq., 64:255 et seq.
- *Federal Litigation Guide P 8.11*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.34

§ 6.34 Claiming Property to be Seized Exempt

Exemptions to protect property that is the subject of a prejudgment seizure request are determined by state law, as is the process of claiming property is exempt. *See KLC, Inc. v. Trayner, 426 F.3d 172, 175-176 (2d Cir. 2005)* (applying state law to determine a homestead exemption).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 64.13, 69.03[3].*
- *Bender's Federal Practice Forms* Form No. 64:50.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Canfield v. Orso, 283 F.3d 686, 692-693 (5th Cir. 2002)* (interpreting state law regarding exemptions in a bankruptcy).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 6 PROVISIONAL REMEDIES
PART G: SEIZING PROPERTY BEFORE JUDGMENT OR OPPOSING PREJUDGMENT SEIZURE

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.35

§ 6.35 Recovering Damages Caused by Improper Seizure

A plaintiff who obtains a prejudgment seizure remedy but is ultimately unsuccessful must redeliver the property to the defendant and is liable for all damages sustained by the defendant that are proximately caused by the seizure and the loss of possession of the property pursuant to the seizure. *See Pinsky v. Duncan, 79 F.3d 306, 313 (2d Cir. 1996)* (actual damages that proximately result from wrongful attachment are recoverable).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 64.13.*
- *Federal Litigation Guide P 8.09[2].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Campbell v. Miller, 373 F.3d 834, 835 (7th Cir. 2004)* (damages are a normal and adequate response to an improper search or seizure, which as a constitutional tort often is analogized to personal injury litigation).
- *United States Fidelity & Guaranty Co. v. Lafayette Engineering & Tool Co., 188 F.2d 778, 779 (5th Cir. 1951)* (allowing bankruptcy court jurisdiction to determine and assess damages resulting from a wrongful and improper seizure of property).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.36

§ 6.36 Appealing Prejudgment Seizure as Collateral Order

Generally, a prejudgment seizure order is not appealable, 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 that determine claims of right separable from, and collateral to, rights asserted in action can be appealed before whole case is adjudicated); *see also Britton v. Howard Savings Bank, 727 F.2d 315, 320-322 (3d Cir. 1984)* (denial of writ of attachment appealable as a 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.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Ibeto Petrochemical Industries Ltd. v. M/T Beffen, 475 F.3d 56, 62 (2d Cir. 2007)* (appeals from interlocutory rulings are permitted pursuant to collateral order doctrine which accommodates a small class of rulings that do not conclude litigation, but conclusively resolve claims of right separable from, and collateral to, rights asserted in action).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureAppealsAppellate JurisdictionCollateral Order Doctrine



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Chapter 6 PROVISIONAL REMEDIES
PART H: SEEKING, OPPOSING, OR APPEALING RECEIVERSHIP

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.37

§ 6.37 Checklist for Seeking, Opposing, or Appealing Receivership

☐ Determine whether court has jurisdiction to appoint receiver. *See § 6.38 below*.

- ○ Whether court has equity jurisdiction in case.
- ○ Whether court has jurisdiction with reference to location of property to be placed in receivership.

☐ Determine whether factual basis exists to appoint receiver. *See §§ 6.39, 6.40 below*.

☐ Consider positions that could be taken and arguments that could be made by adverse party. *See § 6.39 below*.

☐ Consider incidental consequences of having receiver appointed. *See § 6.39 below*.

- ○ Case cannot be dismissed except by court order.
- ○ Applicant has some financial risk, *e.g.*, possibly having to pay premium for bond and being liable for receivership expenses and part of receiver's fee, if receivership later determined to be improper.

☐ Determine appropriate date for hearing, to be specified in order to show cause or notice of motion. *See § 6.42 below*.

☐ Draft order to show cause or notice of motion, and have judge sign order to show cause. *See §§*

6.41, *6.42 below*.

☐ Serve order to show cause or notice of motion (along with supporting papers) on other parties and creditors, if necessary. *See § 6.42 below*.

☐ Attend hearing and argue in support of application, according to normal motion practice. *See § 6.41 below*.

☐ Draft order appointing receiver, and obtain judge's signature. *See § 6.44 below*.

☐ Post receiver's bond, if necessary. *See § 6.42 below*.

☐ If making ex parte request for appointment of temporary receiver, obtain and other documentary evidence of good cause. *See § 6.43[1] below*.

☐ Determine appropriate date for hearing on whether receivership should be continued. *See § 6.43[2] below*.

☐ Draft order appointing temporary receiver. *See § 6.44 below*.

☐ Approach judge, state request for appointment of temporary receiver, submit supporting papers and drafts of orders, and make argument--following usual practice for obtaining TRO. *See § 6.43[1] below*.

☐ Deliver signed order to receiver. *See § 6.44 below*.

☐ Give any appropriate information, guidance, or instructions to receiver, for effective and proper control and management of receivership property. *See § 6.44 below*.

☐ If receiver appointed ex parte, give notice of appointment to adverse party, as required by local rule. *See § 6.43[3] below*.

☐ Attack applicant's factual showing in support of appointment. *See § 6.45[1] below*.

☐ When federal government is suing to collect debt, attack any failure to meet requirements for invoking government's statutory right to seek appointment of receiver. *See § 6.45[2] below*.

☐ If court intends to give applicant some relief, try to minimize harshness of result. *See § 6.45[3] below*.

○ Suggest injunction or bond instead of receivership.

- ○ Propose limited receivership or appointment of custodian in lieu of receiver.
- ○ Challenge applicant's candidate for appointment.

☐ Adverse party: if appropriate, take interlocutory appeal from order of appointment. *See § 6.46 below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Receiverships

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 6 PROVISIONAL REMEDIES
PART H: SEEKING, OPPOSING, OR APPEALING RECEIVERSHIP

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.38

§ 6.38 Determining Court's Jurisdiction to Appoint Receiver

Because an application for appointment of a receiver is not a pleading, but a motion for an order in a pending action, the applicant need not show the basis of the court's subject matter jurisdiction, which presumably is shown in the complaint already on file.

If the complaint in the pending action seeks equitable relief, the court has power to appoint a receiver. *See Kelleam v. Maryland Casualty Co., 312 U.S. 377, 381, 61 S. Ct. 595, 85 L. Ed. 899 (1941)* . Common examples of equitable relief that could implicate appointment of a receiver would 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; or

6. Foreclosure of a lien on real or personal property.

Whenever a court has jurisdiction *in rem*, the court may appoint a receiver for the property if that is 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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed). §§ 66.02, 66.04[4].*

- *Federal Litigation Guide PP 8.20, 8.24.*

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.

- *Kelleam v. Maryland Casualty Co., 312 U.S. 377, 381, 61 S. Ct. 595, 85 L. Ed. 899 (1941)* (receivership is not end in itself, but only means to reach some legitimate end sought through exercise of power of court of equity).

- *Gordon v. Washington, 295 U.S. 30, 37, 55 S. Ct. 584, 79 L. Ed. 1282 (1935)* (a federal court of equity will not appoint a receiver when the appointment is not ancillary to some form of final relief which is appropriate for equity to give).

- *United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 901 (2d Cir. 1992)* (recognition of general principle that court having jurisdiction *in rem* has power to appoint receiver for subject property).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsJurisdictionGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments



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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.39

§ 6.39 Determining Whether Receivership Necessary

A receivership is a remedy of last resort, used only when justified by the most compelling circumstances. *See Consolidated Rail Corp. v. Fore River Railway 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, in order to protect the interests of plaintiff in property). Among the factors that a court might find justify a receivership are the following:

1. Fraudulent conduct by the adverse party;

2. Imminent danger that property will be lost or squandered;

3. Inadequacy of available legal remedies;

4. Probability that harm to the applicant if no receiver were appointed would be greater than any injury to the adverse party if the application were granted;

5. Applicant's probable success in the action and the possibility of irreparable injury to the applicant's interests in the property;

6. Impossibility or impracticability of bringing the action promptly to a final judgment; and

7. Whether the interests of the applicant and others sought to be protected will in fact be well served by the receivership.

The applicant for a receivership should consider the positions the adverse party could take and arguments against receivership that could be made when deciding whether to seek this extraordinary remedy. The applicant should also consider that when a receiver is appointed, the case cannot be dismissed except by court order.

Warning:

Seeking a receivership involves some financial risk to the applicant, in that the applicant may have to pay a premium for a bond covering potential liability to the adverse party and may have to pay some

expenses and part of receiver's fee, if court later decides receivership was improper.

A going business or a foreclosure may present special cases for appointing a receiver. *See Macon Lumber Co. v. Bishop & Collins, 229 F.2d 305, 307 (6th Cir. 1956)* (appointment of receiver for solvent going business corporation is drastic measure which court will take in its discretion only when there is imminent danger of loss to stockholders and no adequate remedy at law); *see also View Crest Garden Apartments, Inc. v. United States, 281 F.2d 844, 847-848 (9th Cir. 1960)* (district court, in its discretion, may appoint receiver to collect rents and profits and manage property during pendency of foreclosure proceeding).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 66.04.*
- *Bender's Federal Practice Forms* Form Nos. 66:1, 66:2.
- *Federal Litigation Guide P 8.22.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *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).
- *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).
- *Bookout v. First National Mortgage & Discount Co., 514 F.2d 757, 758 (5th Cir. 1975)* (receivership can be justified based on applicant's probable success in the action and the possibility of irreparable injury to the applicant's interests in the property).
- *Leighton v. One William Street Fund, Inc., 343 F.2d 565, 568 (2d Cir. 1965)* (inadequacy of available legal remedies justifies receivership).
- *Garden Homes, Inc. v. United States, 200 F.2d 299, 301 (1st Cir. 1952)* (imminent danger of property being lost or squandered justifies receivership).
- *Mintzer v. Arthur L. Wright & Co., 263 F.2d 823, 825 (3d Cir. 1959)* (allowing receivership if probability that harm to applicant if no receiver were appointed would be greater than any injury to adverse party if application were granted).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsJurisdictionGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.40

§ 6.40 Determining Factual Basis for Appointing Receiver

Substantively, the applicant for a receivership must show the kind of extraordinary circumstances that courts routinely mention as being necessary for the so-called drastic remedy of receivership. The applicant should submit persuasive evidence in affidavits and a memorandum of points and authorities relating the facts to a reported case that is squarely on point.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 66.04*.
- *Federal Litigation Guide P 8.22*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Consolidated Rail Corp. v. Fore River Railway Co., 861 F.2d 322, 326 (1st Cir. 1988)* (appointment of a receiver is extraordinary remedy and several factors can be considered in determining whether to appoint receiver).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.41

§ 6.41 Seeking Appointment of Receiver

Procedurally, a receivership can be sought by stating the grounds in a complaint. Otherwise, normal motion practice governs the application for the appointment of a receiver, which is obtained either through an order to show cause or a notice of motion, depending on requirements in local rules and a subsequent hearing.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 66.04*.
- *Bender's Federal Practice Forms* Form Nos. 66:1, 66:2.
- *Federal Litigation Guide PP 8.22, 8.25*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.42

§ 6.42 Meeting Notice and Bond Requirements

The applicant must draft an order to show cause or notice of motion, specifying a hearing date and obtain judge's signature, if order to show cause is used. The applicant must serve the order or notice of motion, along with supporting papers, on the other parties in the case. The court has discretion to order to posting of a bond and to determine the terms and conditions of the bond.



Warning:

Local rules in some districts provide that a notice of the hearing must be given to certain creditors of the adverse party, who is required to provide a list of creditors for this purpose.

Rule 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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 66.04[3][a].*
- *Bender's Federal Practice Forms* Form Nos. 66:1, 66:2.
- *Federal Litigation Guide P 8.23.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *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).
- *Connecticut v. Doehr, 501 U.S. 1, 12, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991)* (due process

requirements were not served when state statute authorized prejudgment of real estate with no hearing or notice and no extenuating circumstances were shown).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.43

§ 6.43 Seeking Ex Parte Appointment of Temporary Receiver

[1] Showing Good Cause for Ex Parte Relief

An ex parte application for a temporary receiver must show good cause for appointing a receiver before a hearing can be held on notice. Generally, courts follow the standard for obtaining a TRO on an ex parte application. *See § 6.07[3] above*. Thus, a temporary receiver can be appointed ex parte if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition. *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 very purpose of receivership, court has discretion to make ex parte appointment).

[2] Holding Prompt Hearing on Receivership

As is the practice when issuing a TRO, the court appointing a temporary receiver on an ex parte application always contemplates holding a reasonably prompt hearing on whether the receivership should be continued during the progress 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] Serving Notice of Hearing

After a temporary receiver is appointed on an ex parte application, either an order to show cause or a notice of motion (depending on local practice) is used to notify other parties and affected creditors, if necessary, that the court will hear an application for appointment of a receiver for the duration of the case.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 66.04[3][b].*
- *Federal Litigation Guide PP 8.23[2], 8.25[3].*

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.

- *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).

- *Connecticut v. Doehr, 501 U.S. 1, 12, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991)* (discussing circumstances under which post-deprivation hearing is adequate to provide due process when ex parte provisional remedies granted).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.44

§ 6.44 Delivering Order of Appointment to Receiver

After a receiver is appointed, the signed order must be delivered to the receiver. The order should specify not only what the receiver is to do but also the powers that the receiver may exercise. *See Atlantic Trust Co. v. Chapman, 208 U.S. 360, 370-371, 28 S. Ct. 406, 52 L. Ed. 528 (1908)* (receiver is creature of court and has no powers except those conferred by order of appointment and course and practice of court). These matters are covered, to some extent, by local rules; otherwise, the usual practice in the drafting of appointment orders can be deduced from reported cases.

In practice, 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.

Some appointment orders 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.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 66.03[2].*
- *Bender's Federal Practice Forms* Form Nos. 66:10-66:12.
- *Federal Litigation Guide P 8.21[2].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 66* (practice in administering estate by receiver must accord with historical practice in federal courts or with local rule).
- *Kohlrautz v. Oilmen Participation Corp., 441 F.3d 827, 836 (9th Cir. 2006)* (court-appointed receiver acts as court officer and must not exceed limits of authority granted the court).
- *Security Pacific Mortgage & Real Estate Services, Inc. v. Republic of Philippines, 962 F.2d 204, 211 (2d Cir. 1992)* (as court-created entity, receiver has only those powers provided for in appointment order and may perform only those acts expressly authorized by appointing court).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.45

§ 6.45 Opposing Appointment of Receiver

[1] Attacking Factual Basis for Seeking Receivership

In opposing a receiver's appointment, the adverse party should try to controvert the factual bases on which the applicant seeks the appointment. *See Meyer Jewelry Co. v. Meyer Holdings, Inc., 906 F. Supp. 428, 434 (E.D. Mich. 1995)* (court refused to appoint receiver when imminent threat to party's investment not established, adequate legal remedy existed, and any harm to applicant if no receiver were appointed would be less than injury to the opposing party if application were granted). This means presenting evidence and argument to establish as many as possible of the following:

1. The opposing party has not engaged in fraudulent conduct;

2. Any risk that property in question will be lost or squandered is nil or no greater than normal;

3. Available legal remedies are adequate;

4. Any harm to the applicant if no receiver were appointed would be less than the injury to the opposing party if the application were granted;

5. The applicant's chance of success in the action is no better than even; or, if the applicant probably will succeed, nevertheless the possibility of irreparable injury to the applicant's interests in property in question (in the absence of a receiver) is remote;

6. Appointment of a receiver will not enhance the prospect of bringing the action promptly to a final judgment; or

7. The interests of the applicant and others sought to be protected will in fact be poorly served by a receivership.

[2] 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, the defendant can attack any failure to meet the statutory requirements, in addition to mounting a factual counter-attack.

[3] Suggesting Less Harsh Alternatives to Receivership

If it becomes apparent that a receiver will be appointed, the adverse party can still suggest less harsh alternatives (e.g., an injunction, or furnishing a bond) or something less than the usual receivership (e.g., a limited receivership, or a custodian in lieu of a receiver). It could also be possible to challenge the eligibility, qualifications, or credentials of the applicant's nominee for appointment.



Strategic Point:

As a practical matter, the party opposing appointment of a receiver has the burden of showing that the appointment would do more harm than good.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 66.04*.
- *Federal Litigation Guide P 8.22*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *World Fuel Services Corp. v. Moorehead, 229 F. Supp. 2d 584, 590 (N.D. Tex. 2002)* (rejecting defendant's objections to receivership).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.46

§ 6.46 Appealing Order Appointing Receiver

Finally, once a receiver has been appointed, the adverse party could consider taking an interlocutory appeal. *See 28 U.S.C. § 1292(a)(1)*; *see also Santibanez v. Wier McMahon & Co., 105 F.3d 234, 238 (5th Cir. 1997)* (courts of appeals have jurisdiction of appeals from interlocutory orders appointing receivers, or denying orders to wind up receiverships).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 66.07*.
- *Federal Litigation Guide P 8.26*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *28 U.S.C. § 1292(a)(1)* (courts of appeal generally have jurisdiction to hear appeals of district courts' interlocutory orders).
- *Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 755 (2d Cir. 1998)* (*28 U.S.C. § 1292(a)* permits interlocutory appeals regarding injunctions, receiverships, and admiralty issues).
- *California ex rel. California Department of Toxic Substances Control v. Campbell, 138 F.3d 772, 777 (9th Cir. 1998)* (courts of appeal can hear appeals from interlocutory orders appointing receivers or refusing orders to wind up receiverships).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureAppealsGeneral Overview



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Chapter 6 PROVISIONAL REMEDIES
PART I: PROCEEDING OR OPPOSING PROCEEDING AGAINST A SURETY

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.47

§ 6.47 Checklist for Proceeding or Opposing Proceeding Against a Surety

☐ Determine whether Rule 65.1 motion is available.

- ○ Determine whether surety entered into bond, stipulation, or undertaking required or permitted by the Federal Rules of Civil Procedure. *See § 6.48 below*.
- ○ Determine whether security given in bankruptcy proceeding. If so, Rule 65.1 motion is not available. *See § 6.48 below*.
- ○ Determine whether Rule 65.1 summary procedure is available against principal, as well as surety. *See § 6.49[1] below*.
- ○ Consider whether to bring independent action in state or federal court. *See § 6.49[2] below*.

☐ Determine whether conditions for payment under the bond have been satisfied. *See § 6.50 below*.

☐ Identify damages available under bond.

- ○ Identify damages available under injunction bond. *See § 6.51[1], below*.
- ○ Identify damages available under attachment undertaking. *See § 6.51[2] below*.
- ○ Identify damages available under supersedeas bond. *See § 6.51[3] below*.

☐ Review Rule 65.1 requirements. *See § 6.48 below*.

☐ Review local rules and individual judge's rules to ascertain preconditions for filing motion. *See § 6.50 below*.

☐ Review terms of bond or other undertaking to ascertain any preconditions to filing motion, such as demand on surety. *See § 6.50 below*.

☐ Ensure that timing of motion is proper. *See § 6.52[1] below*.

☐ Engage opposing counsel in conference attempting resolution as required by local rule. *See § 6.52[3] below*.

☐ Provide opposing counsel with documentation to substantiate claims for costs, interest, and damages. *See § 6.52[1] below*.

☐ Draft motion. *See § 6.52[1] below*.

☐ Provide advance notice of motion. *See § 6.52[2] below*.

☐ Serve and file motion papers on surety or clerk of court who will mail copies to sureties if address is known. *See § 6.52[4] below*.

☐ If opposing Rule 65.1 motion against surety:

- ○ Determine grounds for opposing motion. *See § 6.53[1] below*.
- ○ Determine grounds for challenging damages sought. *See § 6.53[2] below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Bonds > Sureties

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesProcedures



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.48

§ 6.48 Determining Whether to File Rule 65.1 Motion Against a Surety

A Rule 65.1 motion to enforce the liability of a surety is available whenever the Federal Rules of Civil Procedure, including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, require or permit the giving of security by a party and security is given in the form of a bond or stipulation or other undertaking, including the following:

1. As a condition for a stay of proceedings to enforce judgment;

2. Incidental to attachment and other provisional remedies for which state law requiring security applies;

3. As condition to TRO or preliminary injunction;

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; and

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 sureties under bonds or undertakings in bankruptcy proceedings, as they are under the jurisdiction of the Bankruptcy Court and are governed by the Bankruptcy Rules, not the Federal Rules of Civil Procedure.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.1.02.*
- *Federal Litigation Guide P 7.75.*

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.

- *Fed. R. Civ. P. 65.1* (proceedings against a surety).

- *Grupo Mexicano De Desarrollo v. Alliance Bond Fund, 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).

- *Lyrick Studios, Inc. v. Big Idea Productions, Inc., 420 F.3d 388, 396-397 (5th Cir. 2005)* (liability of surety who posts bond for preliminary injunction may be enforced on motion without need for independent action).

- *Bass v. First Pacific Networks, Inc., 219 F.3d 1052, 1054 (9th Cir. 2000)* (surety's liability on a supersedeas bond may be enforced under either Rule 65.1's summary procedure or through independent action initiated in state or federal courts).

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureGeneral OverviewCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.49

§ 6.49 Considering Alternatives to Filing Rule 65.1 Motion Against a Surety

[1] Filing Motion as Creditor Against a Principal

A creditor may bring a Rule 65.1 motion against a principal, as well as a surety. *See Squaxin Island Tribe v. State of Washington, 781 F.2d 715, 723-724 (9th Cir. 1986)* (motion under Rule 65.1 can be filed against principal as well as surety on bond). However, the rule does not provide for a surety to proceed against its principal.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.1.03.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 65.1* (proceedings against a surety).

[2] Bringing Independent Action in Federal or State Court

Rule 65.1 is permissive and allows a creditor to bring an independent action against a surety in state or federal court. *See Bass v. First Pacific Networks, Inc., 219 F.3d 1052, 1054 (9th Cir. 2000)* (surety's liability may be enforced under either Rule 65.1's summary procedure or through independent action initiated in state or federal courts). An independent action is an option to consider if the suit in which the bond was posted has been dismissed. *See American Bible Society v. Blount, 446 F.2d 588, 595 (3d Cir. 1971)* (noting that an independent action against surety could be brought after the action in which bond was posted has been dismissed).

Other factors that can weigh in favor of bringing an independent action are the ability to bring it in another, more favorable forum, the availability of a jury trial, and the recoverability of attorney fees.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.1.03*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 65.1* (proceedings against a surety).

Legal Topics:

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



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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.50

§ 6.50 Determining Whether Conditions for Payment Under Bond Satisfied

Before initiating the Rule 65.1 motion procedure, the conditions for payment on the bond must be satisfied and the surety's liability must have accrued. Therefore, the motion will usually be brought after the underlying action is resolved in the moving party's favor.

A bond may be executed when a party was unlawfully enjoined or restrained within the meaning of Rule 65(c), or when it turns out the party enjoined or restrained had the right all along to do what it was prohibited from doing. *See Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1054 (2d Cir. 1990)* (party has been wrongfully enjoined under Rule 65(c) if it is ultimately found that enjoined party had at all times the right to do the enjoined act).



Warning:

Be sure to consult local rules and individual judge's rules to determine any preconditions for filing motion.



Strategic Point:

In an unusual case, a party may be entitled to proceed against the bond despite the fact that the merits of the underlying action are 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.*

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.

- *Nintendo of America, Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994)* (before court may execute a bond, it must find enjoined or restrained party was wrongfully enjoined or restrained).

- *Continuum Co. v. Incepts, Inc., 873 F.2d 801, 803 (5th Cir. 1989)* (enjoined defendant may recover on the bond if a court later determines that it was wrongfully enjoined).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesBondsExecutions



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Chapter 6 PROVISIONAL REMEDIES
PART I: PROCEEDING OR OPPOSING PROCEEDING AGAINST A SURETY

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.51

§ 6.51 Determining Recoverable Damages

[1] Determining Damages Under Injunction Bond

When an injunction bond is issued under Rule 65(c), federal law governs the question of what is recoverable under that bond. *Fireman's Fund Insurance Co. v. S.E.K. Construction Co., 436 F.2d 1345, 1351-1352 (10th Cir. 1971)* . The wrongfully enjoined party may recover damages for injuries proximately caused by the injunction. *See Milan Express, Inc. v. Averitt Express, Inc., 254 F.3d 966, 981 (11th Cir. 2001)* (to recover against injunction bond, party must prove that it was wrongfully enjoined and that its damages were proximately caused by erroneously issued injunction). The wrongfully enjoined party may recover from the surety provable damages up to the amount of the bond. *Nintendo of America, Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994)* .

Warning:

Attorney 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)* (improperly enjoined party may not demand damages on the bond simply because injunction was improperly granted, but must also demonstrate injury as result of injunction). Damages can also be reduced or denied based on failure to mitigate. *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).

[2] Determining Damages Under Attachment Undertaking

The forum state's law governs the seizure of property for the purpose of securing satisfaction of the judgment, unless a federal statute applies, and determines the circumstances and manner in which attachment is available. *See Fed. R. Civ. P. 64*. This includes undertaking requirements. *See 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, and affidavit requirements, property exempted from attachment, and circumstances under which property may be released from attachment).

Generally, the plaintiff's liability for causing a wrongful attachment includes all damages proximately caused to the defendant by the wrongful attachment. *See United States Fidelity & Guaranty Co. v. J. United Electrical Contracting*

Corp., 62 F. Supp. 2d 915, 925 (E.D.N.Y. 1999) (under state law, plaintiff seeking an order of attachment must give undertaking in amount fixed by court to compensate defendant for all costs and damages sustained by reason of the attachment should defendant prevail). This includes all costs and expenses, including attorney's fees, reasonably expended in defeating the attachment, but is limited by the amount of the undertaking. *See Fidelity & Deposit Co. v. L. Bucki & Son Lumber Co., 189 U.S. 135, 136, 23 S. Ct. 582, 47 L. Ed. 744 (1903)* (counsel fees incurred in securing the dissolution of an attachment are recoverable in actions upon attachment bonds, if state law allows).

[3] Determining Damages Under Supersedeas Bond

An appellant may obtain a formal stay of the judgment pending appeal by posting a supersedeas bond. A supersedeas bond guarantees the damages awarded in the district court when an appeal is taken from that judgment. *See Martin v. Clarke, 105 F.2d 685, 687 (7th Cir. 1939)* (recovery on supersedeas bond includes not only compensatory damages for delay arising from the stay of execution or other process, but also amount due by terms of judgment, with interest and costs). The recovery on a supersedeas bond includes the amount of the judgment, with interest and costs, but does not include attorney fees. *See Bass v. First Pacific Networks, Inc., 219 F.3d 1052, 1055 (9th Cir. 2000)* (recovery on a supersedeas bond doesn't include attorneys fees).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.1.02.*
- *Federal Litigation Guide P 7.75.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 62(d)* (appellant may obtain a formal stay of a judgment pending appeal by posting a supersedeas bond).
- *Fed. R. Civ. P. 64* (forum state's law governs the seizure of property for the purpose of securing satisfaction of the judgment, unless a federal statute applies).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral Overview



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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.52

§ 6.52 Filing Rule 65.1 Motion Against a Surety

[1] Filing Timely Motion

The surety's liability on the bond, stemming from the principal's liability in the underlying action, must be determined before the motion is drafted and filed. Usually, a final adjudication on the merits in favor of the person for whose benefit the bond was issued is a prerequisite to the motion. *See American Bible Society 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). Also, the Rule 65.1 motion must be brought 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 a bond after it is exonerated). Opposing counsel should be given documentation to support the claims for costs, interest, and damages.

Warning:

Although Rule 65.1 has no time limit for filing a motion against a surety, excessive delay in filing motion may bar relief.

[2] Providing Advance Notice

The moving party must provide the same advance notice of Rule 65.1 motion as the local rules require for any other motion.

[3] Attempting Resolution with Opposing Counsel

The moving party must contact opposing counsel and confer to attempt resolution as the local rules require for any other motion. The Rule 65.1 motion procedure for enforcing a surety's liability should be used only if payment cannot be accomplished by agreement.

[4] Providing Notice to Surety

A judgment against the surety will not stand if 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)* (Rule 65.1 requires notice to a

surety when a motion to execute a surety's bond is filed with the court). A 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 on whom any papers affecting the surety's liability on the bond or undertaking may be served. If the clerk is served, the clerk must then mail copies to the sureties if their addresses are known. *See Fed. R. Civ. P. 65.1.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 65.1.03, 65.1.04.*
- *Bender's Federal Practice Forms* Form Nos. 65.1:1, 65.1:2.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *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* (proceedings against surety).
- *Nintendo of America, Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994)* (party who prevailed in underlying litigation was wrongfully enjoined party and thus entitled to have bond executed and recover provable damages up to amount of bond).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProcedures



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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.53

§ 6.53 Opposing Rule 65.1 Motion Against a Surety

[1] Determine Grounds for Opposing Motion

The summary Rule 65.1 procedures to enforce a surety's liability may be delayed by an injunction. *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 a surety's liability may be stayed by an injunction). Further, a district court cannot consider the Rule 65.1 motion after the bond has been exonerated. *See Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1167-1168 (9th Cir. 1976)* (district court cannot consider a Rule 65.1 motion after the bond has been exonerated). Finally, excessive delay in filing motion can bar 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] Determine Grounds for Challenging Damages Sought

A surety can oppose damages sought on the ground that they are not proximately caused by the 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 as result of the injunction, and cannot recover attorney fees). A surety can also object to an injured person seeking damages in excess of the bond or, in the case of an injunction bond, seeking attorney's fees not allowed by the bond. *See Fireman's Fund Insurance Co. v. S.E.K. Construction Co., 436 F.2d 1345, 1351-1352 (10th Cir. 1971)* (attorney fees are 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.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Milan Express, Inc. v. Averitt Express, Inc., 254 F.3d 966, 981 (11th Cir. 2001)* (to recover against

an injunction bond, a party must prove that it was wrongfully enjoined and that its damages were proximately caused by the erroneously issued injunction).

- *Nintendo of America, Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994)* (damages for wrongful injunction limited to amount of bond).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.54

§ 6.54 Appealing Liability Determination

If the district court decides against execution of the bond, the order may be appealed. The surety may appeal to the court of appeals 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 Chemicals, Inc., 460 F.3d 1047, 1059 (8th Cir. 2006)* (court of appeals reviews de novo a district court's decision to execute an injunction bond). A district court's computation of damages is reviewed under the clearly erroneous standard. *See Nintendo of America, Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994)* (court of appeals can review de novo a district court's decision to execute a bond and can review its computation of damages under clearly erroneous standard).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 65.1.04.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 6 PROVISIONAL REMEDIES
PART J: DEPOSITING MONEY OR PROPERTY INTO COURT OR WITHDRAWING SAME

1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.55

§ 6.55 Checklist for Depositing Money or Property Into Court or Withdrawing Same

☐ Determine whether to seek leave to make deposit by Rule 67 motion. *See § 6.55 below*.

- ○ Determine whether voluntary deposit is appropriate, as statutory condition of proceeding with interpleader action, voluntary or court-ordered condition of proceeding with Rule interpleader, or as tender of payment that will stop accrual of interest. *See § 6.56[1] below*.
- ○ Determine whether action is pending that seeks, at least as part or relief sought, judgment for money or property capable of being deposited. *See § 6.56[2] below*.
- ○ Determine whether disputed money or property is suitable for delivery to court. *See § 6.56[2] below*.
- ○ Determine whether to deposit all or part of disputed money or property. *See § 6.56[2] below*.
- ○ Consider alternatives to deposit under Rule 67 for handling funds while action is pending, such as letter of credit, escrow account, or joint signature account in names of counsel. *See § 6.56[1] below*.

☐ Move for leave to deposit disputed money or property with court. *See § 6.57 below*.

- ○ Review Rule 67 requirements. *See § 6.56[2] below*.
- ○ Review local rules and individual judge's rules to ascertain preconditions for filing

motion. *See § 6.57[1] below*.

- ○ Draft motion, or stipulation, and proposed order. *See § 6.57[3] below*.
- ○ Obtain clerk's pre-approval of order if required by local rule. *See § 6.57[3] below*.
- ○ Serve and file motion papers. *See § 6.57[2] below*.
- ○ Serve court order permitting deposit on clerk of court. *See § 6.57[3] below*.

☐ Deposit money or property with U.S. Treasurer or designated depository. *See § 6.57[4] below*.

☐ Appeal denial of motion to court of appeals. *See § 6.58 below*.

☐ Determine whether conditions for withdrawal have been met. *See § 6.59 below*.

- ○ Determine whether claimant has right or other parties will stipulate to withdrawal. *See § 6.59[1] below*.
- ○ Draft order for disbursement. *See § 6.59[2] below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Deposits in Court

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.56

§ 6.56 Determining Whether to File Rule 67 Motion for Leave to Deposit Money or Property

[1] Determining Whether Deposit With Court Is Required

Depositing disputed money or property with the court or giving a bond is a condition of maintaining a federal statutory interpleader action, and 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).

In an interpleader action under Rule 22, the stakeholder is not required to deposit the disputed money or property with the court. *See Gelfgren v. Republic National Life Insurance Co., 680 F.2d 79, 82 (9th Cir. 1982)* (unlike interpleader actions under federal statute, an interpleader action under Rule 22 does not require disputed money or property to be deposited with court). However, Rule 67 permits the deposit and allows the court to order the party in possession of property to deposit it with the court.

For discussion of interpleader, *see §§ 3.22 -3.28 above*.



Strategic Point:

If deposit with court not required, alternatives to such a deposit (e.g., a letter of credit, escrow account, or joint signature account in the names of counsel) should be considered.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 22.03[1][b]*, 67.02.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *28 U.S.C. § 1335(a)(2)* (requiring money or property be deposited into court in federal interpleader

action).

- *Fed. R. Civ. P. 67* (deposit into court).

[2] Determining Whether Rule 67 Requirements Satisfied

Rule 67 allows a party with leave of court to deposit money or other property with the court in an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or other thing capable of delivery.



Warning:

Rule 67 does not permit deposit of funds into court when plaintiff has petitioned for confirmation of an arbitration award and, therefore, is not seeking a money judgment. In addition, the court has the discretion to refuse to authorize the deposit of non-monetary property and to refuse to allow the deposit of money when the deposit would impose an unnecessary burden on the clerk and would not affect the involvement of the depositor in the litigation. *See Design Benefit Plans v. Enright, 940 F. Supp. 200, 207 (N.D. Ill. 1996)* (court has discretion to refuse to allow deposit of money when deposit would impose unnecessary burden on clerk and would not affect involvement of depositor in the litigation); *John v. Sotheby's, Inc., 141 F.R.D. 29, 34 (S.D.N.Y. 1992)* (court has discretion to refuse to authorize deposit of non-monetary property).



Strategic Point:

While money is the most commonly deposited thing under Rule 67, the rule allows for the deposit of any thing capable of delivery. *See Fed. R. Civ. P. 67(a)*. Rule 67 allows the deposit of any money or property in dispute to be made in whole or part, although the court has the discretion to require deposit of the full amount.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 67.03*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Fed. R. Civ. P. 67(a)* (depositing property into court).
- *LTV Corp. v. Gulf States Steel, Inc., 969 F.2d 1050, 1063-1064 (D.C. Cir. 1992)* (court has discretion to require deposit of full amount).
- *Garrick v. Weaver, 888 F.2d 687, 694 (10th Cir. 1989)* (Rule 67 leaves to discretion of district court decision as to whether to permit the deposit of funds in court).
- *Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d 1465, 1475 (5th Cir. 1987) , modified on other grounds, 831 F.2d 557 (5th Cir. 1987)* (court has discretion to authorize deposit of funds in dispute under Rule 67).
- *Eurolines Shipping Co. v. Metal Transport Corp., 491 F. Supp. 590, 592 (S.D.N.Y. 1980)* (Rule 67 does not permit deposit of funds into court when plaintiff has petitioned for confirmation of an

arbitration award).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.57

§ 6.57 Moving for Leave to Deposit Money or Property With Court

[1] Filing Motion for Leave to Deposit Money or Property

Under Rule 67, a motion or stipulation is required to seek court leave to make deposit, unless deposit is allowed by right. *See Fed. R. Civ. P. 67(a)*. Review local rules and individual judge's rules to determine preconditions for filing the motion. Include supporting affidavits, memorandum of law, and draft order with the motion.

[2] Meeting Notice Requirements

Unless otherwise specified, the moving party must provide the same advance notice of Rule 67 motion as the local rules require for any other motion. Thus, notice of motion must also be served and filed.

[3] Obtaining Court Order for Deposit

Rule 67 requires that the court issue an order granting leave to deposit disputed money or other property with the court. *Fed. R. Civ. P. 67(a)*. When filing the motion or stipulation, include a proposed order and obtain the clerk's pre-approval of the order, if required by local rules. Check local rules for specific provisions that must be included in the order. The party making the deposit must serve the order allowing the deposit on the clerk of the court and all other parties. *Fed. R. Civ. P. 67(a)*.

[4] Depositing Money or Property with Treasurer or Designated Depository

Money deposited with the clerk under Rule 67 must be deposited with the Treasurer of the United States or a designated depository, in the name of and to the credit of the court. The funds deposited must be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court. *See Fed. R. Civ. P. 67(b)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 67.03*.

- *Bender's Federal Practice Forms* Form Nos. 67:1-67:3.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *28 U.S.C. § 2041* (money deposited with the clerk under Rule 67 must be deposited with Treasurer of the United States or designated depository, in the name of and to the credit of the court).
- *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).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.58

§ 6.58 Appealing Denial of Motion

If the district court decides against granting leave to make the deposit, the order may be appealed and is subject to review under an abuse of discretion standard. *See Cajun Electric Power Cooperative, Inc. v. Riley Stoker Corp., 901 F.2d 441, 445 (5th Cir. 1990)* . However, the granting of a Rule 67 motion is not appealable. *See Standard Insurance Co. v. Saklad, 1995 U.S. App. LEXIS 24098, at *4 (9th Cir. 1995)* (unpublished opinion).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 67.02.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.
- *Cajun Electric Power Cooperative, Inc. v. Riley Stoker Corp., 901 F.2d 441, 445 (5th Cir. 1990)* (a district court's decision against granting leave to make a deposit may be appealed and is subject to review under an abuse of discretion standard).
- *Perpetual American Bank, F.S.B. v. Terrestrial Systems, 811 F.2d 504, 506 (9th Cir. 1987)* (provisional orders entered by the district court to preserve or protect assets of a party pending final resolution of an action do not generally qualify for interlocutory appeal under the collateral order exception to the final judgment rule).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 6 PROVISIONAL REMEDIES
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1-6 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 6.59

§ 6.59 Withdrawing Money or Property Deposited with Court

[1] Showing Right to Withdraw Money or Property

Generally, withdrawal of registry funds will not be permitted until the dispute over the funds has been decided. The court must decide to whom a sum in the registry of the court is to be paid, and the claimant has the burden of showing that he or she has the right to withdraw the funds deposited in court, unless the parties can stipulate to the withdrawal.

[2] Obtaining Court Order for Disbursement

Money deposited cannot be withdrawn except by court order. The order must comply with federal and local rules.

Once an order for withdrawal issues, the money remains on deposit for five years. If five years elapse and the money remains unclaimed, the court will cause the money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to the funds may, on petition to the court and on notice to the United States attorney and full proof of his or her right to the funds, obtain an order directing payment to him or her. *28 U.S.C. 2042*; *see Palmer v. Warren, 108 F.2d 164, 166 (2d Cir. 1939)* (court that has custody of property can surrender it after it either decides the right to possession itself or awaits the decision of another competent tribunal).

The deposit of funds unclaimed for five years in the Treasury does not work an escheat as the money is merely transferred and any claims to the money are not extinguished. *See United States v. 80 Acres of Land, 197 F.3d 24, 30-31 (1st Cir. 1999)* (deposit of funds unclaimed for five years in the Treasury does not work an escheat as the money is merely transferred and any claims to the money are not extinguished).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 67.03*.
- *Bender's Federal Practice Forms* Form No. 67:30.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 5.

- *Fed. R. Civ. P. 67(b)* (investing and withdrawing funds).

- *28 U.S.C. § 2042* (requirements for withdrawing money).

- *In re Folding Carton Antitrust Litigation, 744 F.2d 1252, 1255 (7th Cir. 1984)* (court's use of reserved settlement funds, after one-year grace period, to establish foundation does not work an escheat).

- *Hansen v. United States, 340 F.2d 142, 144 (8th Cir. 1965)* (claimant has burden of showing that he or she has right to withdraw funds deposited in court).

- *Wood v. Motorola, Inc., 587 F. Supp. 531, 532 (D. Haw. 1984)* (when client dismisses attorney during course of pending action, courts have jurisdiction to determine fees being held by court that are due to attorney).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 7 CLASS ACTIONS

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation 7.syn

§ 7.syn Synopsis to Chapter 7: CLASS ACTIONS

§ 7.01 Procedural Context--Class Actions

§ 7.02 Checklist for Determining Whether Prerequisites to Class Action Can Be Satisfied

§ 7.03 Ascertaining Whether Identifiable Class Exists

§ 7.04 Meeting Requirements as to Class Action Prerequisites (Rule 23(a))

[1] Class Must Be So Numerous That Joinder Is Impracticable

[2] Questions of Law or Fact Must Be Common to Class

[3] Representative's Claims or Defenses Must Be Typical of Class

[4] Representative Must Fairly and Adequately Protect Class Interests

§ 7.05 Meeting Requirements as to Type of Class Action (Rule 23(b))

[1] Class Action Plaintiff Must Establish That Class Actions Falls Within One of Three Subdivisions of Rule 23(b)

[2] Rule 23(b)(1)(A) Requires Risk That Separate Litigation Will Result in Inconsistent or Varying Adjudications

[3] Rule 23(b)(1)(B) Requires Risk of Adjudications That Would Be Dispositive of Interests of Nonparty Class Members

[4] Rule 23(b)(2) Requires That Action Seek Injunctive or Corresponding Declaratory Relief With Respect to Class As Whole

[5] Rule 23(b)(3) Requires That Common Questions Predominate and Class Action Is Superior Method of Adjudication

§ 7.06 Checklist For Filing Action As Class Action

§ 7.07 Applying General Rules of Pleading

§ 7.08 Meeting Jurisdictional Requirements

[1] Requirements For Constitutional Standing Must Be Met

[2] Jurisdiction Must Be Conferred by Specific Jurisdictional Statute

[3] Class Action Fairness Act Expands Federal Jurisdiction Over Certain Class Actions

§ 7.09 Meeting Additional Requirements in Securities Class Actions

[1] Securities Class Actions Governed by PSLRA and SLUSA

[2] Plaintiff Must File Certification With Complaint

[3] Additional Procedures Apply in Securities Class Actions

§ 7.10 Understanding Impact of Class Action Filing on Statute of Limitations

§ 7.11 Checklist for Moving for Class Certification

§ 7.12 Making Timely Motion for Certification

§ 7.13 Understanding Court Action on Certification Motion

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Chapter 7 CLASS ACTIONS
PART A: PROCEDURAL CONTEXT

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.01

§ 7.01 Procedural Context--Class Actions

A class action is a proceeding in which plaintiffs represent interests common to a large group and litigate a common wrong on behalf of the class. Rule 23(a) sets out the prerequisites for bringing a class action. A plaintiff must satisfy several prerequisites to qualify as a representative of the class in addition to establishing that the action falls into one of the four categories for which a class action may be maintained. *See Fed. R. Civ. P. 23(b).*

Rule 23 sets forth the specific requirements that apply to class actions in the federal courts. Rule 23(c) governs the court's determination of whether to certify the class and includes special notice requirements. Rule 23(d) authorizes the court to enter orders to control the conduct of the action. Rule 23(e) governs the settlement, voluntary dismissal, or compromise of a certified class action. In general, notice of a proposed settlement must be given to class members, who have the right to participate in the court's determination of whether the settlement is "fair, reasonable, and adequate." Rule 23(g) sets forth the procedures for appointing class counsel and Rule 23(h) governs attorney fee awards.

Additionally, the practitioner should always consult the district court's local rules and the judge's standing orders, which can provide additional procedural requirements beyond those set out in Rule 23.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview



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Chapter 7 CLASS ACTIONS
PART B: DETERMINING WHETHER PREREQUISITES TO CLASS ACTION CAN BE SATISFIED

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.02

§ 7.02 Checklist for Determining Whether Prerequisites to Class Action Can Be Satisfied

☐ Determine whether the proposed class is sufficiently definite and ascertainable so that the court can order the requested relief. *See § 7.03 below*.

☐ Determine if the four requirements of Rule 23(a) can be met.

- ○ Numerosity: The class must be so numerous that joinder is impracticable. *See § 7.04[1] below*.
- ○ Commonality: Some questions of fact or law must be common to the class members. *See § 7.04[2] below*.
- ○ Typicality: The claims or defenses of the class representatives must be typical of those of the other class members. *See § 7.04[3] below*.
- ○ Adequacy of representation: The class representatives must be able to protect the class interests fairly and adequately. *See § 7.04[4] below*.

☐ Determine whether the action may be maintained under at least one of the categories of Rule 23(b). *See § 7.05 below*.

☐ **Search by Topic:** Civil Procedure > Class Actions

Legal Topics:

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

Civil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesMaintainabilityCivil ProcedureClass ActionsPrerequisitesNumerosityCivil ProcedureClass ActionsPrerequisitesTypicality



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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.03

§ 7.03 Ascertaining Whether Identifiable Class Exists

The party seeking to have the case certified as a class action must establish each of the four prerequisites under *Fed. R. Civ. P. 23(a)*: numerosity, commonality, typicality, and adequacy of representation. *See § 7.04 below*. Additionally, the class proponent must establish that the case falls into one of the four categories for which a class action may be maintained under *Fed. R. Civ. P. 23(b)*. *See § 7.05 below*.

Rule 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)*. 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)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.21*.
- *Federal Litigation Guide PP 42.30 -42.34*.
- *Fed. R. Civ. P. 23* (class actions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesMaintainabilityCivil ProcedureClass ActionsPrerequisitesNumerosityCivil ProcedureClass ActionsPrerequisitesTypicality



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Chapter 7 CLASS ACTIONS
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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.04

§ 7.04 Meeting Requirements as to Class Action Prerequisites (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. *Fed. R. Civ. P. 23(a)(1).*

The requirement that the class be so numerous that joinder is impracticable does not mean that joinder must be impossible. *See Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993)* . Rather, it means that the court must find that the difficulty or inconvenience of joining all members of the class makes class litigation desirable.

Failure to make an adequate showing as to numerosity, even if all other requirements for certification are satisfied, 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] Questions of Law or Fact Must Be Common to Class

A court may certify a class only if questions of law or fact are common to the class members. *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)* .

In order to obtain certification of a class under Rule 23(b)(3) (discussed at *§ 7.05[5] below*) the class proponent must show that the questions of law or fact common to the members of the class *predominate* over questions affecting only individual class members. *Fed. R. Civ. P. 23(b)(3).* For Rule 23(b)(3) class actions, the commonality requirement is subsumed under, or superseded by, the predominance inquiry. *See Amchem Prods. Inc. 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 parties are typical of the claims or

defenses of the class members as a whole. *Fed. R. Civ. P. 23(a)(3)*. The representative's claims are 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. *James v. City of Dallas, 254 F.3d 551, 571 (5th Cir. 2001)* .

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)* .

[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. *Fed. R. Civ. P. 23(a)(4)*. Adequacy has two components: (1) whether the class representative has any conflicts with other class members, and (2) whether the class representative will prosecute the action vigorously on behalf of the class. *Stout v. JD Byrider, 228 F.3d 709, 717-718 (6th Cir. 2000)* .

Before the 2003 amendments to *Fed. R. Civ. P. 23*, adequacy of counsel also was considered when determining adequacy of the class representative. Although Rule 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. A class representative will not represent absent class members adequately if the representative has significant 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)* . If a class representative is closely affiliated with class counsel, 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)* .

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. *Amchem Prods. Inc. 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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesMaintainabilityCivil ProcedureClass ActionsPrerequisitesNumerosityCivil ProcedureClass ActionsPrerequisitesTypicality



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Chapter 7 CLASS ACTIONS
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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.05

§ 7.05 Meeting Requirements as to Type of Class Action (Rule 23(b))

[1] Class Action Plaintiff Must Establish That Class Actions Falls Within One of Three Subdivisions of Rule 23(b)

In addition to satisfying the requirements of *Fed. R. Civ. P. 23(a)*, the case must also fall into one or more of the categories of class actions specified in *Fed. R. Civ. P. 23(b)*.

[2] 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 prosecuting 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. *Fed. R. Civ. P. 23(b)(1)(A)*.

Rule 23(b)(1)(A) applies to cases seeking injunctive or declaratory relief, not those primarily seeking damages. *See In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987)* . Nevertheless, certification may be proper even if the action requests money damages, so long as provided damages are not the predominant relief and are merely incidental to injunctive relief. *See Robertson v. NBA, 556 F.2d 682, 685 (2d Cir. 1977)* .

Class members in 23(b)(1)(A) classes are neither entitled to notice of class certification nor an opportunity to opt out. However, the court has discretion to direct notice to the class if appropriate. *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)* .

[3] Rule 23(b)(1)(B) Requires Risk of Adjudications That Would Be Dispositive of Interests of Nonparty Class Members

An action may be maintained 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. *Fed. R. Civ. P. 23(b)(1)(B).*

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. *Fed. R. Civ. P. 23(c)(2)(A).*

The typical *Fed. R. Civ. P. 23(b)(1)(B)* action involves a "limited fund". *Ortiz v. Fibreboard Corp., 527 U.S. 815, 834, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* . Certain characteristics are "presumptively necessary" to satisfy the limited fund rationale for certification under Rule 23(b)(1)(B). The plaintiff class must demonstrate that the case involves a fund (1) with 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, (3) by an equitable, pro rata distribution. *See Ortiz v. Fibreboard Corp., 527 U.S. 815, 841-842, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* .

A settlement fund that is limited solely as a result of an agreement of the parties is not a limited fund for purposes of Rule 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)* .

[4] Rule 23(b)(2) Requires That Action Seek Injunctive or Corresponding Declaratory Relief With Respect to Class As 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. *Fed. R. Civ. P. 23(b)(2).*

Rule 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, Rule 23(b)(2) is not limited to civil rights claims. *See Fed. R. Civ. P. 23(b)(2)*, Committee Note of 1966.

Class certification under Rule 23(b)(2) is appropriate 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. It does not include cases in which the appropriate final relief relates exclusively or predominantly to money damages. *Fed. R. Civ. P. 23(b)(2)*, Committee Note of 1966.

Rule 23(b)(2) requires that the defendant's actions (or refusals to act) on which the suit is based "apply generally to the class". *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, provided the actions have general applicability to the class. *Fed. R. Civ. P. 23(b)(2)*, Committee Note of 1966.

[5] 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 both:

1. The court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members; and

2. The court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3).

While Rule 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. Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

Rule 23(b)(3)'s predominance requirement goes beyond Rule 23(a)'s commonality requirement. Under Rule 23(a), covering the prerequisites for all class actions, questions of law or fact common to the class members must exist. *Fed. R. Civ. P. 23(a)(2).* For a class to be certified under Rule 23(b)(3), those questions must *predominate* over questions affecting only individual class members. *Fed. R. Civ. P. 23(b)(3).*

A class action may be certified under Rule 23(b)(3) only if the class action will be superior to other available methods for the fair and efficient adjudication of the controversy. *Fed. R. Civ. P. 23(b)(3).* The rule's non-exhaustive list of factors to consider in determining superiority includes:

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.

Fed. R. Civ. P. 23(b)(3).

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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesMaintainabilityCivil ProcedureClass ActionsPrerequisitesNumerosityCivil ProcedureClass ActionsPrerequisitesTypicality



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Chapter 7 CLASS ACTIONS
PART C: FILING ACTION AS CLASS ACTION

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.06

§ 7.06 Checklist For Filing Action As Class Action

☐ Prepare complaint that states the claims of the named plaintiffs and contains "class allegations." *See § 7.07 below*.

☐ Ensure that action meets jurisdictional requirements. *See § 7.08 below*.

☐ In securities class action, consider impact of PSLRA and SLUSA. *See § 7.09 below*.

☐ Consider effect on statute of limitations by filing action and by obtaining class certification. *See § 7.10 below*.

☐ **Search by Topic:** Civil Procedure > Class Actions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass MembersDefendantsCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview



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Chapter 7 CLASS ACTIONS
PART C: FILING ACTION AS CLASS ACTION

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.07

§ 7.07 Applying General Rules of Pleading

Rule 8, which sets forth the general rules on pleading an action in federal court, applies to class actions. *See Fed. R. Civ. P. 8(a)*; *see also* Ch. 4 *above*. All the filing requirements apply in class actions as well. *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*.

Although not required by the Federal Rules of Civil Procedure, local rules may require that the complaint contain class allegations. 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*; *see also § 4.36 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 8.
- *Federal Litigation Guide PP 42.190 -42.194*.
- *Bender's Federal Practice Forms* Form Nos. 23:1, 23:13, 23.14.
- *Fed. R. Civ. P. 5(d)* (requirements for filing papers).
- *Fed. R. Civ. P. 8(a)* (requirements for pleading stating claim for relief).
- *Fed. R. Civ. P. 15* (amendment of pleadings).
- *Fed. R. Civ. P. 23* (class actions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureClass ActionsGeneral

OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview



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Chapter 7 CLASS ACTIONS
PART C: FILING ACTION AS CLASS ACTION

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.08

§ 7.08 Meeting Jurisdictional Requirements

[1] Requirements For Constitutional Standing Must Be Met

The class representative must meet all the requirements of constitutional standing to maintain a class action. However, if a named plaintiff's claims become moot after a class has been certified, 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. *Sosna v. Iowa, 419 U.S. 393, 401-402, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)* . If the class representative's claims become moot and a class has not been certified, though, 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)* . For discussion of standing, see *§§ 1.49 -1.52 above*.

An exception applies when 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. In this situation, a later certification is considered to relate back to the time that the action was filed and an actual controversy still exists even though 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)* .

[2] Jurisdiction Must Be Conferred by Specific Jurisdictional Statute

Federal jurisdiction does not exist merely because an action 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*. For discussion of federal question and diversity jurisdiction, see *§§ 1.02 -1.24 above*.

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., Inc., 545 U.S. 546, 549, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* . For discussion of supplemental jurisdiction, see *§§ 1.25 -1.33 above*.

[3] 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.

3. There are 100 or more members in all proposed plaintiff classes.

28 U.S.C. § 1332(d).

The claims of individual class members are aggregated to determine whether the amount in controversy exceeds $5 million. *28 U.S.C. § 1332(d)(6)*.

For discussion of the special removal provisions relating to covered actions (*28 U.S.C. § 1453*), see *§ 2.07 above*.

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).
- *28 U.S.C. § 1453* (removal of class actions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityMootnessReal Controversy RequirementCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsPrerequisitesGeneral OverviewConstitutional LawThe JudiciaryCase or ControversyStandingGeneral Overview



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Chapter 7 CLASS ACTIONS
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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.09

§ 7.09 Meeting Additional Requirements in Securities Class Actions

[1] Securities Class Actions Governed by PSLRA and SLUSA

The Private Securities Litigation Reform Act (PSLRA) sets out procedures that must be followed, in addition to the requirements of Rule 23, in securities class actions. *See 15 U.S.C. §§ 77z-1, 78u-4.*

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; see also § 2.10[10] above .*

[2] Plaintiff Must File Certification With Complaint

In class actions covered by the PSLRA, each named plaintiff who seeks 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)*. 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] Additional Procedures Apply in Securities Class Actions

The PSLRA contains several other provisions unique to securities class actions, including:

1. 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. *15 U.S.C. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B).*

2. 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).*

3. 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).

4. The 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).*

5. A person may be a lead plaintiff in no more than 5 plaintiff class actions within any 3 year period. *See 15 U.S.C. §§ 77z-1(a)(4), 78u-4(a)(4).*

6. 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).*

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.
- *Federal Securities Act of 1933* § 9.08.
- *Securities Law Techniques* Ch. 92.
- *15 U.S.C. §§ 77z-1, 78u-4* (Private Securities Litigation Reform Act).
- *15 U.S.C. §§ 77p, 78bb(f)* (Securities Litigation Uniform Standards Act).
- *Kircher v. Putnam Funds Trust, 547 U.S. 633, 648, 126 S. Ct. 2145, 165 L. Ed. 2d 92 (2006)* (*28 U.S.C. 1447(d)*'s ban on appellate review of remand orders applies to cases removed under SLUSA).
- *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 82-89, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006)* (leading case on broad scope of SLUSA preemption).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsDerivative ActionsGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewSecurities LawLiabilityPrivate Securities LitigationGeneral Overview



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Chapter 7 CLASS ACTIONS
PART C: FILING ACTION AS CLASS ACTION

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.10

§ 7.10 Understanding Impact of Class Action Filing on Statute of Limitations

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. *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)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.65.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations



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Chapter 7 CLASS ACTIONS
PART D: MOVING FOR CLASS CERTIFICATION

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.11

§ 7.11 Checklist for Moving for Class Certification

☐ Make timely motion for class certification. *See § 7.12 below*.

- ○ Court must decide whether to certify class at early practicable time. *See § 7.13[1] below*.
- ○ Keep in mind that court may certify as to particular issues, create subclasses, or certify a defendant class. *See § 7.13 below*.
- ○ Prepare an order for the court's signature in the event it grants certification. *See § 7.13[6] below*.

☐ If the court's certification decision is unfavorable, consider filing an immediate interlocutory appeal. *See § 7.14 below*.

☐ **Search by Topic:** Civil Procedure > Class Actions > Certification

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersDefendantsCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview



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Chapter 7 CLASS ACTIONS
PART D: MOVING FOR CLASS CERTIFICATION

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.12

§ 7.12 Making Timely Motion for Certification

The class certification motion 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. *Fed. R. Civ. P. 23(c)(1)(B).*



Strategic Point:

The defendant need not wait for the plaintiff to file a motion for certification, but may instead move for an order denying class certification. *See Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 939-941 (9th Cir. 2009)* (Rule 23 does not preclude defendant from bringing "preemptive" motion to deny certification).

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.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 8.
- *Fed. R. Civ. P. 23(c)* (class certification).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsPrerequisitesGeneral Overview



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Chapter 7 CLASS ACTIONS
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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.13

§ 7.13 Understanding Court Action on Certification Motion

[1] Court Decides Whether to Certify Class at Early Practicable Time

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).*



Strategic Point:

A resolution on the merits before certification has no preclusive effect with respect to putative class members other than the named representatives. Thus, the 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. Alternatively, individual resolution may be preferred if 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.

The trial court must conduct a "rigorous analysis" to determine whether the party seeking certification has met requirements of *Fed. R. Civ. P. 23*. The court may certify the class only if the class proponent establishes that all the prerequisites of *Fed. R. Civ. P. 23(a)* and *(b)* have been satisfied. *General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* .

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 Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675-677 (7th Cir. 2001)* . Accordingly, the court may hold an evidentiary hearing to allow proof on whether the requirements of Rule 23 have or have not been met. However, the decision as to whether to hold an evidentiary hearing is within the discretion of the court.

Any factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class, the district court must find that the evidence "more likely than not" establishes each fact necessary to meet the requirements of Rule 23. *See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008)* (district court must consider relevant expert testimony offered by either side).

The district court may permit discovery to determine whether class certification is appropriate, may limit 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. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) ; see Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675-677 (7th Cir. 2001)* . However, the court can resolve issues necessary to the certification decision even if they overlap with merits issues. *See Miles v. Merrill Lynch & Co., 471 F.3d 24, 39-42 (2d Cir. 2006)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.81.*
- *Federal Litigation Guide P 42.210.*
- *Fed. R. Civ. P. 23(c)* (class certification).
- *Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 590 (9th Cir. 2010)* (district courts must satisfy themselves that Rule 23 requirements have been met before certifying a class, which will sometimes, though not always, require inquiry into and preliminary resolution of disputed factual issues, even if those factual issues are relevant to ultimate merits of case).
- *American Honda Motor Co. v. Allen, 600 F.3d 813, 815-816 (7th Cir. 2010)* (when expert's scientific evidence is critical to class certification, district court must perform full *Daubert* analysis and conclusively rule on any challenge to expert's qualifications or submissions prior to ruling on class certification motion).

[2] Court May Certify As to Particular Issues

When appropriate, an action may be certified as a class action with respect to particular issues. *Fed. R. Civ. P. 23(c)(4)*. Such a limited certification may be used to certify a class for determination of liability issues only, with damages issues to be determined in separate pleadings. *See Fed. R. Civ. P. 23*, Committee Note of 1966.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.86[2].*
- *Fed. R. Civ. P. 23(c)* (class certification).

[3] Court May Create Subclasses

When appropriate, the court may divide a proposed class into subclasses. *Fed. R. Civ. P. 23(c)(5)*. When the court certifies subclasses, each subclass is treated as a separate class, and the requirements of *Fed. R. Civ. P. 23* must be applied separately to each subclass. *See Fed. R. Civ. P. 23(c)(5)*.

While the court has the authority to create subclasses, it is not required to do so sua sponte. The party seeking certification has the burden to submit an appropriate certification proposal to the court. *See United States Parole*

Comm'n v. Geraghty, 445 U.S. 388, 407-408, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980) .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.86[1][c].*
- *Fed. R. Civ. P. 23(c)* (class certification).

[4] Court May Certify Settlement-Only Class

A court may properly certify a settlement class, but only if all of the relevant requirements of *Fed. R. Civ. P. 23* are met. The fairness inquiry required for settlements under *Fed. R. Civ. P. 23(e)* does not supersede the requirements of *Fed. R. Civ. P. 23(a)* and *(b). See Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 621-622, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

A court need not inquire whether the case, if tried, would present intractable management problems (*see Fed. R. Civ. P. 23(b)(3)(D)*), because the proposal is that there be no trial. However, Rule 23's other requirements demand undiluted, even heightened, attention in the settlement context. *See Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.161[2][a].*
- *Fed. R. Civ. P. 23(e)* (settlement, voluntary dismissal, or compromise).

[5] Court May Certify Defendant Class

Rule 23 allows the court to certify an action against a class of defendants under Rule 23(b)(1) and (b)(3). *See Fed. R. Civ. P. 23(b)(1),(3).*

Rule 23(b)(2) is usually held to apply only to plaintiff classes. *Fed. R. Civ. P. 23(b)(2)*; *see Tilley v. TJX Cos., 345 F.3d 34, 39-40 (1st Cir.2003)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.41[7].*

[6] Court Issues Written Order on Certification

The court must determine by order whether to certify the action as a class action. *Fed. R. Civ. P. 23(c)(1)(A).*

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(a)* have been met; and

4. Indicate the subsection(s) of *Fed. R. Civ. P. 23(b)* under which the action is proceeding.

Fed. R. Civ. P. 23(c)(1)(B).

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).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.86.*
- *Fed. R. Civ. P. 23(c)* (class certification).

[7] Court May Revise Order or Decertify Class

An order certifying a class action, or refusing to certify a class action, may be altered or amended as appropriate at any time before final judgment. *Fed. R. Civ. P. 23(c)(1)(C).*

If the court redefines a *Fed. R. Civ. P. 23(b)(3)* class so that it includes new members, additional notice and an opportunity to opt out must be afforded the new members. *See Fed. R. Civ. P. 23(c)(1)*, Committee Note of 2003.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.87.*
- *Fed. R. Civ. P. 23(c)* (class certification).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsDecertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsVoluntary Dismissals



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Chapter 7 CLASS ACTIONS
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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.14

§ 7.14 Obtaining Interlocutory 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)* .

However, a court of appeals may, in its discretion, permit an interlocutory appeal from a district court order granting or denying class certification. *Fed. R. Civ. P. 23(f)*.

Timing:

Application must be made to the court of appeals within 14 days after entry of the district court order. *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)* . However, the 14-day period cannot be extended by making another motion for class certification. Instead, the window for Rule 23(f) review closes 14 days after the first motion for certification, and is not re-opened by subsequent renewals and denials of the motion. *See Asher v. Baxter Int'l Inc., 505 F.3d 736, 739 (7th Cir. 2007)* (Seventh Circuit dismissed interlocutory appeal as untimely when district court had denied certification three separate times and plaintiffs had waited until after third decision to apply for review). Furthermore, the deadline for filing an appeal under Rule 23(f) is not extended by the filing of a "motion to clarify" the class certification order. *See In re DC Water & Sewer Auth., 561 F.3d 494, 496 (D.C. Cir. 2009)* (motion to clarify did not "restart the Rule 23(f) clock", when the district court denied the motion and no change in class certification resulted).

An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders. *Fed. R. Civ. P. 23(f)*.

A named plaintiff may appeal a denial of class certification even if the named plaintiff's own individual claims have become moot. The named plaintiff retains a personal stake in obtaining class certification sufficient to assure that the constitutional case or controversy requirement is satisfied. *See United States Parole Comm'n v. Geraghty, 445 U.S. 388, 403-404, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)* .

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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsAppellate ReviewCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersConstitutional LawThe JudiciaryCase or ControversyStandingParticular Parties



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Chapter 7 CLASS ACTIONS
PART E: PROVIDING NOTICE TO CLASS MEMBERS AND OPPORTUNITY TO OPT OUT

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.15

§ 7.15 Checklist For Providing Notice to Class Members

☐ Consider that notice requirements applying to a class certified under *Fed. R. Civ. P. 23(b)(1)* or *(2)* differ from the notice requirements applying to a class certified under *Fed. R. Civ. P. 23(b)(3). See §§ 7.16, 7.17 below.*

☐ In Rule 23(b)(3) class actions, draft notice for court's approval that complies with Rule 23 and court's requirements. *See § 7.17 below.*

☐ Consider that plaintiff ordinarily must bear the cost of providing notice to the class. *See § 7.18 below.*

☐ Consider that interlocutory appeal of orders relating to notice may be available. *See § 7.19 below.*

☐ **Search by Topic:**

- ○ Civil Procedure > Class Actions > Compromises
- ○ Civil Procedure > Class Actions > Opt-Out Provisions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview



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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.16

§ 7.16 Directing Notice in Rule 23(b)(1) or (2) Class Actions

[1] Notice Is Discretionary With Court

For any class certified under Rule 23(b)(1) or (2), the court "may" direct appropriate notice to the class. For these types of class actions, notice is discretionary with the court:

> 1. Rule 23(b)(1) class actions, which are appropriate when separate litigation might impair the interests of the party opposing the class or other class members, including a declaration of the competing rights of the parties as to their interests in a limited fund. *See Fed. R. Civ. P. 23(b)(1)*; *Ortiz v. Fibreboard Corp., 527 U.S. 815, 841-842, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* ; *see also § 7.05[2], [3] above*.
>
> 2. Rule 23(b)(2) class actions, which are appropriate when a class seeks primarily injunctive or declaratory relief with respect to the class as a whole. *Fed. R. Civ. P. 23(b)(2)*. Although these types of class actions do not seek money damages as the primary remedy, these actions may also include secondary claims for damages); *see also § 7.05[4] above*.

Fed. R. Civ. P. 23(c)(2)(A).

Because any notice is discretionary in (b)(1) and (b)(2) class actions, the court has complete flexibility as to the method and type of notice it may order. *See Fed. R. Civ. P. 23(c)(2)(A)*. Therefore, in ordering notice in (b)(1) and (b)(2) class actions, the parties and the court should give consideration to cost-effective notice mechanisms. *See Fed. R. Civ. P. 23*, Committee Note of 2003.

Fed. R. Civ. P. 23(c) provides for notice to the class of the court's certification decision. If the action is settled, the class members also must be given notice of the settlement. *See Fed. R. Civ. P. 23(e)(1)(B)*. Notice of other matters also may be ordered by the court *See Fed. R. Civ. P. 23(d)*.

[2] Opportunity to Opt Out Is Ordinarily Not Required

Members of a Rule 23(b)(1) or (2) class action are not entitled to an opportunity to opt out, even if the court has ordered that class members receive notice of the certification and pendency of the class action. *See Fed. R. Civ. P. 23(c)(2)*, Committee Note of 2003. However, the court has discretion to allow the class members an opportunity to opt out. *See Fed. R. Civ. P. 23(d).*



Strategic Point:

Allowing class members to opt out (and potentially pursue separate suits) may undermine the purposes of a (b)(1) or (b)(2) action. *See Eubanks v. Billington, 110 F.3d 87, 94-96 (D.C. Cir. 1997)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.100.*
- *Bender's Federal Practice Forms* Form No. 23.51.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview



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Chapter 7 CLASS ACTIONS
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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.17

§ 7.17 Directing Notice in Rule 23(b)(3) Class Actions

[1] Notice Is Mandatory

For any class action certified under *Fed. R. Civ. P. 23(b)(3)*, the court *must* direct the best notice practicable under the circumstances to class members. The notice must concisely and clearly state all the following in plain, easily understood language:

1. The nature of the action;

2. The definition of the class;

3. The class claims, issues, or defenses;

4. That a class member may enter an appearance through counsel if the member so desires;

5. That the court will exclude from the class any member who requests exclusion;

6. The time and manner for requesting exclusion; and

7. That a class judgment, whether or not favorable to the class, will be binding on those who have received notice, who did not request to be excluded, and whom the court finds to be members of the class.

Fed. R. Civ. P. 23(c)(2)(B); *see also § 7.05[5] above*.

This notice is required not only by *Fed. R. Civ. P. 23*, but by due process. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808, 812-814, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* .

[2] Notice Must Be "Best Notice Practicable"

The court must direct to class members the "best notice practicable under the circumstances," including individual

notice to all members who can be identified through reasonable effort. *Fed. R. Civ. P. 23(c)(2)(B)*. If class members can be readily identified, personalized notice is necessary. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* . However, in some circumstances, the best notice practicable may be by other means, such as by publication in newspapers. *See Silber v. Mabon, 18 F.3d 1449, 1455 (9th Cir.1994)* .

[3] Class Members Must Be Afforded Opportunity to Opt Out

The notice to class members must clearly state that the court will exclude from the class any member who requests exclusion, as well as when and how members may elect to be excluded. The notice must also state that a class judgment, whether favorable or unfavorable to the class, will be binding on class members who have received notice and who do not request to be excluded. *Fed. R. Civ. P. 23(c)(2)(B)*.

An opportunity to opt out is required by due process; a member of a money damages *Fed. R. Civ. P. 23(b)(3)* class who is not afforded an opportunity to opt out is not bound by the class judgment. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808, 812-814, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* .

[4] Notice Must Set Deadlines for Action by Class Members

The notice must state how and when members may elect to be excluded. *Fed. R. Civ. P. 23(c)(2)(B)*. Accordingly, the notice should include a deadline by which class members must respond if they wish to exercise the right to opt out. When class members seek to opt out but fail to meet the deadline set by the court, the lack of timeliness may be excused under Rule 6 if the class member demonstrates excusable neglect. *Fed. R. Civ. P. 6(b)(1)(B)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.101 -23.104*.
- *Bender's Federal Practice Forms* Form No. 23.50.
- *Federal Litigation Guide PP 42.221, 42.222*.
- *Fed. R. Civ. P. 6(b)(1)(B)* (extension of time based on excusable neglect).
- *Fed. R. Civ. P. 23(c)(2)* (notice of class action).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview



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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.18

§ 7.18 Bearing Cost of Notice

The plaintiff in a plaintiff class action ordinarily must bear the cost of providing notice to the class. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* . However, the defendant may be required to bear some or all of the expense if the cost to the defendant is insubstantial or if the defendant would bear that expense in the ordinary course of business. *See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 355 n22, 358-359, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.106.*
- *Federal Litigation Guide P 42.224.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview



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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.19

§ 7.19 Appealing Orders Relating to Notice May Be Available

The court's order with respect to notice may in some cases be considered a collateral order that is subject to interlocutory appeal. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* . However, the courts of appeals may exercise jurisdiction over such an order only when there is a significant likelihood that a substantial portion of the class would not receive notice in the absence of appellate review. *See Blum v. BankAtlantic Fin. Corp, 925 F.2d 1357, 1360 (11th Cir.1991)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.108.*
- *Federal Litigation Guide P 42.223.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsAppellate ReviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders



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Chapter 7 CLASS ACTIONS
PART F: SEEKING APPOINTMENT AS CLASS COUNSEL AND REQUESTING FEE AWARD

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.20

§ 7.20 Checklist for Seeking Appointment As Class Counsel and Requesting Fee Award

☐ File formal application to be appointed class counsel, considering. *See §§ 7.21* and *7.22 below*.

- ○ The court must appoint counsel and if none of the applicants are satisfactory, the court may deny class certification or may invite new applications.
- ○ The primary obligation of class counsel is to the class rather than to the class representative.
- ○ The court may consider a broad range of factors when appointing class counsel and may designate interim counsel.

☐ Decide whether to request a fee award, considering. *See § 7.23 below*.

- ○ Fees must be authorized by statute or by agreement of the parties.
- ○ A request for an award of attorney's fees and nontaxable costs is filed as a Rule 54(d)(2) motion.
- ○ Reasonable notice of the motion must be given to class members, as directed by the court.

☐ **Search by Topic:** Civil Procedure > Class Actions > Class Counsel

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselAppointmentsCivil ProcedureClass ActionsClass CounselFeesLegal EthicsClient RelationsAttorney FeesGeneral Overview



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Chapter 7 CLASS ACTIONS
PART F: SEEKING APPOINTMENT AS CLASS COUNSEL AND REQUESTING FEE AWARD

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.21

§ 7.21 Appointing Class Counsel

[1] When Court Certifies Class, Court Also Appoints Class Counsel

When a court certifies a class, the court must also appoint class counsel unless a specific statute provides otherwise. *Fed. R. Civ. P. 23(g)(1)*. The appointment must be made in the court's certification order. *Fed. R. Civ. P. 23(c)(1)(B)*.

The court may direct potential applicants for class counsel to provide information on any subject the court deems pertinent to the appointment. *Fed. R. Civ. P. 23(g)(1)(C)*.

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. *Fed. R. Civ. P. 23(g)(2)*.

If the court determines that none of the applicants would be satisfactory class counsel, the court may deny class certification. Alternatively, it may delay certification and invite new applications, or make any other appropriate order. *Fed. R. Civ. P. 23(g)*, Committee Note of 2003.

[2] Factors Considered by Court

In appointing class counsel, the court considers:

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.

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. *Fed. R. Civ. P. 23(g)(1)(B).*

[3] Attorneys Seeking Appointment May File Formal Application

Those attorneys that desire 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)*, Committee Note of 2003.

[4] Appointed Attorney Must Fairly and Adequately Represent the Interests of the Class

An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class. *Fed. R. Civ. P. 23(g)(4).* The primary obligation of class counsel is to the class rather than to the class representatives. 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. *Fed. R. Civ. P. 23(g)*, Committee Note of 2003.

[5] Court May Resolve Disputes Between Counsel and Class Reprentative

Control of the class action is not left completely in the control of class counsel. 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)* .

[6] Appointment Order May Address Attorney's Fees and Nontaxable Costs

The order appointing class counsel may include provisions about the award of attorney's fees or nontaxable costs. *Fed. R. Civ. P. 23(g)(1)(D).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.120 -23.125.*
- *Bender's Federal Practice Forms* Form No. 23.160 .
- *Federal Litigation Guide P 42.86.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 8.
- *Fed. R. Civ. P. 23(g)* (appointment of class counsel).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselAppointmentsCivil ProcedureClass ActionsClass CounselFees



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Chapter 7 CLASS ACTIONS
PART F: SEEKING APPOINTMENT AS CLASS COUNSEL AND REQUESTING FEE AWARD

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.22

§ 7.22 Designating Interim Counsel

The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action. *Fed. R. Civ. P. 23(g)(3).*

Most often, pre-certification matters will be handled by the attorneys who filed the action rather than by specially designated counsel, however. *See Fed. R. Civ. P. 23(g)*, 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)*, Committee Note of 2003.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.121.*
- *Bender's Federal Practice Forms* Form No. 23:162.
- *Fed. R. Civ. P. 23(g)* (appointment of class counsel).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 7 CLASS ACTIONS
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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.23

§ 7.23 Requesting Fee Award

[1] Claim for Award Made by Rule 54 Motion

In an action certified as a class action, the court may award reasonable attorney's fees and costs if authorized by law or by an agreement of the parties. A claim for an award must be made by motion under Rule 54(d)(2) at a time set by the court. *Fed. R. Civ. P. 23(h)(1).*



Timing:

The time for filing a motion for attorney's fees in a class action must be set by the court. *Fed. R. Civ. P. 23(h)(1).* In cases involving a proposed settlement, the court should 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 those cases litigated to judgment, the court also may order prompt filing to expedite notice to the class under Rule 23(h). *See Fed. R. Civ. P. 23(h)(1)*, Committee Note of 2003.

Rule 23(h) provides procedures for the court to follow when awarding attorney's fees pursuant to a statute or pursuant to a fee agreement or settlement agreement. Rule 23 does not create any separate basis for a fee award. *See Fed. R. Civ. P. 23(h)*, Committee Note of 2003.

Notice of the motion requesting fees must be served on all parties and, for motions for fees that are made by class counsel, directed to class members in a reasonable manner. *Fed. R. Civ. P. 23(h)(1)*; *see Fed. R. Civ. P. 5(b).* The notice must be sufficient to provide a basis for class members to exercise their right to object. Notice should be sent sufficiently in advance of the objection deadline to afford class members an opportunity to object. *Fed. R. Civ. P. 23(h)(2)*, Committee Note of 2003.

[2] Class Member May Object to Motion

A class member, or a party from whom payment is sought, may object to the motion. *Fed. R. Civ. P. 23(h)(2).* The court may allow an objector discovery relevant to the objections. *Fed. R. Civ. P. 23(h)(2)*, Committee Note of 2003.

[3] Notice of Fee Motion Provided to Class Members

When a class action is settled, the court must order notice of the settlement to the class members. *Fed. R. Civ. P. 23(e)(1)(B)*. Notice of class counsel's fee motion should be combined with notice of the proposed settlement. *Fed. R. Civ. P. 23(h)(1)*, Committee Note of 2003.

Rule 23(h) requires "reasonable" notice of the fee motion, not the "best notice practicable" that is required to advise class members that a class has been certified. *See Fed. R. Civ. P. 23(c)(2)(B)*.

[4] Court May Hold Hearing on Motion

The court may hold a hearing on a motion for an award of attorney's fees. The court may also refer issues related to the amount of the award to a special master or to a magistrate judge. *Fed. R. Civ. P. 23(h)(3),(4)*. *Fed. R. Civ. P. 23* does not require a formal hearing in all cases. *Fed. R. Civ. P. 23(h)(3)*, Committee Note of 2003.

[5] Court Must Find Facts and State Conclusions of Law

The court must find the facts and state its conclusions of law on the motion for an award of attorney's fees pursuant to Rule 52(a). *Fed. R. Civ. P. 23(h)(3)*; *see Fed. R. Civ. P. 52(a)*. Any award of attorney's fees and nontaxable costs must be reasonable. *Fed. R. Civ. P. 23(h)*.

Courts may choose between two distinct methods to calculate a reasonable attorney's fee in the class action context. The first is the lodestar method, under which the court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the plaintiff and then multiplies that figure by an appropriate hourly rate. A multiplier is typically applied to the lodestar; this multiplier typically represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors. The second calculation method is known as the percentage of recovery method; the court sets some percentage of the recovery as a fee, and in determining what percentage to award, looks to the same factors that are used to determine the multiplier for the lodestar. *Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 47 (2d Cir. 2000)* .

[6] Class Action Fairness Act Provides Special Rules for Calculating Fee Awards in Coupon Settlements

The Class Action Fairness Act of 2005 provides a specific mechanism for calculating attorney 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 award of attorney's fees to class counsel attributable to the class recovery of coupons on the value to class members of the coupons that are actually redeemed. *28 U.S.C. § 1712(a), (c)(1)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.124, 23.125*.
- *Bender's Federal Practice Forms* Form No. 23:170.
- *Federal Litigation Guide P 42.249*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 8.
- *28 U.S.C. §§ 1712, 1713* (attorney's fees under CAFA).

- *Fed. R. Civ. P. 23(h)* (attorney's fees and nontaxable costs).
- *Fed. R. Civ. P. 52(a)* (findings and conclusions by the court).
- *Fed. R. Civ. P. 54(d)* (costs and attorney's fees).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselAppointmentsCivil ProcedureClass ActionsClass CounselFeesCivil ProcedureSettlementsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards



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Chapter 7 CLASS ACTIONS
PART G: SETTLING OR DISMISSING CLASS ACTION

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.24

§ 7.24 Checklist For Settling or Dismissing Class Action

- ☐ Consider that parties may voluntarily dismiss or settle claims *before* certification. *See § 7.25 below*.
- ☐ To obtain court approval of a settlement after certification.
  - ○ Provide notice to federal and state officials. *See § 7.26[6] below*.
  - ○ Ensure that the negotiated settlement is fair, reasonable, and adequate. *See § 7.26[1], [2] below*.
- ☐ Provide notice to all class members, as directed by the court. *See § 7.26[3] below*.
- ☐ Attend hearing on motion and obtain court's findings on proposed settlement. *See § 7.26[5] below*.
- ☐ Ensure that judgment indicates who is bound. *See § 7.26[8] below*.
- ☐ **Search by Topic:** Civil Procedure > Class Actions > Compromises

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsVoluntary DismissalsCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral Overview



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Chapter 7 CLASS ACTIONS
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1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.25

§ 7.25 Voluntarily Dismissing or Settling Claims Before Certification

Rule 23 requires court approval of a voluntary dismissal or settlement, after notice to the class members, but the requirement of court approval applies only to a "certified class". *See Fed. R. Civ. P. 23(e)*. Before certification, plaintiffs may settle or dismiss their individual claims as in an individual action. *See Fed. R. Civ. P. 23(e)*, 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*; *see also § 4.36 above*. 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).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 7 CLASS ACTIONS
PART G: SETTLING OR DISMISSING CLASS ACTION

1-7 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 7.26

§ 7.26 Obtaining Court Approval When Settling or Voluntarily Dismissing After Certification

[1] Court Must Find That Settlement or Voluntary Dismissal Is Fair, Reasonable, and Adequate

The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. *Fed. R. Civ. P. 23(e)*. The court may give its approval only after a finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. *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)*, 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. *Fed. R. Civ. P. 23(e)*, Committee Note of 2003. Additionally, the parties seeking approval of the settlement, voluntary dismissal, or compromise must file a statement identifying any agreement made in connection with the proposed settlement, dismissal, or compromise. *Fed. R. Civ. P. 23(e)(3)*.

[2] Court Will Consider Various Factors to Determine Whether Settlement Is Fair

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. *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)* . Nevertheless, a settlement may include modest "incentive awards" payable to the class representatives. *See Staton v. Boeing Co., 327 F.3d 938, 976-978 (9th Cir. 2003)* .

In a proposed settlement of a class action commenced on or after February 18, 2005, under which class members would 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. *28 U.S.C. § 1712(e)*.

[3] Court Must Order Notice of Proposed Settlement and Allow Opportunity to Object

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. *Fed. R. Civ. P. 23(e)(1)*. Notice is not required when the settlement takes place before certification because only the named parties are bound by such a settlement. *Fed. R. Civ. P. 23(e)(1)(B)*, Committee Note of 2003.

The court must direct notice of a *settlement* regardless of the subsection of Rule 23(b) under which the action is certified, in contrast to certification notices. The court is required to direct notice of *certification* of Rule 23(b)(3) class actions, but notice of certification of *Fed. R. Civ. P. 23(b)(1)* and *(2)* class actions is discretionary with the court. *Fed. R. Civ. P. 23(c)(2)*.



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)*, Committee Note of 2003.

Rule 23(e)(1)(b) requires "reasonable" notice, not the "best notice practicable" such as is required to advise class members that a class has been certified under Rule 23(b)(3).

Any class member may object to a proposed settlement, voluntary dismissal, or compromise. *Fed. R. Civ. P. 23(e)(4)(A)*. An objection may be withdrawn only with the court's approval. *Fed. R. Civ. P. 23(e)(5)*. 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. *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. *Fed. R. Civ. P. 23(e)(4)*.

[4] Objectors Have Limited Right to Discovery

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. *United Wisc. Servs. v. Mylan Labs, Inc., 205 F.R.D. 24, 26 (D.D.C. 2001)* .

[5] Court Must Hold Hearing and Make Findings

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. *Fed. R. Civ. P. 23(e)(1)(C)*; *see 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. *Fed. R. Civ. P. 23(e)*, Committee Note of 2003.

[6] Involuntary Dismissals Do Not Require Prior Notice to Class

Rule 23 does not require notice to class members of *involuntary* dismissal, whether before or after certification. Therefore, the court may make order an involuntary dismissing a class action without prior notice to the class or holding a hearing at which class members may appear and object.

[7] 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 state and federal officials with notice of the proposed settlement. Notice must be given to a state official of each state in which a class member resides. *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 at *12 U.S.C. § 1813*), the defendant must notify its federal and state regulatory agencies. *See 28 U.S.C. § 1715(a), (c)*.

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. *28 U.S.C. § 1715(d)*. A class member may refuse to comply with and may choose not to be bound by a settlement or consent decree in a class action if the class member demonstrates that the required notice to state and federal officials was not given. *28 U.S.C. § 1715(e)*.

[8] Judgment Must Indicate Who Is Bound

When a class action is maintained 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. *Fed. R. Civ. P. 23(c)(3)*.

When a class action is maintained 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. *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 of Richmond, 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. 23:121, 23:150.
- *Federal Litigation Guide PP 42.240 -42.252*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 8.
- *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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsVoluntary DismissalsCivil ProcedureDismissalsVoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview



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Chapter 8 DISCOVERY

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§ 8.syn Synopsis to Chapter 8: DISCOVERY

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Chapter 8 DISCOVERY
PART A: PROCEDURAL CONTEXT

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.01

§ 8.01 Procedural Context--Conducting Discovery

In federal court practice, discovery is the main process by which parties learn and assess the facts of the case. Facts may be obtained from other parties in the action or from nonparties.

Creating a plan and a strategy for discovery is critical to understanding the merits and to achieving the optimal resolution for the case. A proper discovery plan establishes a focused and organized approach for obtaining documents, locating evidence, and identifying witnesses.

In modern discovery practice, electronically stored information is of critical importance. Parties have a duty to become familiar with their own electronically stored information: where it is and how it is stored. In addition, parties must engage in an early dialog with adversaries as to the scope of preservation, the method of searching for responsive electronically stored information, and the form or forms in which electronically stored information will be produced. In addition, parties must be able to explain disputes regarding the production of electronically stored information to the court and to justify their objections based on overbreadth, cost, and burden. Finally, parties have a duty to place a reasonable litigation hold on relevant and responsive information that may need to be produced in litigation.

Always consult the local rules in the district to determine if there are specific provisions governing discovery. Local rules may regulate such matters as page formats, meet-and-confer obligations, and filing deadlines. The judge's own standing order may also have rules relating to discovery matters.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview



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Chapter 8 DISCOVERY
PART B: CONDUCTING ORAL DEPOSITIONS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.02

§ 8.02 Checklist for Oral Depositions

☐ Planning oral depositions. *See § 8.03 below*.

- ○ Review Rule 30.
- ○ Determine who will be deposed and the proposed order of the depositions.
- ○ If seeking deposition testimony from a corporation through individually named employees, determine whether deponent(s) can testify on behalf of corporation.
- ○ If proposed deponent is opposing counsel, determine whether circumstances exist for deposition of opposing counsel.
- ○ Determine whether leave of court is required to take any deposition because deponent is incarcerated.
- ○ Determine if opposing counsel will stipulate to allowing depositions when circumstances would otherwise require leave of court.
- ○ If leave of court is required, draft motion for leave, in accordance with standard motion procedure and local rule requirements.
- ○ Consider available recording methods.

☐ Giving notice of oral deposition. *See § 8.04 below*.

- Determine whether person to be deposed is party or nonparty.
- Determine time and place for deposition.
- If seeking to take deposition by telephone or other remote electronic means, obtain opposing counsel's stipulation or move for court order.
- Prepare notice of taking oral deposition to a party.
- Serve notice on all parties.
- If documents are requested of party deponent, serve 30 days' notice with an accompanying request for production of documents and things and set date for production at the taking of the deposition.
- Prepare subpoena if taking deposition of nonparty.
- If documents are requested of nonparty deponent, serve nonparty with subpoena to compel attendance, testimony, and production of documents and set date for production at the taking of the deposition.

☐ Responding to notice of deposition. *See § 8.05 below*.

- Review notice of deposition and determine whether there are any irregularities in notice, including lack of qualifications of deposition officer and whether there are any grounds for motion to quash or motion for protective order based on discovery sought or manner in which deposition will be conducted.
- Serve written objections promptly.
- If appropriate, draft motion to quash notice of deposition or subpoena and file and serve on all parties.
- If appropriate, draft motion for protective order on grounds of annoyance, embarrassment, oppression or undue burden or expense and file and serve on all parties.
- If notice names a corporation or entity, designate one or more persons who will testify on behalf of the corporation or entity and provide notice of additional methods of recording, if any.

☐ Conducting an oral deposition. *See § 8.06 below*.

○ Make arrangements to take the deposition, including engaging a deposition officer and the method of recording.

○ Proceed with examination and cross-examination of deponent.

○ Suspend deposition if deponent fails to answer questions or a party or deponent demands to suspend the deposition to seek a protective order.

○ Conclude the deposition and have deposition officer so note on the record.

☐ Objecting to the conduct of oral deposition. *See § 8.07 below*.

○ Attend deposition as scheduled.

○ If a party that noticed the deposition fails to attend and proceed with the deposition, file and serve motion for award of expenses.

○ If a deponent fails to attend because a party did not serve a subpoena, file and serve a motion for award of expenses.

○ State objections concisely, and in a non-argumentative and non-suggestive manner.

○ State objections during deposition.

○ Instruct deponent not to answer certain questions to preserve a privilege, enforce a limitation directed by the court, or to present a motion to terminate or limit examination.

○ Consider whether to move for protective order because examination is being conducted in bad faith, or is being conducted in such a manner as unreasonably to annoy, embarrass or oppress deponent or party.

○ If deponent wants to review transcript before it is final, request must be made before the deposition is concluded.

☐ Compelling attendance, testimony or production. *See § 8.08 below*.

○ Determine appropriate remedy if deponent fails to appear, nonparty deponent fails to appear, deponent fails to answer questions during deposition or if corporation or entity fails to designate individuals to testify on its behalf.

○ Determine appropriate remedy if deponent fails to answer after being directed by

the court.

☐ Obtaining copies of and reviewing transcript. *See § 8.09 below*.

○ Review transcript on notification by deposition officer that it is available.

○ Make changes within 30 days of notification of the availability of the transcript and sign statement.

○ Noticing party should store transcript to protect it from loss, destruction, tampering or deterioration. It is not filed until used in proceeding or court orders filing.

○ Opposing party should obtain copy of transcript and file a motion to suppress portions that are subject to errors or irregularities.

☐ Using deposition. *See § 8.10 below*.

○ Determine which parts of deposition are sought to be used at trial in accordance with Federal Rules of Evidence, including for purposes of impeachment, against an adverse party for any purpose, and on court finding that a witness is unavailable.

○ If seeking to prevent use of the deposition, file a motion to suppress all or part of the deposition.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Oral Depositions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedurePretrial MattersSubpoenasCivil ProcedureTrialsDepositions



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Chapter 8 DISCOVERY
PART B: CONDUCTING ORAL DEPOSITIONS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.03

§ 8.03 Understanding Oral Depositions

[1] Deposition Is Record of Testimony Taken Outside Courtroom

A deposition is a record of testimony taken outside the courtroom that has been certified in conformity with the Federal Rules of Civil Procedure so that a court may regard it as equivalent to testimony delivered inside the courtroom under oath. *Windsor Shirt Co. v. New Jersey Nat'l Bank, 793 F. Supp. 589, 606 (E.D. Pa. 1992) , aff'd, 989 F.2d 490 (3d Cir. 1993) .*

Although depositions are defined in terms of constituting sworn testimony equivalent to that given in open court, depositions are used most often for gathering information and supporting pretrial motion practice rather than for use at trial or as a substitute for testimony at trial, although these are also important functions of the deposition.

[2] Depositions Limited in Number

The number of depositions (both written and oral) is generally limited to 10 for each side. *Fed. R. Civ. P. 30(a)(2)(A)(i)* (leave required to take more than 10 depositions).

[3] Party or Nonparty May Be Deposed

Any person may deposed. *Fed. R. Civ. P. 30(a)(1).* Unlike interrogatories or requests for admission, which may not be addressed to nonparties, depositions of nonparties are permitted as of right. *See Fed. R. Civ. P. 30(a)(1), 33(a)(1), 36(a)(1).*

[4] Business Entity May Be Deposed

To depose a corporation or other business entity, a party must consider whether to notice the deposition of the corporation or entity itself or notice the deposition of specific individuals. If a party notices the deposition of a corporation or entity, the corporation or entity must designate a person or persons to testify on its behalf. The deposition is considered a single deposition towards a party's deposition limit. *See Fed. R. Civ. P. 30(b)(6).*

[5] Counsel May Be Deposed in Limited Circumstances

Depositions of counsel are allowed in limited circumstances. For example, depositions of counsel may occur when no other means exist to obtain the information, the information sought is relevant and non-privileged and the information is crucial to the preparation of the case. *See Theriot v. Parish of Jefferson County, 185 F.3d 477, 491 (5th Cir. 1999)* (federal courts disfavor deposing party's attorney; plaintiff's assertions as to what information might be obtained was speculative and information sought was available from the record in the case); *Shelton v. American Motors, 805 F.2d 1323, 1327 (8th Cir. 1986)* (prescribing criteria for determining whether deposition of counsel should proceed).

[6] Expert Whose Opinion Will Be Presented at Trial May Be Deposed

An expert whose opinion will be presented at trial may be deposed. *Fed. R. Civ. P. 26(b)(4)(A).*

[7] Leave of Court Required In Specific Circumstances

A party must obtain leave of court to take an oral deposition if the parties have not stipulated to the deposition and:

1. The deposition would result in more than 10 depositions being taken under Rule 30 (oral depositions) or 31 (written depositions) by the plaintiffs, or by the defendants, or by the third-party defendants;

2. The deponent has already been deposed in the case; or

3. The party seeks to take the deposition before the parties have conferred as required by Rule 26(f), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in the United States until after that time.

Fed. R. Civ. P. 30(a)(2)(A).

Leave is also required if the deponent is confined in prison. *Fed. R. Civ. P. 30(a)(2)(B).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.02 -30.06.*
- *Federal Litigation Guide* Ch. 16.
- *Bender's Federal Practice Forms* Form Nos. 30:1-30:8.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 8.
- *Fed. R. Civ. P. 30* (depositions by oral examination).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyGeneral Overview



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.04

§ 8.04 Giving Notice of Oral Deposition

A notice of deposition must provide reasonable notice and 30 days' notice is required if the notice of deposition is accompanied by a request for production. *Fed. R. Civ. P. 30(b)(2), 34.*

The notice must be in writing and specify the time and date of the deposition, name and address of the deponent, if known (or a description sufficient to identify the person or the particular class or group to which the person belongs), materials to be produced pursuant to subpoena duces tecum, and the method for recording testimony. *Fed. R. Civ. P. 30(b)(1), (2).* Notice (and any accompanying request for production or subpoena duces tecum) must be served on all parties. *Fed. R. Civ. P. 30(b)(1).*



Warning:

The attendance of a nonparty deponent at a written deposition may be compelled by subpoena. *Fed. R. Civ. P. 30(a)(1).* The location of the deposition is therefore limited by the court's subpoena power. The deposition must take place within 100 miles of the place where the nonparty deponent resides, is employed, or regularly transacts business in person. *See Fed. R. Civ. P. 45(c)(3)(A)(ii).*

A party taking the deposition bears the cost of recording unless another party notices an additional method of recording, which is borne by the party seeking that method. *Fed. R. Civ. P. 30(b)(3)(A).*

A deposition by telephone or videoconference may be allowed by stipulation of the parties, or by leave of court. *Fed. R. Civ. P. 30(b)(4).* Also, the parties may stipulate to alter the time and place of the deposition, the manner of the deposition and before whom the deposition is to take place. *Fed. R. Civ. P. 29(a).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 30.20.*
- *Bender's Federal Practice Forms* Form Nos. 30:20-30:45.

- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 8.
- *Fed. R. Civ. P. 29(a)* (stipulation regarding deposition procedure).
- *Fed. R. Civ. P. 30(b)* (notice of deposition).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedurePretrial MattersSubpoenas



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.05

§ 8.05 Responding to Notice of Deposition

A responding party may object to a notice of deposition on the grounds, *inter alia,* that the noticing party failed to comply with the requirements for noticing a deposition, the deposition officer identified in the notice is unqualified or the discovery sought or the manner in which the deposition will be conducted fails to comply with the procedural requirements.



Strategic Point:

Serving objections to the notice will preserve them and ensure that the objections are not waived. *See Fed. R. Civ. P. 32(d)(1).* The objections will not prevent the deposition from proceeding as scheduled, however. A responding party must determine whether there are grounds to proceed with a motion to quash or motion for protective order. *See Fed. R. Civ. P. 26(b)(2), (c); see also §§ 8.62 -8.65 below.* A motion to quash, or a motion for protective order to prohibit a deposition, generally is not granted except in extraordinary circumstances. *See, e.g., Thomas v. IBM, 48 F.3d 478, 483 (10th Cir. 1995)* .

The party responding to the notice may seek a protective order in the court where the action is pending or alternatively, the court in the district where the deposition is to be taken. Good cause must be shown in the moving papers, and the motion must be accompanied by a certification that the moving party has conferred or attempted to confer in good faith in an effort to resolve the dispute before seeking court action. *Fed. R. Civ. P. 26(c)(1).*

A court may make any protective order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *Fed. R. Civ. P. 26(c)(1).*

A protective order may order, *inter alia,* any of the following:

1. That the deposition not be taken;

2. That the deposition be taken on specified terms and conditions, including a designation of the time and place;

3. That the discovery may be had by another method of discovery;

4. That certain matters not be inquired into, or that the scope of questioning be limited to certain matters;

5. That the deposition transcript be sealed and thereafter opened only by order of the court;

6. That a trade secret or other confidential research not be revealed or revealed in a designated manner; or

7. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as the court directs.

See Fed. R. Civ. P. 26(c)(1)); *see also §§ 8.62 -8.65 below*.

A court may award expenses to the prevailing party for costs incurred in relation to the motion for a protective order. *Fed. R. Civ. P. 26(c)(3)*.

Finally, a responding party must prepare the deponent for the deposition. The deponent must be prepared in the same manner as for trial. Counsel should review the topics to be covered, strategies which may be used to question the deponent and strategies to defend the deposition. The deponent should be cautioned not to volunteer non-responsive information and to confine testimony to what the deponent actually knows or remembers. Counsel should inform the deponent about the concept of refreshing recollection and to avoid conversation with the other party's counsel. Additionally, counsel should instruct the deponent about the purpose of objections and how to respond to questions seeking privileged information.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.60, 26.101 -26.105*.
- *Federal Litigation Guide* Ch. 17.
- *Bender's Federal Practice Forms* Form Nos. 26:100-26:103, 26:160, 30:50-30:53.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 8.
- *Fed. R. Civ. P. 26(c)* (protective orders).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective Orders



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Chapter 8 DISCOVERY
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.06

§ 8.06 Conducting an Oral Deposition

A deposition officer must be authorized to administer oaths or be appointed by the court. *See Fed. R. Civ. P. 28(a)(1).* The deposition officer cannot have any relationship to the parties, counsel, or have a financial interest in the action. *Fed. R. Civ. P. 28(c).*

A deposition may be taken abroad subject to the laws of the particular country involved. A court issues a commission or a letter of request on application and notice and on terms that are just and appropriate. *Fed. R. Civ. P. 28(b).*

A deposition officer must make a statement on the record to begin, and include the deposition officer's name and business address, the date, time and place of the deposition, the name of deponent, the administration of oath, and the identification of all persons present. *Fed. R. Civ. P. 30(b)(5).* The officer must personally, or by someone acting under the officer's direction, record the testimony of the witness. *Fed. R. Civ. P. 30(c)(1).*

Other parties may submit written questions, which are transmitted to the officer who propounds them to the deponent and then records the answers. *Fed. R. Civ. P. 30(c)(3).*

The examination proceeds subject to the various objections noted on the record. *Fed. R. Civ. P. 30(c)(2).* Testimony may be suspended, however, for the deponent or a party to move for protective order. *Fed. R. Civ. P. 30(d)(3)*; *see Fed. R. Civ. P. 26(c).*

Examination and cross-examination proceeds as permitted at trial under the Federal Rules of Evidence, but *Federal Rules of Evidence 103* and *615* do not apply at a deposition. *Fed. R. Civ. P. 30(c)(1)*; *see also Fed. R. Evid. 103* (objections and court rulings on evidence); *Fed. R. Evid. 615* (sequestration of witnesses).

At the conclusion of the deposition, it must be noted on the record that the deposition is complete and stipulations by counsel must also be set forth on the record.

Stipulations may relate to custody of the transcript and recordings and the exhibits or other matters. *Fed. R. Civ. P. 30(b)(5).*

The duration of each deposition is limited to seven hours unless otherwise stipulated or otherwise ordered by the court. *Fed. R. Civ. P. 30(d)(1)*. Consistent with the principles set forth in Rule 26(b)(2), the court must allow additional time for a fair examination. Circumstances that might warrant additional time include:

1. The need for an interpreter;

2. The deposition covers events over a long period of time;

3. The deponent is unprepared;

4. Documents were requested but not produced;

5. Each party in a multiparty case needs to examine the witness;

6. Additional time is needed to depose multiple theories of the expert; and

7. The examination has been limited by improper and lengthy objections or the proceedings have been delayed by lengthy consultations with counsel.

If the court finds that any impediment, delay or other conduct has frustrated the fair examination of the deponent, it may impose on the persons responsible an appropriate sanction, including reasonable costs and attorneys' fees. *Fed. R. Civ. P. 30(d)(2)*; *see GMAC Bank v. HTFC Corp., 248 F.R.D. 182, 193-195* (court sanctioned deponent for engaging in hostile and vulgar conduct, frustrating fair examination by refusing to answer and interjecting impermissible objections, and providing intentionally evasive answers, and also sanctioned deponent's attorney for failing to control deponent).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 28.02 -28.32, 30.40 -30.45*.
- *Federal Litigation Guide* Ch. 17.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 8.
- *Fed. R. Civ. P. 28* (persons before whom depositions may be taken).
- *Fed. R. Civ. P. 30* (deposition by oral examination).
- *Meacham v. Church, 2010 U.S. Dist. LEXIS 38393 at *11-*12 (D. Utah Apr. 19, 2010)* (party may not be appointed "officer of the court" for purposes of recording video deposition).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulationsEvidenceProcedural ConsiderationsObjections & Offers of ProofGeneral OverviewLegal EthicsSanctionsGeneral Overview



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Chapter 8 DISCOVERY
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.07

§ 8.07 Objecting to Conduct of Oral Deposition

Any objections to the qualifications of a deposition officer are deemed waived unless made before the deposition occurs or as soon thereafter as disqualification becomes known or could have been discovered with reasonable diligence. *Fed. R. Civ. P. 32(d)(2).*

Objections to competency of a witness, or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the examination, unless the ground for objection is one that might have obviated the need if presented at that time. Objections should be made as early as possible. *Fed. R. Civ. P. 32(d)(3)(A).*

Objections to errors or irregularities during deposition are waived unless objections are seasonably made at the taking of the deposition. *Fed. R. Civ. P. 32(d)(3)(B).* Such objections may include the following:

1. The manner of taking the deposition;

2. The form of the questions and answers;

3. The oath or affirmation;

4. The conduct of the parties; and

5. Errors of any kind that might be obviated, removed or cured if promptly presented.

Fed. R. Civ. P. 30(d)(3)(A).

Objections to questions must be concise, non-argumentative, and non-suggestive. *Fed. R. Civ. P. 30(c)(2).* An instruction to the witness not to answer is permitted in certain circumstances, including to preserve a privilege, enforce a limitation directed by the court, and present a motion to terminate or limit the examination. *Fed. R. Civ. P. 30(c)(2).*

A party or deponent may move for protective order during the deposition. Grounds include that the examination was being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party.

See Fed. R. Civ. P. 26(c)(1). A court may order that the deposition cease or may limit the scope and manner of the deposition. A terminated deposition will resume only on court order and the court may award expenses to the prevailing party in relation to the motion for protective order. *Fed. R. Civ. P. 30(d)(3)* (motion to terminate or limit deposition); *see also Fed. R. Civ. P. 26(c)* (protective order).

If a party that noticed a deposition fails to appear and proceed with the deposition, the other parties may seek on motion to recover the reasonable expenses incurred in attending, including reasonable attorneys' fees. *See Fed. R. Civ. P. 30(g)(1).*

If a party noticing the deposition of a nonparty witness fails to serve a subpoena on the witness and the witness does not attend because of the failure, the other parties and attorneys may move to recover the reasonable expenses incurred in attending, including reasonable attorneys' fees. *See Fed. R. Civ. P. 30(g)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.43, 32.40 -32.47.*
- *Federal Litigation Guide* Ch. 18.
- *Bender's Federal Practice Forms* Form Nos. 30:90, 30:91, 32:50.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 8.
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 30(d)* (motion to terminate or limit deposition).
- *Fed. R. Civ. P. 30(g)* (failure to attend deposition; expenses).
- *Fed. R. Civ. P. 32(d)* (waiver of objections).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective Orders



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Chapter 8 DISCOVERY
PART B: CONDUCTING ORAL DEPOSITIONS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.08

§ 8.08 Compelling Attendance, Testimony, or Production at Deposition

[1] Failure to Appear

If a party deponent fails to appear for a properly noticed deposition, the court may, on motion, award sanctions against the party failing to appear without a prior court order compelling the appearance. *See Fed. R. Civ. P. 37(d)(1)(A)(i)*; *see also §§ 8.80 -8.82 below*.

If a nonparty deponent fails to appear after being properly subpoenaed, the remedy for failure to comply with the subpoena is contempt. *See Fed. R. Civ. P. 45(e) see also § 8.46 below*.

[2] Failure to Answer Questions

If a deponent appears, but refuses to answer questions or is evasive, the remedy is a motion to compel. *See Fed. R. Civ. P. 37(a)(3)(B)(i)*; *see also §§ 8.66 -8.70 below*.

A nonparty deponent who refuses to answer after being directed by the court is subject to contempt. *Fed. R. Civ. P. 37(b)(1), 45(e)*; *see also § 8.46 below*.

A party deponent who fails to comply with an order to answer is subject to additional discovery sanctions as well as contempt. *See Fed. R. Civ. P. 37(b)*; *see also 8.72[1] below* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.70 -30.73, 37.02* et seq.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 8.
- *Fed. R. Civ. P. 37(a)* (motions to compel).
- *Fed. R. Civ. P. 37(b)* (sanctions for failure to comply with discovery order).

- *Fed. R. Civ. P. 37(d)* (sanctions for party's failure to attend deposition).
- *Fed. R. Civ. P. 45(e)* (contempt for noncompliance with subpoena).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedurePretrial MattersSubpoenas



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Chapter 8 DISCOVERY
PART B: CONDUCTING ORAL DEPOSITIONS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.09

§ 8.09 Obtaining Copies of and Reviewing Transcript

A deponent may review and make changes to the transcript of a deposition only if the deponent or a party makes the request for review before completion of the deposition. *Fed. R. Civ. P. 30(e)(1).*

A deponent has 30 days to review the transcript after being notified that the transcript is available. *Fed. R. Civ. P. 30(e)(1).*



Warning:

Under Rule 30(e), the 30-day correction period begins on notification that the transcript is available, not on actual receipt of the transcript.

A deponent must provide a statement of the changes and the reasons for the changes. *Fed. R. Civ. P. 30(e)(1).* While corrections may be made in form or substance, changes must be corrective and not contradictory. *Hambleton Bros. Lumber Co. v. Balkin Enters, 397 F.3d 1217, 1225-1226 (9th Cir. 2005)* .

Circuit Split:

Courts vary as to whether a witness may make changes as to the substance of the testimony. Some courts read Rule 30(e) narrowly to permit only the correction of typographical and transcriptional errors. *See, e.g., Estate of Moore v. Dixon, 2007 U.S. Dist. LEXIS 91604, at *4-*6 (E.D. Wis. 2007)* (citing *Thorn v. Sundstrand Aero. Corp., 207 F.3d 383 (7th Cir. 2000)* for theory that Seventh Circuit follows narrow view); *Burns v. Board of County Comm'rs of Jackson County, 330 F.3d 1275, 1281-1282 (10th Cir. 2003)* (deposition is "not a take home examination"). Others permit changes in substance even when those changes contradict the deposition testimony. *See, e.g., Glenwood Farms, Inc. v. Ivey., 229 F.R.D. 34, 35 (D. Me. 2005)* (changes in substance of deponent's testimony are contemplated by Rule 30(e); *Titanium Metals Corp. v. Elken Management, 191 F.R.D. 468, 472 (W.D. Pa. 1998)* (specifically rejecting view that only simple non-substantive changes may be made).

The deposition officer must indicate that review was requested and append the changes. *Fed. R. Civ. P. 30(e)(2).* If there is a failure to follow procedures, a court may exercise its discretion and strike any changes.

An officer must prepare a certificate to accompany the deposition and must certify that the witness was sworn by the officer and that the deposition is a true record of the testimony given by the witness. *Fed. R. Civ. P. 30(f)(1).* Items produced during the examination must be annexed to the deposition on request of a party. *Fed. R. Civ. P. 30(f)(2).* An officer must arrange for the transcript to be securely sealed in an envelope and delivered to the attorney that arranged for the transcript or recording. *Fed. R. Civ. P. 30(f)(1).* The attorney must store the transcript under conditions that will protect against loss, destruction, tampering or deterioration. *Fed. R. Civ. P. 30(f)(1).* A deposition officer retains the stenographic notes or copy of the recording. *Fed. R. Civ. P. 30(f)(3).*

Any party or deponent may obtain a copy of the transcript or the recording. *Fed. R. Civ. P. 30(f)(3).* A nonparty may obtain a copy unless the deposition was filed subject to a protective order preventing public disclosure. *Fed. R. Civ. P. 26(c)(6).*

The deposition is not filed with the court unless the court orders filing, or the deposition is used in a proceeding. *Fed. R. Civ. P. 5(d)(1).*

Warning:

Any motion to suppress must be made reasonably promptly. Otherwise errors and irregularities in preparation of the deposition, such as how the testimony was transcribed, signed, certified, sealed, indorsed, transmitted, filed or otherwise handled by the officer under Rule 30, are waived. *Fed. R. Civ. P. 32(d)(3).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 30.60 -30.64.*
- *Bender's Federal Practice Forms* Form Nos. 30:80-30:85.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 8.
- *Fed. R. Civ. P. 30(e)* (review of deposition by witness; changes in form or substance).
- *Fed. R. Civ. P. 30(f)* (post-deposition procedures).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedurePretrial MattersSubpoenasEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts



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Chapter 8 DISCOVERY
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.10

§ 8.10 Using Deposition

At the trial or at the hearing of a motion, any part or all of a deposition may be used against any party who was present or represented at the deposition, or who had reasonable notice of the deposition. *Fed. R. Civ. P. 32(a)(1).*

A deposition may be used by a party to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence. *Fed. R. Civ. P. 32(a)(2).*

In addition, an adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4). *Fed. R. Civ. P. 32(a)(3)*; *see also § 8.03[4] above.*

Any party may use a deposition for any purpose if the witness is unavailable, i.e. witness is dead, witness is more than 100 miles from the location of the trial, witness cannot attend or testify for specific reasons, or a party has been unable to procure attendance of witness by subpoena. *Fed. R. Civ. P. 32(a)(4).* Specific reasons a witness may be unavailable to testify include age, illness, infirmity, or imprisonment. *Fed. R. Civ. P. 32(a)(4).*

A deposition may not be used against a party who was unable to obtain counsel for a deposition taken early and without leave of court or against a party who received less than 14 days' notice and moved for protective order. *Fed. R. Civ. P. 32(a)(5).*

If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts. *Fed. R. Civ. P. 32(a)(6).*

A substitution of the parties does not affect the right to use depositions, and depositions may be used in a subsequent action. *Fed. R. Civ. P. 32(a)(7)*; *see also Fed. R. Civ. P. 25* (substitution).

Subject to Rules 28(b) (deposition in foreign country) and 32(d)(3) (waiver of objections as to taking of deposition), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying. *Fed. R. Civ. P. 32(b).*

Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with testimony in nontranscript form as well. *Fed. R. Civ. P. 32(c).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 32.02 et seq.*
- *Federal Litigation Guide PP 25.20, 25.27.*
- *Bender's Federal Practice Forms* Rule 32.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 8.
- *Fed. R. Civ. P. 32* (using depositions in court proceedings).
- *Mazloum v. District of Columbia Metro Police Dep't, 248 F.R.D. 725, 726 (D.D.C. 2008)* (party may use deposition of witness at trial, in lieu of live testimony, even though that witness is a party, a Rule 30(b)(6) deponent, and managing agent of party, if that witness resides more than 100 miles from place of trial).
- *Niver v. Traveler Indem. Co., 430 F. Supp. 2d 852, 866 (N.D. Iowa 2006)* (party cannot introduce deposition testimony of witness, other than for impeachment purposes, if witness will in fact be present and able to give live testimony at trial).
- *Thomas v. Cook County Sheriff's Dep't, 604 F.3d 293, 308 (7th Cir. 2009)* (knowledge of whereabouts of witness did not "detract from the court's finding that the plaintiff exercised reasonable diligence" in attempting to procure attendance when plaintiff issued two subpoenas and hired private detective to try to transport witness to court, but witness still failed to appear).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureTrialsDepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition TranscriptsEvidenceTestimonyCredibilityImpeachmentGeneral Overview



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Chapter 8 DISCOVERY
PART C: CONDUCTING DEPOSITIONS BY WRITTEN QUESTIONS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.11

§ 8.11 Checklist for Deposition By Written Questions

☐ Planning deposition by written questions. *See § 8.12 below*.

- ○ Review Rule 31.
- ○ Determine whether discovery by written questions is necessary.
- ○ Determine who will be deposed by written questions.
- ○ Determine whether leave of court will be necessary.

☐ Serve notice of deposition by written questions. *See § 8.13 below*.

- ○ Draft questions to be propounded to deponent.
- ○ Serve notice and questions on all parties.
- ○ If necessary, serve notice with accompanying Rule 34 request.
- ○ If necessary, serve a nonparty deponent with subpoena to compel attendance and/or production.

☐ Respond to notice of deposition by written questions. *See § 8.14 below*.

- ○ Review notice of deposition and determine whether there are any objections.

- ○ Consider moving for protective order on the grounds of annoyance, embarrassment, oppression, or undue burden or expense.
- ○ Provide party with designation of individuals if notice names an entity.
- ○ Draft cross-questions and serve on all parties.

☐ Propound cross, redirect, and recross questions, if desired. *See § 8.15 below*.

☐ Take deposition on written questions. *See § 8.16 below*.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Written Depositions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryProtective Orders



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.12

§ 8.12 Planning Depositions by Written Questions

A deposition by written questions may be a cost-effective means to obtain discovery. *Fed. R. Civ. P. 31.* However, if it is important to evaluate a witness's demeanor and credibility, a deposition by oral examination may be more appropriate.

A deposition by written questions may be appropriate in the following circumstances:

1. To obtain testimony of nonparty witnesses without incurring travel expenses;

2. To obtain the testimony of a witness in a foreign country that does not permit oral depositions;

3. To obtain the testimony of a nonparty whose testimony is non-controversial and likely predictable in light of the documentary record; and

4. To obtain testimony of a witness whose identity must remain confidential.

The number of depositions, whether oral or written, is limited to 10 per side. Any person, including any party, may be deposed. And corporations or other business organizations may be deposed. *Fed. R. Civ. P. 30(b)(6), 31(a)(4).*

The attendance of a nonparty deponent at a written deposition may be compelled by subpoena, in which case the location of the deposition is limited by the court's subpoena power. The deposition must take place within 100 miles of the place where the nonparty deponent resides, is employed, or regularly transacts business in person. *See Fed. R. Civ. P. 31(a)(1), 45(c)(3)(A)(ii).*

Warning:

Deposition by written questions has inherent limitations. At a deposition by written questions, only the deposition officer and the deponent are required to be present. *Fed. R. Civ. P. 31(b).* The questions to be propounded are submitted in advance. *Fed. R. Civ. P. 31(b)* . There is no opportunity for extensive follow-up questioning, the demeanor of the witness is not observed, and all questions are provided in advance so the witness may have been coached extensively in advance of the deposition.

Leave of court generally is not required to take a deposition by written questions. *Fed. R. Civ. P. 31(a)(1)*. However, leave of court is required when the deponent is incarcerated, a party seeks more than 10 depositions, a party seeks to depose a person already deposed or a party seeks to take a deposition before the parties have agreed to a discovery plan. *Fed. R. Civ. P. 31(a)(2)*.

Rule 26(c), governing protective orders, applies to written depositions, and a court will impose limits when it finds that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive, that the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought, or the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. *Fed. R. Civ. P. 26(b)(2)(C)*; *see §§ 8.62 -8.65 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 31.02 et seq*.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 9.
- *Fed. R. Civ. P. 26(b)(2)* (limitations on frequency and extent of discovery).
- *Fed. R. Civ. P. 26(c)* (protective orders).
- *Fed. R. Civ. P. 31* (depositions by written questions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens



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Chapter 8 DISCOVERY
PART C: CONDUCTING DEPOSITIONS BY WRITTEN QUESTIONS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.13

§ 8.13 Giving Notice of Deposition By Written Questions

[1] Timing of Notice

Rule 31 does not state a specific time for service of the notice of deposition. However, the notice of deposition and written questions should normally be served at least 35 days before the date of the deposition, unless a stipulation by the parties or an order of the court provides otherwise, to allow the required time for service of cross, redirect, and recross questions. See *Fed. R. Civ. P. 31(a)(5)*.



Timing:

Although Rule 31(a)(5) does not mandate a specific period, a 28-day period can be calculated from the specified 14 days to serve cross questions, seven days to serve redirect questions, and seven days to serve recross questions. *Fed. R. Civ. P. 31(a)(5)*. However, if any of these is served by mail, the time to serve recross questions would be greater than 28 days. In addition, each party has seven additional days to object to form, once applicable questions are served. *Fed. R. Civ. P. 32(d)(3)(C)*. Thus the recommended time is at least 35 days.



Warning:

If the notice of deposition by written questions of a party deponent is accompanied by a Rule 34 request for production of documents at the deposition, Rule 34 requires at least 30 days' notice. *See Fed. R. Civ. P. 34(b)(2)(A)*; *see also § 8.22 below*.

[2] Service of Notice and Required Contents

A party who wants to depose a person by written questions must serve the questions on every other party with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken. *Fed. R. Civ. P. 31(a)(3)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 31.10*.
- *Bender's Federal Practice Forms* Form Nos. 31:1-31:6.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 9.
- *Fed. R. Civ. P. 31* (depositions by written questions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryProtective Orders



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Chapter 8 DISCOVERY
PART C: CONDUCTING DEPOSITIONS BY WRITTEN QUESTIONS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.14

§ 8.14 Responding to Notice of Deposition By Written Questions

The deponent should review the notice of deposition by written questions and consider whether there are any objections to errors or irregularities in the notice, qualifications of the deposition officer, form of the written questions, or other grounds to move for protective order, including the substance of the discovery sought or the manner in which the discovery will be conducted. *See Fed. R. Civ. P. 26(c)*, *32(d)(1)*, *32(d)(2)*, *32(d)(3)(C)*.

An objection to the form of a written question is waived if not served in writing on the party submitting the question within the 14-day time period for serving responsive questions, or if the question is a recross-question, within seven days after being served with it. *Fed. R. Civ. P. 32(d)(3)(C)*; *see Fed. R. Civ. P. 31(a)(5)*.

If the notice of deposition names a private or public corporation, partnership, association, or governmental agency as the deponent, the entity must designate one or more officers, directors, managing agents or other persons who consent to testify on its behalf. *Fed. R. Civ. P. 30(b)(6)*.

A responding party may move for protective order. *Fed. R. Civ. P. 26(c)*. A court in which the action is pending or alternatively, the court in the district where the deposition is to be taken, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense. *Fed. R. Civ. P. 26(c)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 31.15*, *31.16*.
- *Bender's Federal Practice Forms* Form No. 31:50.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 9.
- *Fed. R. Civ. P. 31* (depositions by written questions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.15

§ 8.15 Propounding Cross, Redirect, and Recross Questions

Questions to the deponent from other parties must be served on all parties as follows:

1. Cross-questions, within 14 days after being served with notice and direct questions;

2. Redirect questions, within seven days after being served with cross-questions; and

3. Recross questions, within seven days after being served with redirect questions.

Fed. R. Civ. P. 31(a)(5).

The court may enlarge or shorten time for serving questions on a showing for cause. *Fed. R. Civ. P. 31(a)(5).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 31.11.*
- *Bender's Federal Practice Forms* Form Nos. 31:10-31:30.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 9.
- *Fed. R. Civ. P. 31(a)(5)* (questions from other parties).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryProtective Orders



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.16

§ 8.16 Taking Deposition By Written Questions

A party noticing a deposition by written questions must deliver the notice of deposition and all questions to the deposition officer. *See Fed. R. Civ. P. 31(b).*

The deposition officer takes the testimony of the deponent. *Fed. R. Civ. P. 31(b)(1).*

To request review and make changes to the transcript of the deposition by written questions, the deponent or party must request that review before completion of the deposition. A deponent may review the transcript or recording when notified by the deposition officer that it is available. A deponent has 30 days after notification that the transcript is available to review the transcript or recording. On review, a deponent may recite changes, provide a reason for the changes, and sign the statement. *Fed. R. Civ. P. 30(e)(1), 31(b).*

An officer must prepare, certify and file or mail the deposition, attaching the copy of the notice and the questions received by the officer. *Fed. R. Civ. P. 30(e), (f).* The deposition is not filed with the court. *Fed. R. Civ. P. 5(d).* The noticing party must store the deposition to protect it against loss, destruction, tampering or deterioration. *Fed. R. Civ. P. 30(f)(1), 31(b).*

Unless a motion to suppress is promptly made after the defect is, or with due diligence might have been, ascertained, errors and irregularities in the manner in which testimony was transcribed or the deposition prepared, signed, certified, sealed, indorsed, transmitted or otherwise handled by the officer are deemed waived. *Fed. R. Civ. P. 32(d)(3).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 31.12 -31.14.*
- *Bender's Federal Practice Forms* Form No. 31:60.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 9.

- *Fed. R. Civ. P. 31* (depositions by written questions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryProtective Orders



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Chapter 8 DISCOVERY
PART D: USING INTERROGATORIES

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.17

§ 8.17 Checklist for Interrogatories

☐ Propounding interrogatories. *See § 8.18 below.*

- ○ Review Rule 33.
- ○ Evaluate the use of interrogatories as part of the overall discovery plan.
- ○ Consider when and how many interrogatories to propound to each party.
- ○ Draft interrogatories, clearly and narrowly, numbering each one sequentially.
- ○ Serve (but do not file) interrogatories and calendar response date.

☐ Responding to interrogatories. *See § 8.19 below.*

- ○ Review interrogatories and calendar response date.
- ○ Draft preliminary responses and confer with client regarding further responses.
- ○ Consider various objections to interrogatories.
- ○ Consider motion for protective order.
- ○ Draft and serve responses on all parties, including appropriate certifications.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Interrogatories.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective Orders



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Chapter 8 DISCOVERY
PART D: USING INTERROGATORIES

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.18

§ 8.18 Propounding Interrogatories

A party may propound interrogatories to any other party in the action. Interrogatories may inquire into any matter, not privileged, relating to any claim or defense, including the description, nature, custody, condition and location of any books, documents or other tangible things, and the identity and locations of persons having knowledge of any discoverable matter. *Fed. R. Civ. P. 26(b)(1), 33(a)(2).*

Interrogatories need not necessarily seek admissible evidence, but must be reasonably calculated to lead to the discovery of admissible evidence. *Fed. R. Civ. P. 26(b)(1).*

Identification interrogatories are used to obtain factual information, generally at the beginning of the case. *See Fed. R. Civ. P. 26(b)(1), 33(a)(2).* For example, interrogatories may seek the identity and location of certain witnesses for deposition or the identification of specific documents or factual background in support of the other party's allegations or defenses.

Contention interrogatories inquire into an opinion or contention that relates to fact or the application of law to fact. *See Fed. R. Civ. P. 33(a)(2).* Such interrogatories narrow the areas of dispute and provide admissions useful for summary judgment and trial. Generally, contention interrogatories are obtained at or near the close of discovery because otherwise the other party is likely to object and claim that the interrogatory is premature.

Interrogatories are convenient and less expensive than depositions, and require a party to provide all information available to the party (unlike depositions, which require only information of which the witness has knowledge). Additionally, the responding party has a duty to supplement interrogatory responses on learning that the initial responses were incomplete or incorrect. *See Fed. R. Civ. P. 26(e)(1).*

Despite their obvious benefits, interrogatories are limited to parties in the action and they are often prone to prompt and boilerplate objections, crafted by counsel to offer minimum benefit.

Under Rule 33, the number of interrogatories that may be served by one party on another party is 25. This limit includes all discrete subparts. For cases involving multiple parties, the propounding party may serve 25 interrogatories on each party. The limit may be exceeded by obtaining leave of court or stipulation. *Fed. R. Civ. P. 33(a)(1); see Fed. R. Civ. P.*

26(b)(2)(A) (court may alter limit on number of interrogatories).

Generally, interrogatories are served after the Rule 26(f) conference unless otherwise provided by court order or the parties' stipulation. Interrogatories may be served before or after other types of discovery. *See Fed. R. Civ. P. 26(d)*, *33*. Consult local rules for specific deadlines (e.g., the court may require contention interrogatories to be served a certain number of days before the discovery cut-off date).

Interrogatories are served (and not filed) on all parties though responses may be sought from only one party. *Fed. R. Civ. P. 5(a)*.

On failure to respond, the propounding party may move to compel discovery. *See Fed. R. Civ. P. 37(a)*; *see also § 8.67 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 33.02 et seq*.
- *Federal Litigation Guide* Ch. 12.
- *Bender's Federal Practice Forms* Rule 33.
- *Bender's Forms of Discovery*, Chs. 1-221.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 7.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 33* (interrogatories to parties).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders



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Chapter 8 DISCOVERY
PART D: USING INTERROGATORIES

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.19

§ 8.19 Responding to Interrogatories

On receipt of interrogatories, the responding party may consider answering, objecting, or seeking a protective order. Responses are due within 30 days after service of the interrogatories. *Fed. R. Civ. P. 33(b)(2)*. An additional three days are allowed if interrogatories were served by mail or by electronic or alternative means of delivery. *Fed. R. Civ. P. 6(e)*. Otherwise, the time to respond may be altered by stipulation by the parties or by court order. See *Fed. R. Civ. P. 29(b)*, *33(b)(2)*.

Answers to interrogatories must be in writing and be under oath. *Fed. R. Civ. P. 33(b)(3)*.



Warning:

Interrogatory answers will be admissible at trial, to the extent allowed by the Federal Rules of Evidence. *See Fed. R. Civ. P. 33(c)*.

A responding party must verify responses contained in the interrogatories. *Fed. R. Civ. P. 33(b)(5)*.

For a corporation, partnership or association, an officer or agent of the business must sign the responses. *Fed. R. Civ. P. 33(b)(1)(B)*. The officer or agent has a duty to provide all information available to the business entity (and all information under its control), but may sign and verify the interrogatories on the basis of knowledge, information and belief, without firsthand knowledge of the information in the responses. *United States v. 42 Jars, 264 F.2d 666, 670 (3d Cir. 1959)* . An attorney may be designated as the officer or agent of the business. *See Shire Labs., Inc. v. Barr Labs., Inc., 236 F.R.D. 225, 227 (S.D.N.Y. 2006)* . When the answer to an interrogatory may be derived from business records, the records may be provided and specified in the particular response. *Fed. R. Civ. P. 33(d)*.

Grounds for objecting to interrogatories include:

1. Argumentative or speculative;

2. Available from another source;

3. Burden outweighs benefit;

4. Cumulative or duplicative;

5. Irrelevant information;

6. Legal conclusions;

7. Non-witness experts;

8. Exceeds permitted number;

9. Other opportunities to obtain same information;

10. Overbroad;

11. Premature contention interrogatories;

12. Privilege;

13. Not related to discovery of admissible evidence;

14. Trade secrets;

15. Vague and ambiguous; and/or

16. Work product protection.

The responding party should draft complete and separate responses to each question. *Fed. R. Civ. P. 33(b)(3).*

Any grounds for objecting to an interrogatory must be stated with specificity. A ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. *Fed. R. Civ. P. 33(b)(4).*

A responding party may seek a protective order when the discovery causes annoyance, embarrassment, oppression, or undue burden and expense. The moving party must show good cause for the order. *See Fed. R. Civ. P. 26(c)(1)*; *see also §§ 8.62 -8.65.*

Warning:

Courts have ruled that a party faced with supernumerary interrogatories is not entitled to randomly select which of the interrogatories it will answer, but must either answer in order up to the numerical limit and object to the remaining questions, or answer none and seek a protective order. *See, e.g., Lowery v. County of Riley, 2009 U.S. Dist. LEXIS 19957, at *11-*12 (D. Kan. 2009)* .

A responding party may refer to electronically stored information (like other records) as a source from which the response to an interrogatory may be gleaned. *Fed. R. Civ. P. 33(d)*, Advisory Committee Note of 2006.

Finally, a responding party has a duty to supplement and amend responses to interrogatories if the responding party later learns that information previously provided was materially incorrect or otherwise not known at the time the responses were served. *Fed. R. Civ. P. 26(e)(1)*; *see Fortino v. Quasar Co., 950 F.2d 389, 398 (7th Cir. 1991)* (*Fed. R. Civ. P. 26* requires party to supplement interrogatory answer when it is no longer true, and failure to amend is in substance a

knowing concealment); *see also Fed. R. Civ. P. 37(c)(1)* (sanctions for failure to supplement responses).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 33.100 et seq.*
- *Federal Litigation Guide P 12.40 et seq.*
- *Bender's Federal Practice Forms* Form Nos. 33:200, 33:201.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 9.
- *Fed. R. Civ. P. 26(e)* (duty to supplement responses).
- *Fed. R. Civ. P. 33(b)* (answers and objections to interrogatories).
- *Fed. R. Civ. P. 33(d)* (objection to produce business records).
- *Villareal v. El Chile, Inc., 266 F.R.D. 207, 211 (N.D. Ill. 2010)* (because interrogatories must be answered by party to whom they are directed, verified, and signed by person answering them, emails from party's attorney allegedly containing information sought in interrogatories were insufficient to fulfill party's duty to answer interrogatories).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective Orders



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Chapter 8 DISCOVERY
PART E: USING REQUESTS FOR PRODUCTION AND INSPECTION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.20

§ 8.20 Checklist for Requests for Production and Inspection

☐ Planning requests for production and inspection. *See § 8.21 below*.

- ○ Review Rule 34.
- ○ Identify type of items sought, including documents or electronically stored information, tangible items, entry onto land or a particular premises to inspect, copy sample, or conduct other investigative tests.
- ○ Determine whether requested documents, electronically stored information or tangible item is obtainable from a party to the action or may be subpoenaed from a nonparty.

☐ Request production and inspection. *See § 8.22 below*.

- ○ Draft requests for production, numbering them sequentially.
- ○ Define terms to be used throughout the requests for production, including parties and types of documents.
- ○ Specify date for production and inspection.
- ○ If seeking production of electronically stored information, consider specifying form in which information is to be produced.
- ○ Serve requests for production and inspection and calendar response date.

☐ Responding to requests for production and inspection. *See § 8.23 below*.

- ○ Review requests for production and inspection.
- ○ Consider whether to respond, object or move for protective order.
- ○ Draft responses to requests for production and inspection.
- ○ Confer with client regarding various responses.
- ○ Serve responses with verification on all parties.
- ○ Make items available for production and inspection (as they are kept in the regular course of business or organized and labeled to correspond with categories specified in the responses to request for production).
- ○ Supplement and amend responses, if necessary.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Requests for Production and Inspection

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective Orders



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Chapter 8 DISCOVERY
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.21

§ 8.21 Planning Rule 34 Requests for Production and Inspection

Rule 34 offers three general types of discovery:

1. **Documents and electronically stored information.** Any party may serve on any other party a request to produce and permit the requesting party, or someone else acting on the requesting party's behalf, to inspect and copy any designated documents or electronically stored information that constitute or contain discoverable matter, and which are in the possession, custody or control of the party on whom the request is served. *Fed. R. Civ. P. 34(a)(1)(A).*

2. **Tangible items.** Any party may also request to produce and permit the requesting party, or someone acting on the requesting party's behalf to inspect, copy, test, or sample any tangible items that constitute or contain discoverable matters, and which are in the possession, custody or control of the party on whom the request is served. *Fed. R. Civ. P. 34(a)(1)(B).*

3. **Entry on land.** Any party may also request permission to enter land for inspection, sampling or copying tangible items. *Fed. R. Civ. P. 34(a)(2).*



Strategic Point:

Because Rule 34 requests are not limited in number, it may be preferable to serve them before serving interrogatories and requests for admissions and before seeking depositions. Following receipt of the initial disclosures under Rule 26(a), which requires a party to disclose documents it may rely on in proving certain claims and defenses, counsel should be able to propound a first set of requests for production to any party in the action.

A party has a duty to retain evidence that it believes will be relevant to pending litigation. However, it is important to determine, as early as possible, whether the evidence may be destroyed in the course of a company's routine document retention/destruction policy or operation of its electronic information system.

Warning:

Electronically stored information is a separate category of records and information, and may include writings, drawings, graphs, charts, photographs, sound recordings, images and other data, which is discoverable material. *Fed. R. Civ. P. 34(a)(1)(A).*

Rule 34 requests must be within the scope of discovery prescribed by *Fed. R. Civ. P. 26(b).* Included within this scope are matters that are not privileged, that are relevant to the claim or defense of any party, including the existence, description, nature, custody and location of any books, documents, or other tangible items, and the identity and location of persons with knowledge of any discoverable matter. *Fed. R. Civ. P. 26(b), 34(a).*

Rule 34 discovery is available only from parties. *Fed. R. Civ. P. 34(a).* Discovery of documents, electronically stored information, and tangible things from nonparties is addressed in Rule 45. *See Fed. R. Civ. P. 34(c), 45*; *see also §§ 8.42 -8.46 below* .

Warning:

Although a party is not precluded from serving a subpoena on another party to obtain documents and other information, the courts generally will not allow a party to circumvent the discovery deadline through use of a subpoena. Thus, a Rule 45 subpoena cannot be served on a party at the end of the discovery period as "an end-run around the regular discovery process under Rules 26 and 34," to avoid discovery deadlines. *See Thomas v. IEM, Inc., 2008 U.S. Dist. LEXIS 19186, at *4 (M.D. La. 2008)* (subpoena constitutes discovery and cannot be used to circumvent discovery deadline).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 34.02 et seq.*
- *Federal Litigation Guide* Chs. 13, 20.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 5.
- *Fed. R. Civ. P. 34* (requests for production and inspection).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective Orders



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Chapter 8 DISCOVERY
PART E: USING REQUESTS FOR PRODUCTION AND INSPECTION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.22

§ 8.22 Requesting Production and Inspection

A Rule 34 request must:

1. Describe with reasonable particularity each item or category of items to be inspected; and

2. Specify a reasonable time, place, and manner for the inspection and performing the related acts

Fed. R. Civ. P. 34(b)(1)(A), (B); *see De Saracho v. Custom Food Mach., Inc., 206 F.3d 874, 881 (9th Cir. 2000)* (description should enable reasonable person to determine documents requested).

Timing:

Absent leave of court or a written stipulation, requests for production or inspection are served after the Rule 26(f) conference. *Fed. R. Civ. P. 26(d)*. Because the responding party will have 30 days to respond after being served with a Rule 34 request, the request should generally be made at least 30 days prior to the discovery cut-off date set forth in the scheduling order. *See Fed. R. Civ. P. 16(b)(3)(A), 34(b)(2)(A)*. A party must seek leave of court to serve Rule 34 requests that would require production or inspection after the cut-off date. *Thomas v. Pacificorp, 324 F.3d 1176, 1179 (10th Cir. 2003)* ; *see also § 8.61[9] below*.

The request may also set forth the form in which electronically stored information is to be produced. *Fed. R. Civ. P. 34(b)(1)(C)*. Generally, the requesting party may specify the preferred form of production and the producing party has the right to object to the requested form. If the producing party objects to the requested form, it must state the form in which it intends to produce the requested information. Absent an agreement to produce electronically stored information in a particular format or a court order specifying the format, records must be produced either in the form in which they are "ordinarily maintained" or in a form or forms that "are reasonably usable." *Fed. R. Civ. P. 34(b)(2)(E)(ii)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 34.02 et seq.*

- *Federal Litigation Guide* Chs. 13, 20.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 5.
- *Bender's Federal Practice Forms* Rule 34.
- *Fed. R. Civ. P. 34* (requests for production and inspection).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedurePretrial MattersConferencesGeneral Overview



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.23

§ 8.23 Responding to Request for Production and Inspection

A party served with a Rule 34 request should respond to each request for production and inspection, individually or by category. *Fed. R. Civ. P. 34(b)(2)(B)*. A party may respond in part and object in part. *Fed. R. Civ. P. 34(b)(2)(C)*. The responding party should designate each item and category in response with the same numeral or letter as in the request and must present the response in the same order as in the request. *Fed. R. Civ. P. 34(b)(2)(B)*.



Timing:

Generally, a party has 30 days after the service of the Rule 34 request to serve a response. *Fed. R. Civ. P. 34(b)(2)(A)*. The time limit may be altered by court order or by stipulation between the parties. *Fed. R. Civ. P. 29, 34(b)(2)(A)*.

Responses should be served on all parties to the action. *Fed. R. Civ. P. 34(b)*.

Unless there is an objection, the response must be accompanied by production of the documents or electronically stored information responsive to the request. *Fed. R. Civ. P. 34(b)(2)(E)*. Electronically stored information for inspection must be produced in two ways: (1) as it is kept in the regular course of business; (2) organized and labeled to correspond to categories specified in the request for production. *Fed. R. Civ. P. 34(b)(2)(E)(i)*. Typically, documents are "Bates stamped" with a sequential or other numeric designation in order to allow the parties to identify the specific document. *See Manual for Complex Litigation (4th ed.)* § 11.441.

Alternatively, a responding party must permit the requesting party to inspect and copy any designated documents, electronically stored information, and other tangibles. See *Fed. R. Civ. P. 34(a)(1)*. Rule 34 does not grant unrestricted, direct access to a responding party's electronically stored information, nor does it give the requesting party the right to conduct the actual search of the electronically stored information.

A requesting party may test or sample tangible items generally. *Fed. R. Civ. P. 34(a)(1)(B)*. However, if the test or sample would destroy the item, either partially or entirely, a court may preclude or control the testing. The court applies a balancing test between the costs of the alteration of the tangible item, and the benefit of ascertaining the true facts of the case. *See Mirchandani v. Home Depot U.S.A., 235 F.R.D. 611, 613-617 (D. Md. 2006)* .

Potential grounds for objection to a request for production and inspection include:

1. Privilege;

2. Work product;

3. Lack of relevance to claim or defense of party, or absence of good cause to seek discovery of matter merely relevant to subject matter of action;

4. Lack of possession, custody or control;

5. Failure to designate with reasonable particularity;

6. Overly intrusive request to enter land or premises;

7. Compliance will unfairly reveal trade secrets or other confidential information;

8. Vague and ambiguous, unduly burdensome or overly broad; and

9. Request for testing will harm item.

A responding party must clearly specify the grounds for each objection. *Fed. R. Civ. P. 34(b)(2)(C)*. Boilerplate objections are not sufficient and do not support a refusal to produce responsive documents or permit inspection. A responding party must respond to the unobjectionable parts of the request and must verify the responses. *Fed. R. Civ. P. 26(g)(2), 34(b)*.

To assert a claim for privilege, a responding party must describe the nature of the document in order to allow the requesting party to assess the claim. *See Fed. R. Civ. P. 26(b)(5)(A)*. A responding party must make a prima facie showing that the privilege protects the information it intends to withhold from production. Such a showing is made through a privilege log, which lists the documents or other items and a substantiation of the privilege claim on an item-by-item basis. The contents of the item are not disclosed.

To establish work product protection, the material in question must: (1) be a document, item of electronically stored information or tangible thing; (2) which was prepared in anticipation of litigation; and (3) was prepared by, or for a party, or by or for its representative. *See Fed. R. Civ. P. 26(b)(3)(A)*. If the conditions are satisfied, the burden shifts and the party seeking discovery must show substantial need for the materials and the inability without undue hardship to obtain the substantial equivalent of the materials by an alternate method. Opinion work product, which contains counsel's mental impressions or legal strategies, enjoys nearly absolute immunity and can be discovered only in rare circumstances. *See, e.g., Garcia v. City of El Centro, 214 F.R.D. 587, 591 (S.D. Cal. 2003)* ; *see also § 8.57*.

A responding party has a duty to supplement or amend the responses if it later acquires additional information or learns that information previously provided was materially incorrect. *Fed. R. Civ. P. 26(e)(1)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 34.13 -34.15*.
- *Federal Litigation Guide PP 14.01 -14.54, 20.20 -20.22*.

- *Bender's Federal Practice Forms* Form Nos. 34:30-34:34, 34:80, 34:81.

- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 5.

- *Fed. R. Civ. P. 34(b)* (responses and objections).

- *Engel v. Town of Roseland*, 2007 U.S. Dist. LEXIS 73645, at *7-*11 (N.D. Ind. 2007) (individual's income tax returns and bank statements are in that person's "custody or control" for purposes of Rule 34 request for production of documents, even if they are actually in third person's possession).

- *MGP Ingredients, Inc. v. Mars, Inc.*, 2007 U.S. Dist. LEXIS 76853, at *9-*10 (D. Kan. 2007) (party who produces electronically stored information and other documents in order in which they are "kept in the usual course of business" is not required to categorize documents by topic or relate them to specific request for production).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance



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Chapter 8 DISCOVERY
PART F: DISCOVERING ELECTRONICALLY STORED INFORMATION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.24

§ 8.24 Checklist for Electronically Stored Information

☐ Making requests for electronically stored information. *See § 8.25 below*.

○ Inform opposing party in writing of duty to preserve relevant electronically stored information and evidence.

○ Use interrogatories to discover details of electronic information systems, document retention, back-up policies and procedures.

○ Depose person most knowledgeable about electronic information systems, back-up policies and procedures, record management, storage destruction and retention policies, and other personnel responsible for those activities.

○ Request inspection of computers, network, and other electronic storage equipment.

○ Request production of computer records, and other electronically stored information.

☐ Responding to requests for electronically stored information. *See § 8.26 below*.

○ Review discovery requests and notify client of duty to preserve electronically stored information.

○ Perform diligent search and conduct reasonable inquiry to comply with discovery requests.

○ Negotiate stipulated protective order to protect against disclosure and use of confidential or privileged information.

○ Determine whether production involves significant costs, and whether to move for cost-shifting.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Electronic Discovery

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryRelevanceEvidenceDemonstrative EvidenceComputer-Generated Evidence



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Chapter 8 DISCOVERY
PART F: DISCOVERING ELECTRONICALLY STORED INFORMATION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.25

§ 8.25 Making Requests for Electronically Stored Information

[1] Types of Discoverable Information Subject to Disclosure and Discovery

Electronically stored information is subject to initial disclosure requirements under Rule 26(a)(1), requests to parties for production under Rule 34, and subpoenas to nonparties under Rule 45. *See Fed. R. Civ. P. 26(a)(1)(A)(ii)*, *34(a)(1)(A)*, *45(a)(1)(C)*; *see also Fed. R. Civ. P. 26(b)(2)(B)* (specific limitations).

Types of electronically stored information subject to discovery include email, voicemail, deleted email, data files, program files, back-up files, archival tapes, temporary files, system history files, website information in textual, graphical or audio format, website files, cache files, cookies, and other information not visible in a printed document as well as computer tapes and hard drives.



Strategic Point:

Courts are generally reluctant to order the direct inspection of an opposing party's computer. Direct inspection of a computer's hard drive, or mirror image copying, are considered to be highly intrusive because these methods of production raise serious confidentiality and privacy concerns. *Henderson v. U.S. Bank, N.A., 2009 U.S. Dist. LEXIS 40968, at *4 (E.D. Wis. 2009)* (2006 addition of testing and sampling to Rule 34(a) for electronically stored information did not create routine right of direct access to an opposing party's electronic information system). Nevertheless, computer inspections have been ordered when there are reasonable grounds to believe that information is being concealed or the responding party has attempted to delete or destroy relevant information. *See, e.g., Orrell v. Motorcarparts of Am., Inc., 2007 U.S. Dist. LEXIS 89524, at *18-*19 (W.D.N.C. 2007)* (court ordered direct inspection of plaintiff's home computer in action for sexual harassment and gender discrimination after plaintiff testified she had forwarded work-related emails to her home computer and had "scrubbed" her work computer's hard drive).

Even previously deleted files may be subject to discovery, but if recovery is expensive and the burden undue, the responding party may move for a protective order and an order for cost-shifting. *See Fed. R. Civ. P. 26(b)(2)(B)* (court may "specify conditions" for discovery), (c)(1) (protective orders); *see also § 8.26 below*.

[2] Disclosure Obligations

Electronically stored information is subject to the initial disclosure requirements of Rule 26(a). *See Fed. R. Civ. P. 26(a)(1)(A)(ii)*; *§ 5.04[8] above* .



Warning:

Because electronically stored information is subject to initial disclosure, a party at the commencement of litigation, and even before receiving a formal discovery request, must search its available electronic systems for relevant information as part of its duty to conduct an appropriate analysis of potentially relevant documents and electronically stored information.

[3] Items for Discussion at Rule 26(f) Conference

A Rule 26(f) conference includes, *inter alia,* an obligation by the parties to discuss: (1) any issues that relate to the preservation of discoverable information; (2) any issues that relate to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced; and (3) any issues that relate to claims of privilege or of protection as trial-preparation material, including--if the parties agree on a procedure to assert such claims after production--whether to ask the court to include their agreement in an order *See Fed. R. Civ. P. 26(f)(3)*.

A Rule 26(f) conference also may be used to narrow the scope of electronically stored information to be searched in response to discovery requests and to avoid undue burden on the responding party and production of too much information.



Strategic Point:

Use various discovery methods to identify sources of electronically stored information. For example, use interrogatories to identify persons most knowledgeable of storage policies and procedures, depose persons with knowledge of electronic information systems and storage, demand inspection of electronic information systems, and request production of electronically stored information. Note, however, that an on-site inspection of computers is subject to a Rule 26(b)(2) proportionality test. The requesting party must demonstrate that an on-site inspection is likely to lead to the recovery of relevant matter and that no less intrusive discovery will suffice.

[4] Choosing Format for Production

A party may request production of electronically stored information in one format, including hard copy or CD ROM. *Fed. R. Civ. P. 34(b)(1)(C)*. However, electronic format is useful to obtain metadata that is not always apparent from printouts such as the date of creation, identity of creator, etc., and the electronic format is searchable. *See, e.g., In re Lorazepam & Clorazepate Antitrust Litig., 300 F. Supp. 2d 43, 47 (D.D.C. 2004)* (ordering a litigation support firm to determine whether electronic documents could be converted into a searchable electronic format.).

Courts have taken varied approaches to the question as to whether a party must produce the metadata associated with the electronically stored information. *See, e.g., Autotech Techs. Ltd. P'ship v. AutomationDirect.com, Inc., 248 F.R.D. 556, 559 (N.D. Ill. 2008)* (court refused to compel production of metadata after documents responsive to party's request for production had already been produced in both paper and electronic format, and requesting party did not specifically request metadata in its requests for production); *D'Onofrio v. SFX Sports Group, Inc., 247 F.R.D. 43, 47-48 (D.D.C. 2008)* (defendant not required to produce document in its original electronic format with accompanying metadata absent request that documents be produced in specific format, because production of metadata not required by rules of civil procedure in absence of clear agreement or court order); *In re NYSE Sec. Specialists Lit.,* 2006 WL 1704447, at *1

(S.D.N.Y. 2006) ("all electronic documents shall be produced in their native format. When producing electronic documents, the producing party shall also provide all metadata associated with the documents."); *Jackson v. City of San Antonio, 2006 U.S. Dist. LEXIS 8091, at *3-*4 (W.D. Tex. 2006)* (holding that disclosing electronic information, such as metadata is not a "data dump" and may be an adequate response to discovery request.); *but see CP Solutions PTE, Ltd v. General Elec. Co., 2006 U.S. Dist. LEXIS 27053, at *11 (D. Conn. 2006)* (ordering party to produce electronic information in a usable format, but not requiring production in native format.).

[5] Duty to Preserve Electronic Evidence and Use Litigation Hold

A party has a duty to preserve evidence when the party has notice that the evidence is relevant to litigation or when the party should have known that the evidence may be relevant to future litigation. *Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)* ; *William T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)* .

Absent exceptional circumstances, sanctions may not be imposed on a party for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system. *See Fed. R. Civ. P. 37(e).*

The *Zubulake* cases provide guidance on electronic evidence preservation. These decisions have been followed by other courts throughout the country. *Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432-434 (S.D.N.Y. 2004) (Zubulake V); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)* (*Zubulake IV).* Among the most notable directives from the cases, 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. *Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)* .

A litigation hold has no universally accepted definition but likely includes the following components:

1. A notice to all custodians of records--which may include not only information technology (IT) people but key employees;

2. A protocol for retrieving and preserving relevant electronically stored information; and

3. Monitoring procedures to ensure that employees are actually implementing the litigation hold.

Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432-434 (S.D.N.Y. 2004) (Zubulake V); see also Sedona Principles, at 25 ("Comment 5.d Notice to Affected Persons").

Under *Zubulake,* an attorney's duties include issuing a litigation hold promptly, communicating with key players, instructing employees to produce electronic copies of relevant active files, and running a system-wide keyword search. *Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 434 (S.D.N.Y. 2004)* .

A stipulation or an order for preservation of evidence will facilitate sanctions for spoliation or violation of the order. The order should include reasonable limits on the obligation to preserve evidence. *Fed. R. Civ. P. 26(d), 37(b).*

Note that there is an independent obligation to preserve evidence once the complaint has been filed or the notice of litigation is imminent. A failure to preserve evidence or destruction of evidence may result in sanctions. *See Fed. R. Civ. P. 37*; *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992)* ; *see also §§ 8.86 -8.88 below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 37A.
- *Bender's Federal Practice Forms* Form Nos. 26:190-26:192, 26:600-26:604.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 6.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceComputer & Internet LawPrivacy & SecurityComputer CookiesEvidenceDemonstrative EvidenceComputer-Generated Evidence



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Chapter 8 DISCOVERY
PART F: DISCOVERING ELECTRONICALLY STORED INFORMATION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.26

§ 8.26 Responding to Requests for Electronically Stored Information

Electronically stored information may be sought in a Rule 34 discovery request to a party or a Rule 45 subpoena to a nonparty. *See Fed. R. Civ. P. 34(a)(1)(A), 45(a)(1)(A)(iii).*



Warning:

Routine procedures to destroy electronic records must be suspended once the duty to preserve evidence has been triggered. *See Fed. R. Civ. P. 37(e).*

Unless the form of production has been specified in the request, a responding party should produce documents as they are ordinarily maintained or in a form that is reasonably usable and any electronically stored information must be produced only in one form. *Fed. R. Civ. P. 34(b)(2)(E)(i), 45(d)(1)(B).*

The responding party need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery, or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, or it may specify conditions for the discovery. *Fed. R. Civ. P. 26(b)(2)(B)* (discovery as to parties), 45(d)(1)(D) (nonparty subpoenas). The court will consider the limitations on frequency and extent of discovery in Rule 26, e.g.:

1. Whether the discovery sought is unreasonably cumulative or duplicative;

2. Whether the information sought is obtainable from some other more convenient, less burdensome or inexpensive source;

3. Whether the party seeking the information already has had adequate opportunity to obtain the information; and

4. Whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into consideration the needs of the case, the amount in controversy, the resources of the parties, the

importance of the issues at stake in the litigation and of discovery sought to resolution of the issues.

Fed. R. Civ. P. 26(b)(2)(C).

The court's power to limit discovery under Rule 26(b)(2) includes the power to allocate costs. The responding party usually must bear the cost of responding to discovery requests, although an order shifting costs may be available when production requires significant or special costs. *See Oppenheimer Fund Inc. v. Sanders, 437 U.S. 340, 358, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* . When deciding whether to shift the cost of electronic production, the court may consider the accessibility of the data and order cost-shifting only when the data is relatively inaccessible and costly to restore and/or retrieve, such as back-up data and other data that has been deleted or damaged.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 34.13, 37A.01* et seq.
- *Bender's Federal Practice Forms* Form Nos. 34:80, 34:81.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 6.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue BurdensEvidenceDemonstrative EvidenceComputer-Generated Evidence



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Chapter 8 DISCOVERY
PART F: DISCOVERING ELECTRONICALLY STORED INFORMATION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.27

§ 8.27 Protecting Confidentiality and Privilege

A responding party should seek a stipulation to protect disclosure and use of privileged or otherwise confidential information. Indeed, this is a topic for the Rule 26(f) conference. The discussion should address the procedure for handling claims of waiver resulting from the inadvertent production of privileged information and whether to ask the court to include their agreement in its scheduling order. *See Fed. R. Civ. P. 26(f)*, Advisory Committee Note of 2006.

If the requesting party will not stipulate, counsel should move for a protective order if production of computer hardware, software or electronically stored information will reveal confidential or privileged information. A court has broad discretion to fashion an appropriate protective order.

Privileged matter is not subject to discovery and may be withheld. *Fed. R. Civ. P. 26(b)*. A responding party asserting the privilege must specifically designate the privileged matters and has the burden of showing the withheld matter is privileged. *Fed. R. Civ. P. 26(b)(5)(A)*. Note also that in 2008, a new federal rule of evidence took effect that provides safeguards against inadvertent waiver of the attorney-client privilege and protection for attorney work product. *Fed. R. Evid. 502*; *see § 8.53[3] below*.

The attorney-client privilege applies to communications by e-mail provided that the client has maintained the e-mails' confidentiality. *United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1078 (N.D. Cal. 2002)* .

The work product doctrine may apply to a computerized litigation support system. Information in a computerized litigation support system is work product. The issue becomes whether the information sought is "ordinary" work product or "opinion" work product. Courts have held that the attorney's personal involvement is the key to determining the level of protection afforded. *See, e.g., Shipes v. BIC Corp., 154 F.R.D. 301, 309 (M.D. Ga. 1994)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.47, 37A.32.*
- *Bender's Federal Practice Forms* Form Nos. 26:70-26:72.

- *Moore's AnswerGuide: Federal Discovery Practice* Chs. 3, 6.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.28

§ 8.28 Admitting Electronically Stored Information at Trial

Electronically stored information is a writing subject to the Federal Rules of Evidence. *Fed. R. Evid. 1001(1).* Electronically stored information is subject to the same hearsay objections and exceptions as apply to paper documents. *See Fed. R. Evid. 802.*

Under *Fed. R. Evid. 901*, electronically stored information must be authenticated to be admissible. *See also United States v. Siddiqui, 235 F.3d 1318, 1322 (11th Cir. 2000)* .

Questions as to the accuracy of electronically stored information affect the weight of the evidence, and not its admissibility. *United States v. Catabran, 836 F.2d 453, 458 (9th Cir. 1988)* . The mere fact that it is possible to alter data contained in a computer is insufficient to establish untrustworthiness. *United States v. Bonallo, 858 F.2d 1427, 1436 (9th Cir. 1988)* . The burden is on the proponent to lay a proper foundation by establishing the accuracy of the electronically stored information. *Manual for Complex Litigation (4th ed.)* § 11.446.

Under the Federal Rules of Evidence, to prove the contents of a writing, the original writing is required "except as otherwise provided." *Fed. R. Evid. 1002.* When data is stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an "original." *Fed. R. Evid. 1001(3).* A copy of a printout is admissible as a duplicate unless a genuine question is raised as to the authenticity of the original, or unless in the circumstances it would be unfair to admit the duplicate in lieu of the original. *Fed. R. Evid. 1003.*

PRACTICE RESOURCES:

- *Weinstein's Federal Evidence (2d ed.) § 900.01 et seq.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 6.
- *Fed. R. Evid. 801-807* (hearsay).
- *Fed. R. Evid. 901-903* (authentication).

- *Fed. R. Evid. 1001-1008* (contents of writings, recordings, and photographs).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceEvidenceDemonstrative EvidenceComputer-Generated EvidenceEvidenceDocumentary EvidenceBest Evidence Rule



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Chapter 8 DISCOVERY
PART G: USING PHYSICAL AND MENTAL EXAMINATIONS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.29

§ 8.29 Checklist to Move for Physical and Mental Examinations

☐ Moving for physical and mental examinations. *See §§ 8.30 -8.32 below* .

- ○ Review Rule 35.
- ○ Determine whether timing of the discovery is proper.
- ○ Meet and confer with opposing counsel to determine whether the parties are able to stipulate to specific terms for physical or mental examinations.
- ○ Draft motion and serve and file motion papers.

☐ Opposing physical or mental examinations. *See § 8.34 below*.

- ○ Consider alternatives to opposition, including stipulation to terms and conditions of examination.
- ○ Seek to limit the scope of the examination to the actual condition in controversy.
- ○ Consider moving for protective order if proposed examination is overly broad, invasive, or involves highly personal matters.
- ○ Speak with client after examination to evaluate discrepancies that may occur in the examination report.

Search by Topic: Civil Procedure > Discovery > Methods > Mental & Physical Examinations

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance



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Chapter 8 DISCOVERY
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.30

§ 8.30 Determining Whether to Conduct Examination of Party

Parties generally seek Rule 35 physical and mental examinations when the mental or physical condition of a party is in controversy. A Rule 35 examination may be sought by any party to the action. *Fed. R. Civ. P. 35(a).*

Circuit Split:

Most courts will not require a plaintiff to submit to a medical examination simply because the plaintiff is seeking damages for emotional distress. *See, e.g., Ford v. Contra Costa County, 179 F.R.D. 579, 580 (N.D. Cal. 1998)* (district court refused to compel plaintiff to undergo psychiatric examination simply because she sought damages for emotional distress in her gender discrimination action). A minority of courts, however, have held that a plaintiff puts his or her mental condition in controversy by simply making a claim for emotional distress damages as part of an employment discrimination claim. *See, e.g., Jansen v. Packaging Corp. of Am., 158 F.R.D. 409, 410 (N.D. Ill. 1994)* (claim that plaintiff suffered and continues to suffer ongoing emotional distress due to alleged sexual harassment and retaliation by her former supervisor).

A party moving to compel a physical or mental examination has the burden of showing "good cause" for the examination. *See Fed. R. Civ. P. 35(a)(2)(A).* Specifically, the moving party must show that the examination could lead to the discovery of facts relevant to claims or defenses in the action, and that the discovery of such facts is necessary for the moving party's case. *Fed. R. Civ. P. 35*; *Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

The examination must be conducted by a qualified examiner and the examination must be sought, and completed prior to the discovery cut-off specified in the scheduling order. *See Fed. R. Civ. P. 16(b)(3)(A), 35(a)(1).*

The party to be examined generally is not permitted to have his or her attorney or a third party present at the examination because it subverts the purpose of a Rule 35 examination, which is to put the plaintiff and defendant on an equal footing with regard to evaluating the plaintiff's medical condition. *Calderon v. Reederei Claus-Peter Offen GmbH & Co., 2009 U.S. Dist. LEXIS 39178, at *9 (S.D. Fla. 2009)* (following majority rule, court held that plaintiff was not entitled to have attorney present at medical examination, but could have certified Spanish interpreter of examining party's choice). For the same reason, courts have also denied a plaintiff's request to have the medical

examination videotaped. *See Lerer v. Ferno-Washington, Inc., 2007 U.S. Dist. LEXIS 84347, at *4-*8 (S.D. Fla. 2007)* (doctor may inquire about plaintiff's medical history during examination, because review of patient's medical history is likely to assist doctor in patient's evaluation).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.02 et seq.*
- *Federal Litigation Guide*[Middle dot] P 21.05.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 11.
- *Fed. R. Civ. P. 35* (physical and mental examinations).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance



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Chapter 8 DISCOVERY
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.31

§ 8.31 Agreeing or Stipulating to Physical or Mental Examination

As an alternative to the formal motion procedure in Rule 35, parties may stipulate or agree to physical and mental examinations. Such agreements and stipulations offer the advantage of flexibility.

Parties wishing to stipulate should discuss the proposed terms for taking physical or mental examinations, including the time and place of the examination, who will conduct the examination, what procedures will be used, who will observe the examination, whether the examination will be recorded, the scope of the examination, and the length of the examination. *See Fed. R. Civ. P. 35(a).*

On stipulation by the parties to the terms for taking physical or mental examinations, the parties (and any appropriate third party) should execute an agreement and or stipulation in writing.



Warning:

Rule 35(b), governing the procedures for the examiner's report, will apply to an examination made by the parties' agreement, unless the agreement states otherwise. *Fed. R. Civ. P. 35(b)(6)*; *see also § 8.35 below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.02[5].*
- *Federal Litigation Guide P 21.04.*
- *Bender's Federal Practice Forms* Form No. 35:10.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 11.
- *Fed. R. Civ. P. 35* (physical and mental examinations).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 8 DISCOVERY
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.32

§ 8.32 Moving for Court-Ordered Physical or Mental Examination

To move for a physical or mental examination under a Rule 35, a party proceeds under standard noticed motion procedure. In the moving papers, the party seeking the examination must show that there is "good cause" for the examination. *Fed. R. Civ. P. 35(a)(2)(A)*. The physical or mental condition of the party to be examined must be "in controversy." *Fed. R. Civ. P. 35(a)(1)*. The moving papers must specify the parameters of the examination, including time, place, manner for examination, and the name of the examiner. *Fed. R. Civ. P. 35(a)(2)(B)*.



Strategic Point:

Rule 35 does not authorize a court to order that the plaintiff receive a medical examination of himself or herself. *See Melton v. Simmons, 2009 U.S. Dist. LEXIS 17543, at *2-*3 (W.D.N.C. 2009)* (pro se plaintiff improperly sought examination to obtain an expert opinion as to his medical status relating to conditions alleged in the complaint).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.02[4].*
- *Federal Litigation Guide P 21.06.*
- *Bender's Federal Practice Forms* Rule 35.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 11.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 35* (physical and mental examinations).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.33

§ 8.33 Sanctioning Non-Compliance With Court Order for Examination

If a party fails to comply with a court order for examination, the party seeking the examination can move for sanctions. Unless the failure was substantially justified or other circumstances make an award of expenses unjust, the court may award reasonable expenses caused by the non-compliance. *See Fed. R. Civ. P. 37(b)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.11.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 11.
- *Fed. R. Civ. P. 35* (physical and mental examinations).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.34

§ 8.34 Opposing Request for Examination

Grounds for opposing Rule 35 motions seeking physical or mental examination of a party include the following:

1. The mental or physical condition of the proposed examinee is not actually in controversy. *See, e.g., O'Quinn v. New York Univ. Med. Ctr., 163 F.R.D. 226, 227 (S.D.N.Y. 1995)* (mere allegations of "mental anguish, emotional distress, and humiliation" in sexual discrimination complaint held insufficient to justify mental examination of plaintiff); *see also § 8.30 above*;

2. The moving party has not shown good cause for the examination. *See, e.g., Stanislawski v. Upper River Servs., 134 F.R.D. 260, 262 (D. Minn. 1991)* (plaintiff not required to submit to defendant-requested vocational rehabilitation examinations when defendant had been provided with all of plaintiff's medical records, had deposed plaintiff, and had been provided information concerning plaintiff's education, experiences, and medical disability); *see also § 8.30 above*;

3. The proposed examination is unduly painful or invasive. *See, e.g., Hernandez v. Gulf Oil Corp., 21 Fed. R. Serv. 2d 1378, 1379 (E.D. Pa. 1976)* (pain and stress of proposed bone scan outweighed necessity of examination); and

4. The proposed examination method is of questionable scientific validity and reliability. *See, e.g., Usher v. Lakewood Eng'g & Mfg. Co., 158 F.R.D. 411, 413 (N.D. Ill. 1994)* (correlation factors and validity factors of psychological test used by defendant were inadequate).

Counsel should determine whether opposing the physical or mental examination will have a practical effect. If a party is entitled to the physical or mental examination, negotiating toward a stipulation may allow more flexibility in determining the terms and conditions of the examination. A stipulation will allow the parties to agree on the terms and conditions of the examination, including the scope of the examination, how, when and where the examination will occur.

Alternatively, if the proposed examination is overly invasive, or involves highly personal matters, the party opposing the motion for physical or mental examination should seek a protective order. *See Fed. R. Civ. P. 26(c)*; *see also §§ 8.62*

-8.65 below.

Regardless of the scope of the stipulated or court-ordered physical or mental examination, counsel should prepare the client for the examination (e.g., advise the client to answer only the questions posed and to provide the shortest and simplest answers). Following the examination, counsel should interview the client to determine whether any improprieties may have occurred during the examination.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.02 et seq*.
- *Federal Litigation Guide P 21.14*.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 11.
- *Fed. R. Civ. P. 35* (physical and mental examinations).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.35

§ 8.35 Obtaining and Using Examination Reports

The party who underwent the physical or mental examination is entitled to obtain the examination report. *Fed. R. Civ. P. 35(b)(1)*. However, the party requesting the report is reciprocally obligated to furnish examination reports from its own experts on the same condition, and waive any privilege as to examination of the condition. *Fed. R. Civ. P. 35(b)(1)*, *35(b)(3)*.

The examiner's report must be in writing, and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests. *Fed. R. Civ. P. 35(b)(2)*.



Warning:

By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have, in that action or any other action involving the same controversy, concerning testimony about all examinations of the same condition. *Fed. R. Civ. P. 35(b)(4)*.

On motion, the court may order, on just terms, that a party deliver the examination report. If the report is not provided, the court may exclude the examiner's testimony at trial. *Fed. R. Civ. P. 35(b)(5)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 35.12 et seq.*
- *Federal Litigation Guide P 21.15.*
- *Bender's Federal Practice Forms* Form Nos. 35:100-35:120.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 11.
- *Fed. R. Civ. P. 35* (physical and mental examinations).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 8 DISCOVERY
PART H: USING REQUESTS FOR ADMISSION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.36

§ 8.36 Checklist for Requests for Admission

☐ Requesting admission. *See § 8.37 below*.

- ○ Review Rule 36.
- ○ Determine whether subject matter is appropriate for request for admission.
- ○ Consider other discovery methods to obtain information.
- ○ Identify the party to whom the requests for admission is to be directed.
- ○ Consider whether the requests for admission are timely. If the requests for admission would be untimely, consider obtaining a stipulation or leave of court to propound the discovery.
- ○ Determine how many requests for admission to propound.
- ○ Prepare the requests for admission, including numbering each request separately, framing each request as a statement, phrasing each request clearly, and complying with the applicable limits on the number of requests.
- ○ Serve the requests and calendar the date for responses.
- ○ Review sufficiency of responses. If responses are insufficient, consider moving for order determining the sufficiency of responses, and follow standard noticed motion

procedure.

○ Maintain record of the requests for admission for use at trial, or other post-trial proceedings.

☐ Responding to requests for admission. *See § 8.38 below*.

○ On receipt of requests for admission, calendar date for service of responses.

○ If there is insufficient time to prepare responses, negotiate with propounding party for additional time to serve responses, and or move for additional time to prepare responses.

○ Conduct reasonable inquiry into the subject matter of the requests.

○ Determine how to respond to each request (e.g., admission, denial, objection).

○ Prepare responses to requests for admission.

○ Serve responses to requests for admission.

○ Prepare and serve supplemental requests for admission, if required.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Admission

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsStipulations



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Chapter 8 DISCOVERY
PART H: USING REQUESTS FOR ADMISSION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.37

§ 8.37 Making Requests for Admission

Rule 36 offers a mechanism by which parties may, for the purpose of a pending action only, make written requests for admission by other parties relating to:

1. Facts;

2. The application of law to fact;

3. Opinions about facts or the application of law to fact; and

4. The genuineness of documents.

See Fed. R. Civ. P. 36(a).

Timing:

Requests for admission may be propounded to any party in the action following the discovery conference and prior to the discovery cut-off. *See Fed. R. Civ. P. 16(b)(3)(A), 26(d)(1), 36(a).*

Each matter in a request for admission must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying. *Fed. R. Civ. P. 36(a)(2).*

Requests must be relevant to any claims and defenses in the case and not privileged. *See Fed. R. Civ. P. 26(b)(1), 36(a)(1).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.02 et seq.*

- *Federal Litigation Guide PP 19.01 -19.29*.
- *Bender's Federal Practice Forms* Rule 36.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 13.
- *Fed. R. Civ. P. 36* (requests for admission).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsStipulations



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Chapter 8 DISCOVERY
PART H: USING REQUESTS FOR ADMISSION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.38

§ 8.38 Responding to Requests for Admission

Potential responses to requests for admission include:

1. Answering. *See Fed. R. Civ. P. 36(a)(4)*;

2. Objecting. *See Fed. R. Civ. P. 36(a)(5)*;

3. Requesting an extension of time. *See Fed. R. Civ. P. 36(a)(3)*; and

4. Seeking a protective order. *See Fed. R. Civ. P. 26(c)*.



Timing:

A written response to requests for admission must be served within 30 days unless another time is set by court order or pursuant to stipulation by the parties. *Fed. R. Civ. P. 36(a)(3)*.

The response may be an unqualified admission, an admission with qualification, a denial, either complete or partial, or assertion of a lack of information. *Fed. R. Civ. P. 36(a)(4)*.

The responding party must make reasonable inquiry and secure such knowledge and information as are readily obtainable. *Fed. R. Civ. P. 36(a)(4)*. The responding party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that it has made a reasonable inquiry, and insufficient information exists on which to base an admission or denial. *See Asea, Inc v. Southern Pac. Transp. Co., 669 F.2d 1242, 1247 (9th Cir. 1981)* . Generally, a reasonable inquiry is limited to review and inquiry of those persons and documents that are within the responding party's control. However, it may also reasonable for the responding party to inquire of a third party with whom the responding party has a relationship, such as a former employee of the responding party, or a co-defendant with whom the responding party has a relationship. *See Brown v. Arlen Mgmt. Corp., 663 F.2d 575, 580 (5th Cir. 1981)* .

To object, the responding party must state the objection, and the reason for the objection. *Fed. R. Civ. P. 36(a)(5)*. Grounds for objection, include, *inter alia*, any of the following:

1. Improper format of request;

2. Untimely request;

3. Excessive number of requests;

4. Undue burden;

5. Improper scope of request;

6. Irrelevance;

7. Privilege; and

8. Failure to provide document.

Warning:

Failure to timely respond to a request for admission is deemed as an admission to the matters contained in the request. *Fed. R. Civ. P. 36(a)(3)*.

The responding party must supplement its responses to requests for admission if the responding party learns that the prior response was materially incomplete or incorrect, and if additional information has not been otherwise made known to the other parties during the discovery process or in writing. *Fed. R. Civ. P. 26(e)(1)*.

If responses are later determined to be inadequate, untimely or incomplete, the requesting party may move for sanctions. *See Fed. R. Civ. P. 37(c)(2)*; *see also § 8.78 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.11 et seq*.
- *Federal Litigation Guide PP 19.40 -19.50*.
- *Bender's Federal Practice Forms* Form Nos. 36:10, 36:11.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 13.
- *Fed. R. Civ. P. 36* (requests for admission).
- *Praetorian Ins. Co. v. Site Inspection, LLC, 604 F.3d 509, 514 (8th Cir. 2010)* (admissions made in response to Rule 36 requests for admissions are binding on that party and may be used to support entry of summary judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil

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Chapter 8 DISCOVERY
PART H: USING REQUESTS FOR ADMISSION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.39

§ 8.39 Moving to Determine Sufficiency of Responses

The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. *Fed. R. Civ. P. 36(a)(6).*

On finding that an answer does not comply with Rule 36, the court may order either that the matter is admitted or that an amended answer be served. *Fed. R. Civ. P. 36(a)(6).*

The court may defer its final decision on the motion until a pretrial conference or a specified time before trial. *Fed. R. Civ. P. 36(a)(6).*

Rule 37(a)(5), governing payment of expenses in connection with certain discovery motions, applies to motions regarding the sufficiency of an answer or objection. *See Fed. R. Civ. P. 36(a)(6), 37(a)(5).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.12.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 13.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 36* (requests for admission).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsStipulations



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Chapter 8 DISCOVERY
PART H: USING REQUESTS FOR ADMISSION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.40

§ 8.40 Withdrawing or Amending Admissions

The responding party may move to withdraw or amend the responses to requests for admission. *See Fed. R. Civ. P. 36(b).*

Grounds for withdrawal or amendment of responses, include the following:

1. That the presentation of the action's merits will be served by allowing withdrawal or amendment;

2. Withdrawal or amendment will not prejudice the propounding party in maintaining its action or defense on the merits; and

3. Withdrawal or amendment is necessary to prevent manifest injustice (if trial has already begun or if the admission has been incorporated in the court's order following the final pretrial conference).

The moving party bears the burden of persuading the court that withdrawal will subserve the presentation of the merits of the case. The propounding party bears the burden of persuading the court that it would be prejudiced by the withdrawal or amendment of the responses. *Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995)* .

Rule 36(b), which permits a court to grant relief from an admission when presentation of the merits of the action will be subserved, and the party who obtained the admission fails to establish prejudice, is permissive. In deciding whether to exercise its discretion when the two-pronged test has been met, the district court may consider other factors, including whether the moving party can show good cause for the delay and whether the moving party appears to have a strong case on the merits. *See Conlon v. United States, 474 F.3d 616, 624-625 (9th Cir. 2007)* (unanswered requests for admissions may be relied on as basis for granting summary judgment, but reliance on deemed admission in preparing summary judgment motion does not constitute prejudice). However, the excusable neglect standard of Rule 6(b) does not apply to a Rule 36(b) motion to withdraw deemed admissions. *See Pritchard v. Dow Agro Sciences, 255 F.R.D. 164, 171 (W.D. Pa. 2009)* (Rule 36(b) contains its own two-pronged standard to evaluate whether withdrawal of admissions is warranted).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.13*.
- *Federal Litigation Guide PP 19.60 -19.63*.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 13.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 36* (requests for admission).
- *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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawals



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Chapter 8 DISCOVERY
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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.41

§ 8.41 Recovering Expenses of Proving Matters Not Admitted

If the propounding party proves any matter that the responding party had failed to admit in response to a request for admission at trial, there may be grounds for award of expenses of proof. *Fed. R. Civ. P. 37(c)(2).*

Following standard noticed motion procedure, the moving party must show the grounds for an expense award are present and that the expenses would have not been incurred if the matter had been admitted. *See Fed. R. Civ. P. 37(c)(2)*; *see also §§ 8.77 -8.79 below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.70 et seq.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 13.
- *Fed. R. Civ. P. 36* (requests for admission).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponses



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Chapter 8 DISCOVERY
PART I: USING SUBPOENAS FOR NONPARTY DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.42

§ 8.42 Checklist for Subpoenas

☐ Seeking discovery from nonparty by subpoena.

- ○ Determine whether it is important to seek discovery from a nonparty.
- ○ Review Rule 45.
- ○ Draft subpoena to contain items required by Rule 45(a)(1). *See § 8.43[1] below*.
- ○ If subpoena seeks production of electronically stored information, consider specifying form in which information is to be produced.
- ○ Determine court from where subpoena will issue. *See § 8.43[2] below*.
- ○ Determine whether clerk or attorney will issue subpoena. *See § 8.43[3] below*.
- ○ Serve subpoena. *See § 8.44 below*.
- ○ If necessary, address opposition by subpoenaed nonparty. *See § 8.45 below*.
- ○ Enforce subpoena. *See § 8.46 below*.

☐ Responding to subpoena. *See § 8.45 below*.

- ○ Review subpoena, and determine whether it complies with Rule 45 requirements.

See §§ 8.43, 8.44.

- ○ If appropriate, make written objection. *See § 8.45[1] below.*
- ○ If appropriate, move to quash subpoena. *See § 8.45[2] below.*
- ○ If responding, comply with Rule 45(d) duties. *See § 8.45[3] -[5] below.*

☐ **Search by Topic:** Civil Procedure > Pretrial Matters > Subpoenas

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersSubpoenas



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Chapter 8 DISCOVERY
PART I: USING SUBPOENAS FOR NONPARTY DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.43

§ 8.43 Preparing Subpoena

[1] Determining Form and Contents

Every subpoena must:

1. State the court from which it issues;

2. State the title of the action, the court in which it is pending, and its civil-action number;

3. Command each person to whom it is directed to do the following at a specified time and place: (a) attend and testify; (b) produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or (c) permit the inspection of premises; and

4. Set out the text of *Fed. R. Civ. P. 45(c)* governing protections for a person subject to a subpoena and *Fed. R. Civ. P. 45(d)* governing duties in responding to a subpoena.

Fed. R. Civ. P. 45(a)(1)(A).

A subpoena commanding attendance at a deposition must state the method for recording the testimony. *Fed. R. Civ. P. 45(a)(1)(B).*

A command to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. *Fed. R. Civ. P. 45(a)(1)(C).*

A subpoena may specify the form or forms in which electronically stored information is to be produced. *Fed. R. Civ. P. 45(a)(1)(C).*

[2] Determining Proper Court

A subpoena must issue as follows:

1. For attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

2. For attendance at a deposition, from the court for the district where the deposition is to be taken; and

3. For production and inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

Fed. R. Civ. P. 45(a)(2).

[3] Issuance by Clerk or Attorney

The clerk must issue a subpoena, signed but otherwise blank, to a party who requests it. That party must complete it before service. *Fed. R. Civ. P. 45(a)(3).*

An attorney also may issue and sign a subpoena as an officer of:

1. A court in which the attorney is authorized to practice; or

2. A court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

Fed. R. Civ. P. 45(a)(3).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.02 -45.11.*
- *Bender's Federal Practice Forms* Form Nos. 45:1-45:5.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 14.
- *Fed. R. Civ. P. 45* (discovery from nonparty by subpoena).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersSubpoenas



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Chapter 8 DISCOVERY
PART I: USING SUBPOENAS FOR NONPARTY DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.44

§ 8.44 Serving Subpoena

Prior to serving a subpoena to compel production or to inspect premises, notice must be served on each party in the manner prescribed by Rule 5(b). *Fed. R. Civ. P. 5(b), 45(b)(1).*

Prior notice means notice must be served prior to service of the subpoena on the nonparty and not prior to the date of production. The purpose of the notice is to allow other parties the opportunity to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things, such that the other parties can monitor the discovery and pursue access to any information that may or should be produced. *Fed. R. Civ. P. 45*, Committee Note of 1991. A failure to provide prior notice may result in the court granting a request to quash the subpoena. *See, e.g., Firefighters' Inst. For Racial Equal. v. City of St. Louis, 220 F.3d 898, 903 (8th Cir. 2000)* .

The subpoena should be served after the parties have met and conferred pursuant to Rule 26(d) and (f) and prior to the discovery cut-off unless the parties have agreed otherwise or the court has ordered otherwise.

The subpoena must be served by a person who is not a party to the action and is at least 18 years of age. Service of the subpoena "shall be made by delivering a copy thereof to such person." *Fed. R. Civ. P. 45(b)(1).*

Circuit Split:

Courts are in disagreement as to whether personal service is required. *See, e.g., Halawani v. Wolfenbarger, 2008 U.S. Dist. LEXIS 100482, at *9-*10 (E.D. Mich. 2008)* (district court adopted minority view in holding that a subpoena may be served by certified mail); *Hall v. Sullivan, 229 F.R.D. 501, 503-506 (D. Md. 2005)* (citing **Moore's**, service of subpoena duces tecum by Federal Express was sufficient to ensure receipt and satisfied requirements of Rule 45(b)(1)); *Terre Haute Warehousing Serv. v. Grinnell Fire Protection Sys. Co., 193 F.R.D. 561, 562-563 (S.D. Ind. 1999)* (personal service of subpoena required, and certified mail is insufficient).

Service of the subpoena must occur within prescribed territorial limits, including at any place within the district of the court by which it is issued, any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, or other activity specified in the subpoena, or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of

the deposition, hearing, trial, production, or inspection specified in the subpoena. *Fed. R. Civ. P. 45(b)(2)*. A nonparty corporation is amenable to service in any forum which the corporation has minimum contacts.

28 U.S.C. § 1783 governs service of subpoenas on witnesses in foreign countries who are nationals or residents of the United States. *See Fed. R. Civ. P. 45(b)(3)*. Service of a subpoena on an individual in a foreign country must conform to Rule 4(f). *See Fed. R. Civ. P. 4(f)*.

A court may authorize the service of subpoena at any other place on a proper application to the court and cause shown, when so provided by U.S. statute. *Fed. R. Civ. P. 45(b)(2)(C)*.

Proper service of a subpoena to compel testimony requires that the subpoena be accompanied by payment to the witness of "the fees for 1 day's attendance and the mileage allowed by law." *Fed. R. Civ. P. 45(b)(1)*; *see also In re Dennis, 330 F.3d 696, 704-705 (5th Cir. 2003)* (simultaneous tendering of witness fees and mileage fees required); *Tedder v. Odel, 890 F.2d 210, 211 (9th Cir. 1989)* ; *CF&I Steel Corp. v. Mitsui & Co., 713 F.2d 494, 496 (9th Cir. 1983)* (simultaneous tendering of witness fees and reasonable estimated mileage allowed by law required with service of subpoena). The amount of these witness fees is determined by statute. A court may quash a subpoena for failure to tender witness fees.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.20 -45.24*.
- *Bender's Federal Practice Forms* Form Nos. 45:10, 45:11.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 14.
- *Fed. R. Civ. P. 45(b)* (service of subpoenas).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersSubpoenas



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Chapter 8 DISCOVERY
PART I: USING SUBPOENAS FOR NONPARTY DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.45

§ 8.45 Responding to Subpoena

[1] Objecting to Command to Produce Materials or Permit Inspection

A person commanded to produce designated materials or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the designated materials or to inspecting the premises, or to producing electronically stored information in the form or forms requested. *Fed. R. Civ. P. 45(c)(2)(B).*



Timing:

The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. *Fed. R. Civ. P. 45(c)(2)(B).*

If an objection is made, at any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection. The order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance. *Fed. R. Civ. P. 45(c)(2)(B).*

[2] Moving to Quash or Modify Subpoena

On timely motion, a court may modify or quash the subpoena. *Fed. R. Civ. P. 45(c)(3).* Generally, a timely motion is made anytime before the date of compliance set forth in the subpoena.

Mandatory grounds for quashing or modifying the subpoena include the following:

1. Subpoena fails to allow a reasonable time to comply;

2. Subpoena requires person who is neither party nor party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person;

3. Subpoena requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

4. Subpoena subjects a person to undue burden.

Fed. R. Civ. P. 45(c)(3)(A).

Non-mandatory grounds for quashing or modifying the subpoena include the following:

1. Subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information;

2. Subpoena discloses an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

3. A person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

Fed. R. Civ. P. 45(c)(3)(B).

Also, if non-mandatory grounds apply, the court may, instead of quashing or modifying the subpoena, order appearance or production if the serving party shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and ensures that the subpoenaed person will be reasonably compensated. *Fed. R. Civ. P. 45(c)(3)(C).*

Warning:

Filing a motion to quash does not stay discovery. Therefore, a responding party must move to stay discovery, or for a protective order when moving to modify or quash the subpoena.

[3] Producing Documents or Electronically Stored Information

A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize them and label them to correspond to the categories in the demand. *Fed. R. Civ. P. 45(d)(1)(A).*

If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. *Fed. R. Civ. P. 45(d)(1)(B).*

The person responding need not produce the same electronically stored information in more than one form. *Fed. R. Civ. P. 45(d)(1)(C).*

For discussion of special rules relating to discovery of electronically stored information from sources that the subpoenaed nonparty identifies as not reasonably accessible because of undue burden or cost, *see § 8.26 above*.

[4] Withholding Privileged or Work Product Materials

A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must expressly assert the claim and describe the nature of the withheld documents, communications, or things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim. *Fed. R. Civ. P. 45(d)(2)(A)*; *see also § 8.53 below*.

[5] Producing Privileged or Work Product Materials

If information produced in response to a subpoena is subject to claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. *Fed. R. Civ. P. 45(d)(2)(B).*

After being notified, the party:

1. Must promptly return, sequester, or destroy the specified information and any copies it has;

2. Must not use or disclose the information until the claim is resolved;

3. Must take reasonable steps to retrieve the information if the party disclosed it before being notified; and

4. May promptly present the information to the court under seal for a determination of the claim.

Fed. R. Civ. P. 45(d)(2)(B).

The person who produced the information must preserve the information until the claim is resolved. *Fed. R. Civ. P. 45(d)(2)(B).*

Note also that in 2008, a new federal rule of evidence took effect that provides safeguards against inadvertent waiver of the attorney-client privilege and protection for attorney work product. *Fed. R. Evid. 502*; *see § 8.53[3] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.60 -45.64.*
- *Bender's Federal Practice Forms* Form No. 45:20 et seq.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 14.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 45* (discovery from nonparty by subpoena).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedurePretrial MattersSubpoenas



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Chapter 8 DISCOVERY
PART I: USING SUBPOENAS FOR NONPARTY DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.46

§ 8.46 Enforcing Subpoena

A nonparty's failure to obey a subpoena without an adequate excuse may constitute contempt of the court from which the subpoena was issued. *Fed. R. Civ. P. 45(e).*

If a subpoena recipient does not respond to the subpoena or the response is deemed to be inadequate, the party serving the subpoena should look to the court for enforcement of the subpoena. Generally, the party serving the subpoena will file a motion that requests (1) an order compelling compliance with the subpoena and (2) the imposition of contempt sanctions on the subpoena recipient. Because the subpoena is an order of the court, contempt sanctions are available merely for the initial disobedience of the subpoena, and a prior court order compelling compliance with the subpoena is not invariably required. *See PaineWebber Inc. v. Acstar Ins. Co., 211 F.R.D. 247, 249 (S.D.N.Y. 2002)* (failure to appear at deposition as required by subpoena punished as contempt).

A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the 100-mile limit of Rule 45(c)(3)(A)(ii). *Fed. R. Civ. P. 45(e).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 45.62.*
- *Bender's Federal Practice Forms* Form No. 45:80 et seq.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 14.
- *Fed. R. Civ. P. 45(e)* (failure to obey subpoena as contempt).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsGeneral Overview



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Chapter 8 DISCOVERY
PART J: USING DEPOSITIONS TO PERPETUATE TESTIMONY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.47

§ 8.47 Checklist for Perpetuation of Testimony

☐ Petitioning for perpetuation of testimony. *See § 8.48 below*.

- ○ Review Rule 27.
- ○ Determine whether a future action is contemplated.
- ○ Consider whether vital evidence for the anticipated future action may be lost or destroyed.
- ○ Identify potential adverse parties in the action.
- ○ Identify specific testimony, documents, or things to be sought.
- ○ Identify which depositions will be needed.
- ○ Determine basis of federal jurisdiction for future action.
- ○ Draft petition for perpetuation of testimony.
- ○ Draft notice to be served on all adverse parties.
- ○ File petition and schedule hearing.
- ○ Serve notice at least 21 days before hearing date as provided by Rule 4.

- ○ Draft proposed order.

☐ Opposing petition to perpetuate testimony. *See § 8.49 below*.

- ○ Object on the grounds that petition lacks required elements.
- ○ Object on the grounds that petition was improperly served and filed.
- ○ Object on the grounds that petition fails to show that evidence will be lost or destroyed.
- ○ Object on the grounds that the petition lacks specificity.
- ○ Draft and serve opposing papers.
- ○ Consider whether to seek sanctions.

☐ **Search by Topic:** Civil Procedure > Discovery > Methods > Perpetuation of Testimony

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of Testimony



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Chapter 8 DISCOVERY
PART J: USING DEPOSITIONS TO PERPETUATE TESTIMONY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.48

§ 8.48 Petitioning for Perpetuation of Testimony

Depositions to perpetuate testimony under Rule 27(a) offer a method for securing testimony before the filing of a suit when there is an expectation of future litigation and a risk that testimony will be lost if not preserved. *Penn. Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1373 (D.C. Cir. 1995)* .

Under Rule 27, perpetuation of testimony may be available when:

1. A matter is cognizable in any United States court. *See Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1374* (petitioner need not demonstrate cognizable action with absolute certainty); *28 U.S.C. § 451* ("court of the United States" defined);

2. Petitioner can show that the action is anticipated in federal court. *See Fed. R. Civ. P. 27(a)*;

3. Petitioner can show that federal jurisdiction would exist for the anticipated action. *See Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 484 (4th Cir. 1999)* ;

4. Petitioner can show that the anticipated action will be a civil action. *See In re Eisenberg, 654 F.2d 1107, 1113 (5th Cir. 1981)* ; or

5. Petitioner can show that the perpetuation of testimony will prevent the failure or delay of justice. *See Fed. R. Civ. P. 27(a)(3).*

Contents of the petition should include:

1. Name of petitioner;

2. Expectation of action;

3. Description of subject matter;

4. Facts of testimony;

5. Reasons for perpetuation;

6. Names of adverse parties;

7. Names of persons to be examined;

8. Request for order; and

9. Verification.

See Fed. R. Civ. P. 27(a)(1).

The petition must be filed in the federal district court in the district of the residence of any expected adverse party. Notice (and a copy of the petition) must be served on each person named in the petition as an adverse party. *Fed. R. Civ. P. 27(a)(2).* Notice must state that the petitioner will apply to the court at the time and place named in the notice for the order described in the petition. *Fed. R. Civ. P. 27(a)(2).* Notice must be served at least 21 days before the date of the hearing. *Fed. R. Civ. P. 27(a)(2).*

In the petition, petitioner must set forth three elements:

1. A showing that litigation is anticipated;

2. A description of the testimony sought; and

3. A showing that there is a risk of losing evidence.

Calderon v. United States Dist. Court, 144 F.3d 618, 621-622 (9th Cir. 1998) .

Petitioner may request production of documents, electronically stored information and things, entry on land, and physical and mental examinations. *See Fed. R. Civ. P. 27(a)(3).*

After the hearing, if the court is satisfied that the perpetuation of testimony may prevent a failure or delay of justice, the court must make an order designating or describing the persons whose depositions will be taken, specifying the subject matter of the examination, specifying whether the depositions will be taken by oral examination or written interrogatories, or whether the order for production of documents or things, or entry on land or orders for physical or mental examinations is granted. *Fed. R. Civ. P. 27(a)(3).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 27.02 et seq.*
- *Bender's Federal Practice Forms* Form Nos. 27:1-27:31.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 10.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.

- *Fed. R. Civ. P. 27* (perpetuation of testimony).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of Testimony



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Chapter 8 DISCOVERY
PART J: USING DEPOSITIONS TO PERPETUATE TESTIMONY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.49

§ 8.49 Opposing Petition to Perpetuate Testimony

Rule 27 sets forth specific requirements for the petition. *See § 8.48 above*. Failing to include any of the required elements may be grounds to object to the petition.

Common objections to Rule 27 petitions include:

1. Petition has not shown an inability to bring presently the action;

2. Petition has not shown that risk of loss of testimony exists;

3. Petition shows an effort to engage in a fishing expedition;

4. Petition lacks basis for federal jurisdiction in the anticipated action;

5. Petition fails to set forth the substance of the testimony sought;

6. Notice was not served on all potential adverse parties; and

7. Notice was served less than 21 days before the hearing date.

See Fed. R. Civ. P. 27(a).

The opposition must be filed and served on all named potential adverse parties. See, e.g., *In re Amenia, 200 F.R.D. 200, 201 (S.D.N.Y. 2001)* .

Frivolous or offending motions under Rule 27(a) may be sanctioned. *See 18 U.S.C. § 401* (contempt power), *28 U.S.C. § 1927* (punishing attorneys who vexatiously multiply proceedings); *Chambers v. NASCO, 501 U.S. 32, 45, 111 S. Ct. 2123, 115 L. Ed. 2d 27* (court has inherent authority to impose sanctions); *see also* Ch. 11 *below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 27.02 et seq.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 10.
- *Fed. R. Civ. P. 27* (perpetuation of testimony).
- *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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryProtective Orders



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Chapter 8 DISCOVERY
PART K: EVALUATING RESTRICTIONS ON SCOPE AND EXTENT OF DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.50

§ 8.50 Checklist for Evaluating Restrictions on Scope and Extent of Discovery

☐ Evaluating relevance. *See § 8.51 below.*

- ○ Review Rule 26(b).
- ○ Determine whether discovery sought is relevant to claim or defense of any party in the action (or subject matter of action, if stipulation or court order on good cause shown permits broader standard of relevance).
- ○ Consider whether discovery sought has any tendency to make the existence of any fact more or less probable than it would be without the matter, and it is either admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.
- ○ Relevant matter for discovery may relate to existence, description, nature, custody, condition and location of any books, documents or other tangible things, or identity and location of persons having knowledge of any discoverable matter.

☐ Applying federal and state privilege law. *See §§ 8.52 -8.54 below.*

- ○ Consider whether state or federal law on privilege applies in case.
- ○ Consider whether discovery material calls for potentially privileged information.
- ○ Consider whether the holder of the privilege has waived or will waive the privilege, taking into account new *Fed. R. Evid. 502.*

○ If responding party, assert any available claim of privilege in lieu of discovery response by raising claim expressly, stating ground of claim of privilege or describing withheld materials.

○ If claim of privilege raised, consider whether propounding party should test claim of privilege by motion to compel discovery.

☐ Evaluating attorney-client privilege. *See § 8.55[1] below*.

○ Determine if there is or was an attorney-client relationship.

○ Determine if the communication between the attorney and client was privileged, by considering if the communication was related by client, made in confidence, communicated for purpose of securing an opinion of law, legal services, or assistance in a legal proceeding and not communicated for purpose of committing a crime or tort.

○ Consider whether privilege was waived by voluntary disclosure, involuntary disclosure or inadvertent disclosure, failure to assert the privilege, or implied waiver by placing the issue in controversy; consider impact of new *Fed. Evid. R. 502*.

☐ Evaluating physician-patient privilege. *See § 8.55[2] below*.

○ Consider whether medical condition has been placed in controversy.

○ Determine if the privilege has been waived.

☐ Evaluating psychotherapist-patient privilege. *See § 8.55[3] below*.

○ Determine whether there was a communication with a licensed professional.

○ Consider whether the claim for privilege is timely, expressly raised, grounds stated, and a sufficient description of withheld material or testimony.

○ Determine if the privilege has been waived.

☐ Evaluating clergy-penitent privilege. *See § 8.55[4] below*.

○ Determine whether there has been a confidential communication with a member of clergy.

○ Consider whether the claim for privilege was timely made, expressly made, grounds

stated, and a sufficient description of withheld material or testimony.

○ Determine if the privilege has been waived.

☐ Evaluating marital communications privilege. *See § 8.55[5] below*.

○ Ascertain whether the confidential marital communication privilege applies, including whether there was a valid marriage, whether the communication was made during the marriage, whether the communication was confidential and whether any criminal activities exceptions apply.

○ Consider whether the claim for privilege was timely made, expressly made, grounds stated, and a sufficient description of withheld material or testimony.

○ Determine if the privilege has been waived.

☐ Evaluating *Fifth Amendment* privilege against self-incrimination. *See § 8.55[6] below*.

○ Determine whether the *Fifth Amendment* applies by inquiring whether the claimant is a natural person, the claim is for testimony, and whether the claimant has a reasonable expectation of potential prosecution.

○ Consider whether the claim has been properly raised because it must be claimed on a question-by-question basis.

☐ Evaluating qualified privilege of journalist to protect sources. *See § 8.55[7] below*.

○ Determine whether qualified *First Amendment* privilege applies.

○ Consider whether the claim for privilege was timely made, expressly made, grounds stated, and a sufficient description of withheld material or testimony.

○ Consider whether the claim of privilege has been waived.

☐ Evaluating deliberative process privilege. *See § 8.55[8] below*.

○ Determine whether the government is withholding documents or testimony that reflects advisory opinions, recommendations, and deliberations.

○ Determine whether the need for the information outweighs the government's interest.

- Review whether claim has been properly made, including formal claim of privilege must be made, after actual consideration by the head of the department, government must provide precise and certain reasons for asserting confidentiality, and the material is related to process not facts.

- Determine whether the claim of privilege has been waived.

☐ Evaluating other governmental and law enforcement privileges. *See § 8.55[9] below*.

- Privilege to withhold state secrets.

- Privilege to withhold identity of government informant.

- Privilege to withhold law enforcement information.

☐ Evaluating trade secret protection. *See § 8.56 below*.

- Review definition of trade secrets.

- Consider whether the claim for privilege was timely made, expressly made, grounds stated, and a sufficient description of withheld material or testimony.

- Determine whether the claim of privilege has been waived.

☐ Evaluating work product protection. *See § 8.57 below*.

- Ascertain whether protected material is in a document or other tangible thing, whether the material was prepared or produced by an attorney, client or representative of attorney or client, and whether the material was prepared or produced because of ongoing litigation or in anticipation of future litigation.

- Ascertain whether the material contains facts or opinions, mental impressions or conclusions of attorney.

- Ascertain whether protected material can be discovered due to substantial need for materials or unavailability from other means without hardship.

- Ascertain whether protection of material has been waived by voluntary or inadvertent disclosure, third-party disclosure, or by placing the material in controversy, taking into account new *Fed. R. Evid. 502*.

☐ Evaluating expert witness discovery. *See § 8.58 below*.

- Review restrictions relating to experts whose opinions may be used for trial.
- Review restrictions relating to experts employed only for trial preparation.

☐ **Search by Topic:**

- Civil Procedure > Discovery > Relevance
- Civil Procedure > Discovery > Privileged Matters

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryPrivileged MattersWork ProductWaiversCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue BurdensEvidencePrivilegesSelf-Incrimination PrivilegeWaiver



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Chapter 8 DISCOVERY
PART K: EVALUATING RESTRICTIONS ON SCOPE AND EXTENT OF DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.51

§ 8.51 Understanding Scope of Discovery

[1] Information Must Be Relevant to Party's Claim or Defense

The scope of discovery is generally limited to information that is not privileged, but is "relevant to any party's claim or defense." Discovery may be sought as to any matter that is itself admissible in evidence or appears "reasonably calculated to lead to the discovery of admissible evidence." *Fed. R. Civ. P. 26(b)(1).*

[2] Court May Restrict Cumulative or Unduly Burdensome Discovery

Even if the discovery sought is relevant, it may be limited if a court determines that the discovery sought is cumulative or unduly burdensome, the party seeking the information has had ample opportunity to obtain it, or after balancing the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation and the importance of the sought discovery in resolving those issues, the burden or expense of the proposed discovery outweighs its likely benefit. *Fed. R. Civ. P. 26(b)(2).*

[3] Court May Expand Scope of Discovery on Showing of Good Cause

A court may expand the scope of permissible discovery to the "subject matter" standard of relevance on a showing of good cause. Such discovery is allowed when to do so is consistent with the overarching purposes of the discovery rules, i.e., promote fair trials, eliminate surprise, and achieve justice. *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* ; *see § 8.61[4] below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.41 -26.46.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 2.
- *Fed. R. Civ. P. 26(b)* (discovery scope and limits).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.52

§ 8.52 Determining Applicable Law

The privileges generally available to a party in federal court, including discovery proceedings, are those defined by federal common law. However, in federal cases in which only state claims and defenses have been raised (e.g., a diversity suit involving only state-law claims), state law governs privilege. *Fed. R. Evid. 501.*

In federal question cases in which state law claims are also raised, any asserted privileges relating to evidence relevant to both state and federal claims are governed by federal common law. Similarly, in cases in which jurisdiction is based both on diversity of citizenship and the presence of federal claims, federal common law controls any claims of privilege with respect to evidence relevant to both sets of claims. *See, e.g., In re von Bulow, 811 F.2d 136, 141 (2d Cir. 1987)* .

Warning:

Federal statutory or regulatory law may prohibit or restrict the discovery of materials in the hands of state governmental agencies or other specific parties. *See, e.g., 23 U.S.C. § 409* (restricting discovery of information compiled or collected by state agencies in connection with federal highway safety programs); *45 C.F.R. §§ 164.508(c), 164.512(e)* (protecting medical and health records kept by health plans, clearinghouses, or health care providers).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.47[4].*
- *Weinstein's Federal Evidence (2d ed.) § 501.02 et seq.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *Fed. R. Evid. 501* (law governing privileges).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawApplicabilityCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.53

§ 8.53 Asserting Privilege and Avoiding Waiver

[1] Party and Nonparty Recipients of Discovery Requests May Assert Privilege Claims

The Federal Rules expressly authorize recipients of discovery requests (whether parties or nonparties) to assert privilege claims. *See Fed. R. Civ. P. 26(b)(5)(A)* (privilege claim by party), 45(d)(2) (privilege claim by nonparty responding to subpoena).

[2] Person Asserting Privilege Has Burden of Proof

Generally, the individual asserting the protection of privilege has the burden of proof. *In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 394 (D.D.C. 1978)* .

A party asserting a claim of privilege in lieu of a discovery response must raise that claim expressly by stating the ground of the claim of privilege and by describing the withheld materials so that the validity of the claim may be judged. *Fed. R. Civ. P. 26(b)(5)(A)*. If the privilege holder fails to comply with the requirement, any claim of privilege may be waived. *Humphreys v. Regents of the Univ. of Cal., 2006 U.S. Dist. LEXIS 20148, at *5 (N.D. Cal. 2006)* .

[3] Effect of New Fed. R. Evid. 502 on Waiver Issues

Signed into law on September 19, 2008, *Fed. R. Evid. 502* provides safeguards against waiver of the attorney-client privilege and work product protection by limiting both the scope of waiver and the circumstances under which waiver will be found. Under the rule, if a waiver is found, it applies only to the information disclosed and does not extend to undisclosed communications or information unless:

1. The waiver was intentional;

2. The disclosed and undisclosed communications or information concern the same subject matter; and

3. Fairness dictates that they be considered together.

See Fed. R. Evid. 502(a).

Despite disclosure, a waiver will not be found under the following circumstances:

1. The disclosure was inadvertent;

2. Reasonable steps were taken by the holder to prevent the disclosure; and

3. Reasonable steps were taken by the holder to retrieve the inadvertently disclosed communications or information, including (if applicable) following the procedure in *Fed. R. Civ. P. 26(b)(5)(B)*.

See Fed. R. Evid. 502(b); *see also* § 8.57[7] *below* (discussing procedure under *Fed. R. Civ. P. 26(b)(5)(B)*).

The Rule governs only disclosure made at the federal level, either in a federal proceeding or to a federal office or agency. *Fed. R. Evid. 502(a)*. The Rule applies in federal court even in diversity cases or in other situations where state law provides the rule of decision. *Fed. R. Evid. 502(f)*; *see Fed. R. Evid. 501*.

State courts are bound by the Rule only under the following circumstances:

1. The disclosure was made at the federal level; and

2. A federal court entered an order providing that the disclosure did not constitute a waiver.

See Fed. R. Evid. 502(d); *Fed. R. Evid. 502*, Committee Note of 2008.

A disclosure made in a state proceeding, that was not the subject of a state court order concerning waiver, would not operate as a waiver at the federal level under either of the following conditions:

1. The disclosure would not be a waiver had it been made in a federal proceeding; or

2. The disclosure would not be a waiver under the law of the state where the disclosure occurred.

See Fed. R. Evid. 502(c).

Under the Rule, parties in a federal proceeding can enter into a confidentiality agreement to protect against waiver in the proceeding. However, such an agreement would not bind nonparties unless it was incorporated into a court order. *See Fed. R. Evid. 502(e)*.

The Rule's effective date is the date of its enactment, September 19, 2008. The Rule applies to all proceedings commenced after that date and, "insofar as is just and practicable," in all proceedings pending on that date. *See* 110 P.L. 322, 122 Stat. 3537.

[4] Putting At Issue Matters Sought to Be Shielded From Discovery as Waiver

If a plaintiff's claims put at issue the very matters that the plaintiff wishes to shield from discovery, the privilege will be deemed to be waived. *Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162-1163 (9th Cir. 1992)* .

[5] Maintaining Privilege Log

Counsel should consider maintaining a privilege log as standard practice. With respect to documents, the privilege log should contain:

1. The date the document was prepared;

2. The identity of the person or persons who prepared the document;

3. The identity of any person or persons to whom the document was provided;

4. A brief description or summary of the contents of the document;

5. The specific privilege or protection allegedly applicable to the document; and

6. A description of how each element of the privilege or protection is met as to the document.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.47.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *Fed. R. Evid. 502* (limitations on waiver).
- *Hernandez v. Tanninen, 604 F.3d 1095, 1100-1101 (9th Cir. 2010)* (district court committed clear error in concluding that single disclosure constituted blanket waiver of party's attorney-client privilege and work product protection and mandamus review was appropriate because blanket waiver was "particularly injurious" in that it could result in compelled disclosure of matters far beyond scope of immediate waiver, including case strategy and all communications between attorney and client).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductWaiversCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.54

§ 8.54 Opposing Claim of Privilege

If a claim of privilege is raised in order to resist discovery, the party propounding the discovery may bring a motion to compel discovery. *Fed. R. Civ. P. 37(a)*; *see Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995)* (party asserting work product must prove doctrine's applicability); *see also §§ 8.66 -8.70 below* .

Whether to file a motion to compel requires a balancing of factors, including the importance of the information sought and whether it can be obtained by someone else, as well as the merits of the claim of privilege.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.02 -37.23.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *Fed. R. Civ. P. 37(a)* (motions to compel).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductWaiversCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.55

§ 8.55 Applying Specific Privileges

[1] Attorney-Client Privilege

Federal common law recognizes the attorney-client privilege. When legal advice of any kind is sought from a professional legal adviser in his or her capacity as such, the communications relating to that purpose, made in confidence by the client, are permanently protected from disclosure by the client or by the legal adviser, unless the protection is waived. *Reed v. Baxter, 134 F.3d 351, 355-356 (6th Cir. 1998)* .

The client holds the privilege. *United States v. Blackman, 72 F.3d 1418, 1424 (9th Cir. 1995)* . A corporation or other artificial entity may be entitled to claim the attorney-client privilege. *Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* (corporation may be holder of attorney-client privilege). The privilege also extends to any corporate employee, when the communications concern matters within the employee's corporate duties and the employee is aware that the information is being provided to enable the attorney to render legal advice or service to the corporation and to former corporate employees. *Upjohn Co. v. United States (1981) 449 U.S. 383, 394, n.3, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* .

When a client seeks legal advice in furtherance of a crime or fraud, the attorney-client communications are not privileged and may be discovered. *See United States v. Zolin, 491 U.S. 554, 562-563, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989)* .

Only the client may waive the privilege and a corporate client may waive the privilege for communications of employees or agents. *See In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 125 (3d Cir. 1986)* .

In a case of inadvertent disclosure, such as when a party accidentally produces privileged documents, the attorney-client privilege will be preserved if the disclosure was inadvertent, reasonable steps were taken by the privilege holder to prevent the disclosure, and reasonable steps were taken by the holder to retrieve the inadvertently disclosed communications or information, including (if applicable) following the procedure in *Fed. R. Civ. P. 26(b)(5)(B). Fed. R. Evid. 502(b)*; *see* § 8.53[3] *above*.

If the claims of a plaintiff put at issue the very matters that the plaintiff alleges are within the protection of the attorney-client privilege, the privilege is waived. *See, e.g., Conkling v. Turner, 883 F.2d 431, 434-435 (5th Cir. 1989)* (when plaintiff alleged that fraud claim was not time barred because he was unaware of fraud until informed of it by his attorneys, plaintiff waived any attorney-client privilege that might have existed by placing notice of fraud issue in controversy).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.49.*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 503.
- *Bender's Federal Practice Forms* Form Nos. 26:30, 26:32, 26:70-26:72.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *Fed. R. Evid. 502* (limitations on waiver).

[2] Physician-Patient Privilege

The physician-patient privilege is not recognized in federal common law, federal statutes, or the U.S. Constitution. *Whalen v. Roe (1977) 429 U.S. 589, 602 n.28, 97 S. Ct. 869, 51 L. Ed. 2d 64* ; *see also Gilbreath v. Guadalupe Hosp. Foundation, Inc., 5 F.3d 785, 791 (5th Cir. 1993)* (plaintiff could not block release of her medical records by invoking Texas physician-patient privilege in federal court); *Patterson v. Caterpillar, Inc., 70 F.3d 503, 506 (7th Cir. 1995)* (federal common law does not recognize physician-patient privilege). In a federal question case in which federal law governs privileges, any physician-patient privilege that might be recognized under state law is inapplicable when inconsistent with the application of federal law.

Note, however, that federal statutes or regulations may provide an independent basis for restricting access to medical records. *See, e.g., United States ex rel Chandler v. Cook County, 277 F.3d 969, 981-982 (7th Cir. 2002)* , *aff'd on other grounds, 538 U.S. 119, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2002)* (permitting mandamus to review discovery order compelling production of patient records from county hospital when federal regulations restricted release of that data).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.50[3].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 514.
- *Bender's Federal Practice Forms* Form Nos. 26:30, 26:31.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.

[3] Psychotherapist-Patient Privilege

Federal common law recognizes the psychotherapist-patient privilege. *Jaffee v. Redmond, 518 U.S. 1, 11-15, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)* . The communication must be confidential and with a licensed professional in the course of diagnosis or treatment. The federal psychotherapist-patient privilege extends to communications with counselors at worksite Employee Assistance Programs. *See, e.g., Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154,*

1157 (9th Cir. 2001) .

The federal psychotherapist privilege is generally inapplicable when the patient is a litigant and has placed his or her mental or emotional condition in controversy. *See EEOC v. Danka Indus., 990 F. Supp. 1138, 1142 (E.D. Mo. 1997)* (plaintiff in sexual harassment action waived privilege by seeking damages for emotional distress).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.50[5].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 504.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.

[4] Clergy-Penitent Privilege

Federal common law recognizes a clergy-penitent privilege. *See Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)* ; *Mockaitis v. Harcleroad, 104 F.3d 1522, 1532 (9th Cir. 1995)* ; *United States v. Gordon, 655 F.2d 478, 486 (2d Cir. 1981)* (conversations between defendant and priest, who held executive position in defendant's company and was on leave of absence from priesthood, not within scope of privilege). The federal clergy-penitent privilege applies only to communications between penitent and a clergyperson that are made to the minister in a spiritual capacity to obtain spiritual aid or counseling. *See United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971)* (letter to priest that contained no reference to religious counsel not within scope of privilege).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.50[4].*
- *Weinstein's Federal Evidence (2d ed.)* Ch. 506.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.

[5] Marital Communications Privilege

Federal courts recognize a privilege for confidential marital communications. *See Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)* .

In the context of discovery, the marital communications privilege may be asserted against the production of information when:

1. There has been a communication;
2. There was a valid marriage at the time of the communication;
3. The communication was made in confidence; and
4. The privilege was not waived.

SEC v. Lavin, 111 F.3d 921, 925-927 (D.C. Cir. 1997) .

PRACTICE RESOURCES:

- *Weinstein's Federal Evidence (2d ed.)* Ch. 505.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.

[6] Fifth Amendment Privilege Against Self-Incrimination

The *Fifth Amendment* guarantees that no person "shall be compelled in any criminal case to be a witness against himself. *U.S. Const. amend. V.* The privilege against self-incrimination applies in civil cases. *See Pillsbury Co. v. Conboy, 459 U.S. 248, 256-257, 103 S. Ct. 608, 74 L. Ed. 2d 430 (1983)* (courts cannot compel civil deponent to testify over valid assertion of *Fifth Amendment* privilege absent grant of immunity).

The holder of the privilege must have a reasonable belief that there is a possibility of criminal prosecution. There is no requirement that such prosecution be imminent or even likely. *In re Master Key Litig., 507 F.2d 292, 293 (9th Cir. 1974)* (privilege does not depend on likelihood but on possibility of prosecution, so that when statute of limitations had not expired, privilege was properly invoked).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.51.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *U.S. Const., amend. V.*

[7] Qualified Privilege of Journalist to Protect Sources

The federal courts have recognized the propriety of a qualified journalists' privilege that derives from the *First Amendment* freedom of the press. *See, e.g., Miller v. Transamerican Press, Inc. 621 F.2d 721, 725 (5th Cir. 1980)* (reporter qualified for *First Amendment* privilege that protects refusal to disclose confidential sources).

The privilege is qualified and not absolute. It may be overcome by a showing that discovery of the materials sought from the journalist is appropriate under the circumstances. *Herbert v. Lando, 441 U.S. 153, 169-178, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979)* .

The privilege applies to both confidential and non-confidential information. That the information was not intended to be confidential, however, is an appropriate factor for consideration as to whether discovery should be permitted in spite of the privilege. *Shoen v. Shoen, 5 F.3d 1289, 1295 (9th Cir. 1993)* ; *see Gonzales v. NBC, 194 F.3d 29, 35 (2d Cir. 1999)* (when information is not confidential, privilege is overcome by showing relevance to significant issue in case and that information is not readily obtainable from other sources).

The privilege may be invoked by any person collecting information when the person has an intent to disseminate the information to the public. *Shoen v. Shoen, 5 F.3d 1289, 1294 (9th Cir. 1993)* (author of investigative book is "journalist" entitled to invoke privilege).

A litigant may be entitled to discovery despite a valid assertion of the qualified journalist's privilege by showing that the requested material is (1) unavailable despite exhaustion of all reasonable alternative sources; (2) non-cumulative; and

(3) clearly relevant to an important issue in the case. *Crowe v. County of San Diego, 242 F. Supp. 2d 740, 750 (S.D. Cal. 2003)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.48[1].*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *U.S. Const., amend. I.*

[8] Deliberative Process Privilege

Under the deliberative process privilege, a governmental entity (e.g., a state agency) can withhold documents or prevent testimony that reflects advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975)* .

In order to qualify for the privilege, a document must be pre-decisional and deliberative, meaning it must actually be related to the process by which policy is formulated. *Mitchell v. Fishbein, 227 F.R.D. 239, 250 (S.D.N.Y. 2005)* .

The governmental entity bears the burden of invoking the privilege and must: (1) make a formal claim of privilege, after actual consideration by the head of the entity; (2) provide precise and certain reasons for asserting the confidentiality over the information or documents; and (3) identify and describe the information or documents sought to be shielded. *See Greenpeace v. National Marine Fisheries Serv., 198 F.R.D. 540, 543 (W.D. Wash. 2000)* ; *United States v. Ernstoff, 183 F.R.D. 148, 152 (D.N.J. 1998)* .



Warning:

The Freedom of Information Act (FOIA) and its exemptions must be consulted as to discovery of information in the hands of the federal government. Exemption 5 of FOIA (*5 U.S.C. § 552(b)(5)*) is essentially a recognition of the deliberative process privilege as it applies to federal agencies.

Because the deliberative process privilege is a qualified privilege, it may be overcome when the party seeking discovery can show a particularized need for the information that outweighs the governmental interest in protecting the materials. *Newport Pac. Inc. v. County of San Diego, 200 F.R.D. 628, 638-641 (S.D. Cal. 2001)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.52.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.

[9] Other Governmental and Law Enforcement Privileges

Other governmental and law enforcement privileges include:

1. The absolute state secrets privilege, a federal common law evidentiary privilege that permits the government to resist discovery when the documents sought or other information sought should be

shielded to protect state secrets with respect to military interests, national security, or related subjects. *United States v. Reynolds, 345 U.S. 1, 7-8, 73 S. Ct. 528, 97 L. Ed. 727 (1953)* ;

2. The government's qualified privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Roviaro v. United States, 353 U.S. 53, 59, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)* ; and

3. The qualified government privilege for official information. *See Sanchez v. City of Santa Ana., 936 F.2d 1027, 1033-1034 (9th Cir. 1990)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.52[5].*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersAttorney-Client PrivilegeCivil ProcedureDiscoveryPrivileged MattersWork ProductWaiversCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeEvidencePrivilegesClergy CommunicationsWaiverEvidencePrivilegesGovernment PrivilegesFreedom of Information ActEvidencePrivilegesJournalist's PrivilegeElementsEvidencePrivilegesMarital PrivilegesConfidential CommunicationsGeneral Overview



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Chapter 8 DISCOVERY
PART K: EVALUATING RESTRICTIONS ON SCOPE AND EXTENT OF DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.56

§ 8.56 Applying Protection for Trade Secrets

A trade secret is any formula, pattern, device, or compilation of information which is used in one's business and which gives one an opportunity to obtain an advantage over competitors who do not know or use it. *Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984)* (quoting Restatement of Torts, section 757, Comment b).

A party may seek a protective order 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)*; *see also § 8.63 below*. To show good cause, a the party seeking the order must show that the information sought is a trade secret or other confidential information protected by Rule 26(c)(1)(G) and that the harm caused by its disclosure outweighs the need of the party seeking disclosure. *See Miles v. Boeing Co., 154 F.R.D. 112, 114 (E.D. Pa. 1994)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.105[8].*
- *Bender's Federal Practice Forms* Form Nos. 26:170-26:183.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductWaiversCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceTrade Secrets LawCivil ActionsDiscoveryTrade Secrets LawCivil ActionsProtection Orders



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Chapter 8 DISCOVERY
PART K: EVALUATING RESTRICTIONS ON SCOPE AND EXTENT OF DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.57

§ 8.57 Applying Protection for Attorney Work Product

[1] Scope of Work Product Doctrine

The federal work product doctrine provides that a party may not obtain discovery of documents or other tangible things prepared in anticipation of litigation or trial by or for another party or that other party's representative, unless the party seeking discovery (1) has substantial need of the materials in the preparation of his or her case and (2) the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. If the court orders the discovery of work product materials after the other party has made the required showing, the court must nevertheless protect to the extent possible against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. *Fed. R. Civ. P. 26(b)(3).*

A federal court applies only federal law to work product claims, even in diversity cases. *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP, 305 F.3d 813, 816 (8th Cir. 2002)* .

A major purpose of the work product doctrine is to establish a zone of privacy for strategic litigation planning and to prevent one party from unfairly taking advantage of an adversary's preparation. *Peterson v. Wallace Computer Services, Inc., 984 F. Supp. 821, 826 (D. Vt. 1997)* . The doctrine is intended to protect an attorney's mental processes so that the attorney can analyze and prepare for the client's case without interference from an opponent. *In re Perrigo Company, 128 F.3d 430, 437 (6th Cir. 1997)* ; *United States v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *Fed. R. Civ. P. 26(b)(3)* (protection for trial preparation materials).

[2] Client or Attorney May Claim Work Product Protection

Work product protection may be claimed either by the client or the attorney. *In re Sealed Case, 29 F.3d 715, 718 (D.C. Cir. 1994)* . Because the work product doctrine protects only materials that were prepared in anticipation of litigation, at the time a client seeks protection of the material, the client also must be a "party." *Lasalle Bank Nat'l Ass'n v. Lehman Bros. Holdings, Inc., 209 F.R.D. 112, 117 (D. Md. 2002)* . The person claiming work product may be either an individual or an organization, including the government. *See United States v. 266 Tonawanda Trail, 95 F.3d 422, 428 n.10 (6th Cir. 1996)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70[4].*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *Fed. R. Civ. P. 26(b)(3)* (protection for trial preparation materials).

[3] Documents Must be Prepared in Anticipation of Litigation or for Trial

The work product doctrine applies to documents or things prepared in anticipation of litigation or for trial. *Fed. R. Civ. P. 26(b)(3)(A)*. However, litigation need not have actually commenced for the doctrine to apply. Courts have held that some degree of certainty of litigation must exist before protection will attach to a given document. However, "anticipation of litigation" does not necessarily mean that any specific litigation claims have been made. *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP, 305 F.3d 813, 817 (8th Cir. 2002)* . Some courts require that at the time the document is created, the party or its representative must have in mind a specific claim supported by concrete facts that would likely lead to litigation. *See, e.g., Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Co., 5 F.3d 1508, 1515 (D.C. Cir. 1993)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70[3].*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *Fed. R. Civ. P. 26(b)(3)* (protection for trial preparation materials).

[4] Burdens Under Work Product Doctrine

The party asserting work product protection has the burden of establishing that the doctrine applies. In order to satisfy this burden, the party must show that the materials are:

1. Documents and tangible things;
2. Prepared in anticipation of litigation or for trial; and
3. By or for the party or by or for that party's representative.

See Fed. R. Civ. P. 26(b)(3)(A); *Onwuka v. Federal Express Corp., 178 F.R.D. 508, 512 (D. Minn. 1997)* .

Once a party claiming protection under the work product doctrine establishes that the doctrine applies, the party seeking discovery has the burden to establish that:

1. The party has substantial need of the materials in preparation of the party's case; and

2. The party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

See Fed. R. Civ. P. 26(b)(3)(A)(ii); *see Hendrick v. Avis Rent A Car Sys., 916 F. Supp. 256, 261 (W.D.N.Y. 1996)* .

Even when the proponent of discovery has established these two elements, the court still must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. *Fed. R. Civ. P. 26(b)(3)(B)*; *see Kelly v. Ford Motor Co., 110 F.3d 954, 965-966 (3d Cir. 1997)* ("core" work product of mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning litigation is generally afforded near absolute protection from discovery). Accordingly, the substantial need and undue hardship test applies only to "ordinary" or "fact" work product, i.e., documents prepared in anticipation of litigation or for trial that do not contain the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. *See Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 512 (D.N.H. 1996)* (substantial need and hardship tests for "ordinary" rather than "opinion" work product).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70[5].*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *Fed. R. Civ. P. 26(b)(3)* (protection for trial preparation materials).

[5] Waiver of Work Product Protection

A party may waive protection of the work product doctrine. *United States v. Nobles, 422 U.S. 225, 239-240, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975)* (party's decision to call investigator as witness waived work product protection for investigator's report).

Failure to assert the protection may constitute waiver. *Carte Blanche (Singapore) PTE, Ltd. v. Diners Club Int'l, Inc., 130 F.R.D. 28, 32 (S.D.N.Y. 1990)* (failure to specify work product as particular privilege asserted waived work product protection for documents).

A party also can waive work product protection by disclosing a work product document to a third party, when the disclosure is deliberate and, at the time of disclosure, there was a substantial danger that the documents would be disclosed to an adversary. *See Samuels v. Mitchell, 155 F.R.D. 195, 200-201 (N.D. Cal. 1994)* .

In a case of inadvertent disclosure, such as when a party accidentally produces privileged documents, the work product protection will be preserved if the disclosure was inadvertent, reasonable steps were taken by the privilege holder to prevent the disclosure, and reasonable steps were taken by the holder to retrieve the inadvertently disclosed communications or information, including (if applicable) following the procedure in *Fed. R. Civ. P. 26(b)(5)(B). Fed. R. Evid. 502(b)*; *see* § 8.53[3] *above*.

City of Worcester v. HCA Management Co., 839 F. Supp. 86, 89 (D. Mass. 1993) .

Note that the Civil Rules provide a procedure for retrieval of inadvertently disclosed work product. *Fed. R. Civ. P. 26(b)(5)(B)*; *see also § 8.57[7] below*.

A party impliedly waives work product protection if it places the substance of the documents for which the protection is claimed at issue. *See, e.g., Harding v. Dana Transp., Inc., 914 F. Supp. 1084, 1098 (D.N.J. 1996)* . Likewise, if a party uses the substance of the documents in testimony, any work product protection is waived. *See Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 419-420 (D. Del. 1992)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.70[6].*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *Fed. R. Evid. 502* (limitations on waiver).

[6] Disclosure of Prior Statement

Regardless of the work product doctrine, any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. *Fed. R. Civ. P. 26(b)(3)(C)*. For purposes of Rule 26(b)(3)(C), a "previous statement" is either: (1) a written statement that the person has signed or otherwise adopted or approved; or (2) a contemporaneous stenographic, mechanical, electrical, or other recording, or a transcript of such a recording, that recites substantially verbatim the person's oral statement. *Fed. R. Civ. P. 26(b)(3)*.



Strategic Point:

A party seeking production of its own previous statement pursuant to Rule 26(b)(3)(C) may simply request the statement without resorting to a formal Rule 34 request for production. *See Drossin v. National Action Fin. Servs., Inc., 2008 U.S. Dist. LEXIS 97576, at *12-*17 (S.D. Fla. 2008)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.71.*
- *Bender's Federal Practice Forms* Form No. 26.40 et seq.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *Fed. R. Civ. P. 26(b)(3)* (protection for trial preparation materials).

[7] Retrieving Inadvertently Disclosed Work Product

If information later determined to be protected as attorney work product was inadvertently disclosed in discovery, a procedure exists for the responding party to assert the protection claim and for the receiving party to contest the claim. The responding party may notify any party that received the information of the protection claim and the basis for the assertion. The notice should be in writing, unless the circumstances preclude it. After receiving notice, a receiving party must promptly return, sequester, or destroy the subject information and any copies. The receiving party may not use or disclose the information until the claim is resolved. If the receiving party disclosed the information before being

notified, it must take reasonable steps to retrieve it. A receiving party may present the information to the court under seal for a determination of the claim and the producing party must preserve the information until the claim is resolved. *Fed. R. Civ. P. 26(b)(5)(B)*; *see also Fed. R. Evid. 502* (limitations on waiver of work product protection).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.91.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 3.
- *Fed. R. Civ. P. 26(b)(5)(B)* (retrieval of inadvertently disclosed work product or privileged material).
- *Fed. R. Evid. 502* (limitations on waiver).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersAttorney-Client PrivilegeCivil ProcedureDiscoveryPrivileged MattersWork ProductFact Work ProductCivil ProcedureDiscoveryPrivileged MattersWork ProductWaiversCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance



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Chapter 8 DISCOVERY
PART K: EVALUATING RESTRICTIONS ON SCOPE AND EXTENT OF DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.58

§ 8.58 Understanding Restrictions on Discovery from Experts

[1] Deposition of Experts Whose Opinions May Be Presented at Trial

Any party may depose any expert witnesses who are expected to testify at trial. However, if a report is required from the expert witness under the discovery rules, the deposition may not be conducted until after the report is provided. *Fed. R. Civ. P. 26(b)(4)(A).*

[1A] Work Product Protection for Draft Reports or Disclosures

In 2010, Rule 26(b)(4) was amended to provide work product protection for drafts of expert reports or disclosures. *Fed. R. Civ. P. 26(b)(4)* advisory committee's note (2010). Specifically, the rule provides that Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. *Fed. R. Civ. P. 26(b)(4)(B).* The rule is intended to protect drafts of any supplementation under Rule 26(e) as well. *Fed. R. Civ. P. 26(b)(4)* advisory committee's note (2010).

[1B] Work Product Protection for Communications Between Attorney and Expert

In 2010, Rule 26(b)(4) was amended to provide work product protection for most communications between an attorney and a retained expert. *Fed. R. Civ. P. 26(b)(4)* advisory committee's note (2010). With specified exceptions, communications between a party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, are granted work product protection. The exceptions provide that such communications are not protected to the extent they (1) relate to compensation for the expert's study or testimony; (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (3) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed. *Fed. R. Civ. P. 26(b)(4)(C).*

Work product protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying. Although the rule does not protect communications between counsel and other types of expert witnesses, it also does not preclude protection under other doctrines such as privilege or independent development of the work product doctrine. *Fed. R. Civ. P. 26(b)(4)* advisory committee's note (2010).

Discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C) is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii); that is, that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. A party rarely will be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. *Fed. R. Civ. P. 26(b)(4)* advisory committee's note (2010).

Warning:

Former versions of Rule 26 created uncertainty as to whether work product protection is waived when an attorney provides work product materials to an expert witness. The uncertainty was based on an apparent conflict in the language of Rule 26. A former version of Rule 26(a)(2)(B) required that an expert report contain a complete statement of all of the "data or other information" considered by the expert in forming the opinions, without express limitation. Based on this language, many courts held that work product protection was waived for any document or information provided to a testifying expert, whether or not the expert relied on the information in preparing the expert report. *See, e.g., In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001)* . In 2010, Rule 26(a)(2)(B) was amended to replace the term "data or other information" with the term "facts or data." This amendment was intended to disapprove of cases that relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. In addition, Rule 26(b)(4) was amended at the same time to provide work-product protection for draft reports and communications between a party's attorney and expert witnesses. *Fed. R. Civ. P. 26(a)(2)(B)* advisory committee's note (2010). The amendments to Rule 26(b)(4) were designed to protect work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to discovery. *Fed. R. Civ. P. 26(b)(4)(C)* advisory committee's note (2010).

[2] Discovery from Experts Employed Only For Trial Preparation

A party may use either interrogatories or depositions to discover facts known or opinions held by an expert specially retained by a party in anticipation of litigation or preparation for trial, but not expected to be called as a witness. *Fed. R. Civ. P. 26(b)(4)(D)*. An expert is considered hired in anticipation of litigation if there is more than a remote possibility of litigation, even if a lawsuit has not actually been filed at the time of the hiring. *Spearman Indus., Inc. v. St. Paul Fire & Marine Ins. Co., 128 F. Supp. 2d 1148, 1151 (N.D. Ill. 2001)* . Discovery may be made regarding such an expert only under the following two circumstances:

- As provided in Rule 35(b), regarding reports on the physical and mental examinations of persons. *Fed. R. Civ. P. 35(b)*.

- If the party requesting discovery shows exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. The party seeking discovery has a heavy burden of proving that the required exceptional circumstances exist. *Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership, 154 F.R.D. 202, 208-209 (N.D. Ind. 1993)* .

Fed. R. Civ. P. 26(b)(4)(D).

The purpose of these restrictive provisions is to prevent a party from replacing the work of its own experts with that of its opponent. *Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership, 154 F.R.D. 202, 207 (N.D. Ind. 1993)* . The provisions do not apply when the opposition party has allowed discovery of its expert without objection. *Agron v. Trustees of Columbia Univ., 176 F.R.D. 445, 449 (S.D.N.Y. 1997)* . To trigger the restrictions, the party claiming "privilege" pursuant to Rule 26(b)(4)(D) has the burden to establish that the materials were prepared by a

non-testimonial expert retained in anticipation of trial, and when that burden is met, the party requesting discovery has the burden to prove waiver of the privilege. *Western Resources, Inc. v. Union Pacific R.R. Co., 2002 U.S. Dist. LEXIS 1911, at *10-*13 (D. Kan. 2002)* .

[3] Payment of Fees

Unless manifest injustice would result, the court will require the party seeking discovery to pay the expert a reasonable fee for the time spent in responding to any discovery demands. *Fed. R. Civ. P. 26(b)(4)(E)(i)*. The purpose of this rule is to calibrate the fee so that parties will not be hampered in efforts to hire quality experts, while opposing parties will not be burdened by unfairly high fees preventing feasible discovery and resulting in windfalls to the expert. *Mathis v. NYNEX, 165 F.R.D. 23, 24 (E.D.N.Y. 1996)* .

In situations in which a party is permitted to discover facts known or opinions held by a non-testifying expert, the court may require the party seeking discovery to pay the other party a fair portion of the cost of obtaining such discovery. *Fed. R. Civ. P. 26(b)(4)(E)(ii)*. "Reasonable fees" do not include those expenses that could have been avoided by the party that is responding to the expert discovery request. *M.T. McBrian, Inc. v. Liebert Corp., 173 F.R.D. 491, 493 (N.D. Ill. 1997)* .

In determining the reasonableness of a requested fee, the court should consider: the expert's area of expertise; the education and training required to provide the expertise that is sought; the prevailing rates for other comparably respected experts; the nature, quality, and complexity of the information provided by the expert; the cost of living in the applicable geographic area; and any other factor that may assist the court in achieving the proper balance of interests implicated by Rule 26. *Goldwater v. Postmaster General of the U.S., 136 F.R.D. 337, 340 (D. Conn. 1991)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.80.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 12.
- *Fed. R. Civ. P. 26(b)(4)* (trial preparation; experts).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance



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Chapter 8 DISCOVERY
PART L: REGULATING DISCOVERY BY STIPULATION OR MOTION GENERALLY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.59

§ 8.59 Checklist for Regulating Discovery by Stipulation or Motion

☐ Using stipulations to regulate discovery. *See § 8.60 below*.

- ○ Consider stipulations on discovery procedure, including timing, limits on scope of discovery, custody of discovery, physical or mental examinations, limiting use of discovery, issues regarding documents, and objections at depositions.
- ○ Draft proposed stipulation(s).
- ○ Meet and confer regarding proposed stipulation(s).

☐ Using motion practice to regulate discovery. *See § 8.61 below*.

- ○ Determine whether proposed modification would interfere with court imposed deadlines.
- ○ Consult with opposing party to attempt to resolve differences.
- ○ Consider whether joint motion is appropriate.
- ○ Carefully review district court rules and any standing orders issued by the assigned judge for any local prerequisites to bringing discovery motion (e.g., meet and confer requirements).
- ○ Determine whether to seek order assessing costs of discovery motion on opposing

party.

- Prepare notice of motion and supporting documents.

Search by Topic: Civil Procedure > Discovery > Stipulations

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.60

§ 8.60 Using Stipulations to Modify Discovery Procedures

Sometimes a party may find it necessary to seek a stipulation to alter the limitations provided in the discovery rules. For example, a stipulation may relate to expediting certain discovery, extending deadlines for discovery, or limiting the scope of discovery.

Under the Civil Rules, parties may stipulate that:

> 1. Depositions may be taken before any person, at any time or place, on any notice, and in the manner specified, in which case the deposition may be used in the same way as any other deposition; and
>
> 2. Other procedures governing or limiting discovery be modified--but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

Fed. R. Civ. P. 29.

Unless the parties stipulate in court or on the record during a deposition, a stipulation generally must be in writing. However, a court may enforce an oral discovery agreement, just as with certain other contracts that otherwise must be in writing, if the failure to do so allows one party to take unfair advantage of another. *Oliver v. City of Shattuck, 157 F.2d 150, 153 (10th Cir. 1946)* .

Though the Federal Rules of Civil Procedure do not require that a stipulation be filed, local rules may require a filing to alert the court as to changes in scheduling.

Unless the stipulation interferes with court-imposed deadlines, court approval for discovery stipulations generally is not required. A court, however, has authority to reject a stipulation and parties may not enter into stipulations that conflict with a court order. *Fed. R. Civ. P. 29.* Moreover, a court may relieve a party from an improvident stipulation if enforcement of the stipulation would contravene the policy favoring full disclosure and interfere with the ability to dispose of a case on the merits. *See, e.g., In re Westinghouse Elec. Corp., 570 F.2d 899, 902-903 (10th Cir. 1978)* .

Various federal discovery rules specifically authorize stipulations to modify discovery procedures. *See, e.g., Fed. R. Civ. P. 30(d)(1)* (stipulation to allow more time for deposition than usual 7-hour limit); *Fed. R. Civ. P. 33(a)(1)* (stipulation to exceed 25-per-party limit on interrogatories).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 29.02 et seq.*
- *Bender's Federal Practice Forms* Form Nos. 29:1, 29:2.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 15.
- *Fed. R. Civ. P. 29* (discovery stipulations).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance



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Chapter 8 DISCOVERY
PART L: REGULATING DISCOVERY BY STIPULATION OR MOTION GENERALLY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.61

§ 8.61 Using Motions to Modify Discovery Procedures

[1] General Rules for Discovery Motions

If parties cannot reach a stipulation as to a modification of discovery procedures, a party may move to have the court order the modification.

The moving party generally should bring a discovery motion in the court where the action is pending. *Fed. R. Civ. P. 26(c), 37(a)(1).* A motion to compel discovery from a nonparty, however, must be brought in the court in the district where the discovery would be taken. *Fed. R. Civ. P. 37(a)(1).*

Adverse parties may join together to bring a discovery motion. *See, e.g., Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 288 F. Supp. 2d 1033, 1040* (joint motion to vacate discovery deadlines pending scheduling conference).

The procedure for preparing an opposition to a discovery motion generally follows the procedure for opposing other motions. *See Fed. R. Civ. P. 7(b), 37(a).*



Warning:

Many districts have local rules specifically regulating discovery motions.



Strategic Point:

Not opposing a motion means that a court is likely to grant it, and the court may look unfavorably on the parties' failure to stipulate to the matter at issue in the motion. If for some reason a party cannot stipulate but decides not to oppose the motion, it may consider filing a notice of non-opposition explaining why it could not stipulate.

[2] Certification Regarding Good-Faith Attempt to Confer Is Mandatory

Discovery motions for protective orders, motions to compel, and motions for sanctions must be accompanied by a

certification that the moving party has in good faith or attempted to confer with the opposing party. *Fed. R. Civ. P. 26(c), 37(a)(2)(B), (d).* Local district court rules may set out additional meet-and-confer requirements.

[3] Courts May Limit Frequency or Extent of Discovery on Party's Motion

The recipient of discovery demands may bring a motion to limit the frequency or extent of use of discovery. *Fed. R. Civ. P. 26(b)(2)(C).*

[4] Party May Bring Motion to Widen Discovery Scope

A party may, for good cause, make a motion to expand the scope of discovery as to any unprivileged matters relevant to the subject matter of the action. Normally, the scope of discovery only extends to matters "relevant to any party's claim or defense." *Fed. R. Civ. P. 26(b)(1).*

[5] Party May Move to Require Discovery Papers Be Filed

Depositions, interrogatories, requests for documents, or to permit entry on land and, requests for admission are not to be filed unless ordered by the court. *Fed. R. Civ. P. 5(d).* A party may bring a motion that these documents be filed, although this practice is not common except in cases where there is suspicion that discovery item have been tampered with.

[6] Party May Move for Expedited Discovery

Normally, a party may not seek discovery from any source prior to the Rule 26(f) planning meeting absent an agreement between the parties or court order. *Fed. R. Civ. P. 26(d)(1).* If unable to secure a stipulation to expedite discovery, a party may move the court to order than certain discovery be expedited. *See, e.g., Semitool, Inc. v. Tokyo Electron Am., Inc., 208 F.R.D. 273, 276-277 (N.D. Cal. 2002)* (need for expedited discovery, considering administration of justice, must outweigh prejudice to responding party); *Yokohama Tire Corp. v. Dealers Tire Supply, Inc., 202 F.R.D. 612, 614 (D. Ariz. 2001)* (applying preliminary injunction standard to evaluate good cause for expedited discovery).

[7] Party May Move to Restrict Timing or Sequence of Discovery for Convenience and Interests of Justice

Normally, a party may employ any method of discovery in any desired sequence, and the fact that one party is conducting discovery in any desired sequence, and the fact that one party is conducting discovery does not serve to delay another party's discovery. *Fed. R. Civ. P. 26(d).* A party may make a motion, however, to restrict the sequence or timing of discovery for the parties' and witnesses' convenience and in the interests of justice. *Fed. R. Civ. P. 26(d)(2).*

[8] Party May Move to Shorten or Extend Time for Response

If a party has been refused a request to stipulate to shorten or extend the time to respond to discovery demands, the party may move the court to modify the 30-day deadline for response. *Fed. R. Civ. P. 33(b)(2), 34(b)(2)(A), 36(a)(3).* If an extension of time to conduct discovery is desired that extends beyond the discovery cutoff, a hearing on the motion, or trial, a party must move to extend the date, even if all parties stipulate to the extension. *Fed. R. Civ. P. 29(b).*

[9] Party May Move to Extend Discovery Cutoff

If discovery needs to be taken after the discovery cutoff date, the party seeking additional discovery needs to file a motion to extend the cutoff date. The motion must establish good cause, unless the extension is otherwise authorized by local rule or order of the magistrate judge. *See Fed. R. Civ. P. 16(b)(4)* (schedule may be modified only for good cause and with judge's consent).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 7.03, 26.60, 26.122.*
- *Federal Litigation Guide* Ch. 11.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 16.
- *Fed. R. Civ. P. 7(b)* (motions).
- *Fed. R. Civ. P. 26(b)* (discovery scope and limits).
- *Fed. R. Civ. P. 26(d)* (timing and sequence of discovery).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance



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Chapter 8 DISCOVERY
PART M: USING PROTECTIVE ORDERS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.62

§ 8.62 Checklist for Protective Orders

☐ Evaluating grounds for protective order.

○ On receipt of discovery requests, determine whether grounds for a protective order exist, including whether the request results in unnecessary annoyance, embarrassment, oppression, or undue burden or expense.

○ If grounds for protective order exist, determine type of relief sought, e.g.: (1) block on discovery, (2) imposition of specified terms and conditions on discovery, (3) stay of discovery, (4) prescription of particular discovery method, (5) limitation on scope of discovery, (6) exclusion of particular person from attending deposition, (7) sealing discovery materials, (8) limiting discovery of trade secrets or other confidential information.

☐ Preparing motion for protective order.

○ Confer or attempt to confer.

○ Ensure that motion on written discovery will be filed before responses due.

○ Ensure that motion on deposition will be filed prior to scheduled date for deposition.

○ Confer or attempt to confer with opposing parties.

○ In moving papers, establish good cause, show that danger of harm or prejudice outweighs need for discovery, and identify type of protection needed.

- Prepare affidavits by knowledgeable persons to establish good cause.
- Attach certification that movant conferred or attempted to confer to resolve dispute.
- Serve and file motion in accordance with federal motion practice, local rules, and individual judge's rules.
- Include proposed order with motion.

☐ Opposing a motion for protective order.

- Use federal pretrial motion procedure to oppose motion.
- Refute showing of good cause by establishing minimal risk of harm, minimal harm, or lack of cognizable prejudice.
- Show that relevance and need for discovery outweigh potential harm to the party seeking the protective order.
- Draft opposition to motion for protective order and file and serve opposition papers.

☐ **Search by Topic:**

- Civil Procedure > Discovery > Privileged Matters
- Civil Procedure > Discovery > Protective Orders
- Civil Procedure > Discovery > Relevance
- Civil Procedure > Discovery > Undue Burdens

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedurePretrial MattersConferencesPretrial OrdersTrade Secrets LawCivil ActionsProtection OrdersTrade Secrets LawCivil ActionsSealed Records



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Chapter 8 DISCOVERY
PART M: USING PROTECTIVE ORDERS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.63

§ 8.63 Evaluating Availability of Protective Order

A party or any person from whom discovery is sought may move for a protective order. 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 disclosure or discovery;

2. Specifying terms, including time and place, for disclosure or discovery;

3. Prescribing a discovery method other than the one selected by the party seeking discovery;

4. Forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

5. Designating the persons who may be sealed and opened only on court order;

6. Requiring that a deposition be sealed and opened only on court order;

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; and

8. Requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

Fed. R. Civ. P. 26(c)(1).

Even if a motion for protective order is denied in whole or in part, the court may order that a party or other person provide or permit discovery on "just terms". *Fed. R. Civ. P. 26(c)(2).*

Warning:

Filing a motion for protective order does not substitute for filing a written response to a discovery request. Failing to object may be deemed a waiver of an objection.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.101 et seq.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 16.
- *Fed. R. Civ. P. 26(c)* (protective orders).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens



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PART M: USING PROTECTIVE ORDERS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.64

§ 8.64 Obtaining a Protective Order

A party moving for a protective order must follow the general procedure for noticed motions. *See* Ch. 9, *below*.

The motion must be timely made. A motion made prior to the date set for producing the discovery is timely. *Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C. 1991)* . In the case of a deposition, a Rule 26(c), the motion should be made before the deposition begins. *See BCI Communication Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154, 159 (N.D. Ala. 1986)* .

The motion must be filed in the proper district. Typically, that will be the court in which the action is pending. As an alternative on matters relating to a deposition, the motion may be filed in the court for the district where the deposition will be taken. *Fed. R. Civ. P. 26(c)(1).*

To satisfy the burden of proof, the moving party must show good cause. *Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986)* . A party may use affidavits from knowledgeable persons to show good cause. The affidavits should articulate facts in support of the request for protective order.

After a party has established good cause, the court must balance the hardship to the party seeking the protective order against public and private interests to decide whether a protective order is necessary. *See Phillips v. GMC, 307 F.3d 1206, 1211 (9th Cir. 2002)* .

Parties may stipulate to a protective order to avoid delays, uncertainties and costs associated with moving to compel or opposing a motion for protective order. *See Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994)* (stipulated protective orders are relatively common).

Protective orders are subject to modification, in the sound discretion of the district court. *See, e.g., United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990)* (modifying protective order to permit nonparties access to discovery materials for use in collateral litigation against defendants).

If a motion for protective order is granted, the court may award to the prevailing party any expenses incurred by it in relation to making the motion, including attorneys' fees. A court will not award expenses if it finds that the movant filed

the motion before attempting in good faith to obtain the relief sought without court action, the opposing party's opposition was substantially justified, or other circumstances make an award of expenses unjust. *See Fed. R. Civ. P. 26(c)(3), 37(a)(5)(A).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.101 et seq.*
- *Bender's Federal Practice Forms* Form No. 26:100 et seq.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 16.
- *Fed. R. Civ. P. 26(c)* (protective orders).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.65

§ 8.65 Opposing Motion for Protective Order

A party opposing a motion for protective order must use noticed motion procedure. In the opposition, a party should refute good cause by focusing on the unlikelihood of potential harm or prejudice and on the minimal nature of any harm or prejudice that might occur. Additionally, a party opposing a motion for protective order may defeat or limit the reach of the protective order by showing that the relevance and necessity of the information outweigh the opposing party's interest in restricting discovery. See *Fed. R. Civ. P. 26(c)(1)*.

If a motion for protective order is denied, the court may award to the prevailing party any expenses incurred by it in relation to opposing the motion, including attorneys' fees. A court will not award expenses if it finds that filing the motion was substantially justified or that other circumstances make an award of expenses unjust. *See Fed. R. Civ. P. 26(c)(3), 37(a)(5)(B)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 26.101 et seq.*
- *Bender's Federal Practice Forms* Form No. 26:106.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 16.
- *Fed. R. Civ. P. 26(c)* (protective orders).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 8 DISCOVERY
PART N: SEEKING ORDER UNDER RULE 37(a) TO COMPEL MANDATORY DISCLOSURE OR DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.66

§ 8.66 Checklist for Compelling Mandatory Disclosure or Discovery

☐ Bringing motion to compel. *See § 8.67 below*.

- ○ Review Rule 37(a).
- ○ Determine whether grounds for motion exist, such as failure to comply with discovery requests, failure to answer deposition questions, failure to answer interrogatories, or failure to produce or permit inspection.
- ○ Determine nature of information sought and whether preclusion of that material would be more advantageous than disclosure or discovery of it.
- ○ Balance the costs of the motion against the value of the motion.
- ○ Consider the delay that would be caused by the motion.
- ○ Follow local rules on discovery motions, including meet-and-confer requirements.
- ○ Draft motion to compel and file and serve motion papers.

☐ Opposing motion to compel. *See § 8.68 below*.

- ○ Determine grounds for opposing a motion to compel, including information sought is not relevant, proportionality factors favor denial of motion, good-faith requirements favor denial of motion, or materials sought are privileged or protected by the work

product doctrine.

- ○ Draft opposition papers and file and serve accordingly.

☐ Seeking expense-shifting sanctions on motion to compel mandatory disclosure or discovery. *See § 8.69 below*.

- ○ When motion to compel mandatory disclosure or discovery is granted, move for sanctions against party opposing the motion, including documentation for amount of sanctions sought.

- ○ When motion to compel mandatory disclosure or discovery is denied, move for sanctions against party bringing motion, including documentation for amount of sanctions sought.

☐ Opposing expense-shifting sanctions on motion to compel mandatory disclosure or discovery. *See § 8.70 below*.

- ○ If position on motion to compel is unsuccessful, oppose expense-shifting sanctions because the unsuccessful position was substantially justified, other circumstances make the imposition of sanctions unjust, the prevailing party did not make a good faith attempt at resolving the issues or the amount requested is excessive.

☐ **Search by Topic:** Civil Procedure > Discovery > Motions to Compel

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMotions to Compel



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.67

§ 8.67 Bringing Motion to Compel Mandatory Disclosure or Discovery

[1] Nature of Motion

A motion to compel pursuant to Rule 37(a) is the proper vehicle to address instances in which the responding party fails to make or cooperate in providing the requested discovery. *See Patelco Credit Union v. Sahni, 262 F.3d 897, 913 (9th Cir. 2001)* . The objective of Rule 37(a) is the prevention of delay and costs to other litigants caused by the filing of groundless motions. *See, Cunningham v. Hamilton County, 527 U.S. 198, 208-209, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999)* (monetary sanctions against attorney not immediately appealable).

[2] Including Certification

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action. *Fed. R. Civ. P. 37(a)(1).*

[3] Bringing Motion in Appropriate Court

A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken. *Fed. R. Civ. P. 37(a)(2).*

[4] Using Motion to Compel Disclosure

If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure, and for appropriate sanctions. *Fed. R. Civ. P. 37(a)(3)(A).* The court will treat an evasive or incomplete disclosure as a failure to disclose. *Fed. R. Civ. P. 37(a)(4).*

[5] Using Motion to Compel Discovery Response

A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

1. A deponent fails to answer a question asked under Rule 30 (oral depositions) or Rule 31 (depositions on written questions);

2. A corporation or other entity fails to make a designation under Rule 30(b)(6) (notice or subpoena directed to organization) or Rule 31(a)(4) (questions directed to an organization);

3. A party fails to answer an interrogatory submitted under Rule 33; or

4. A party fails to respond that inspection will be permitted or fails to permit inspection, as requested under Rule 34.

Fed. R. Civ. P. 37(a)(5)(B).

The court will treat an evasive or incomplete answer or response as a failure to answer or respond. *Fed. R. Civ. P. 37(a)(4).*

When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order to compel. *Fed. R. Civ. P. 37(a)(3)(C).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.02 -37.23.*
- *Federal Litigation Guide PP 22.01 -22.08.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *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)* (motions to compel).

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART N: SEEKING ORDER UNDER RULE 37(a) TO COMPEL MANDATORY DISCLOSURE OR DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.68

§ 8.68 Opposing Motion to Compel Mandatory Disclosure or Discovery

If a motion for order compelling disclosure is denied in whole or in part, the court may enter a protective order authorized under Rule 26(c). A party opposing a motion to compel may also seek a protective order in the event that the motion to compel is granted. *See Fed. R. Civ. P. 37(a)(5).*

Factors supporting denial of a motion to compel discovery include the following:

1. The discovery sought does not meet the applicable relevance standard. *See Fed. R. Civ. P. 26(b)(1)*;

2. The discovery sought is unreasonably cumulative or duplicative. *See Fed. R. Civ. P. 26(b)(2)(C)(i)*;

3. The discovery sought is obtainable from a more convenient, less burdensome, or less expensive source. *See Fed. R. Civ. P. 26(b)(2)(C)(i)*;

4. The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought. *See Fed. R. Civ. P. 26(b)(2)(C)(ii)*;

5. The burden or expense of the proposed discovery outweighs its likely benefit. *See Fed. R. Civ. P. 26(b)(2)(C)(iii)*;

6. Discovery sought is not warranted by existing law or a good faith argument to change existing law;

7. Discovery has been sought for improper purpose; or

8. Privilege or work product protection apply to the information sought.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.02 -37.23.*

- *Federal Litigation Guide PP 22.01 -22.08*.
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Bender's Federal Practice Forms* Form Nos. 37:40-37:60.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 17.
- *Fed. R. Civ. P. 37(a)* (motions to compel).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMotions to Compel



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.69

§ 8.69 Seeking Imposition of Expense-Shifting Sanctions on Motion to Compel Mandatory Disclosure or Discovery

[1] If Motion Is Granted, or Disclosure or Discovery is Provided After Filing

If the motion for an order compelling disclosure or discovery is granted, or if the disclosure or request is provided after the motion is filed, the court must, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising the conduct, or the both of them, to pay the moving party the reasonable expenses incurred in making the motion, including attorneys' fees unless the court finds that: (1) motion was filed without a prior good faith effort to obtain the discovery or disclosure 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).*

[2] If Motion Is Denied

If a motion for an order compelling disclosure or discovery is denied, the court may enter any protective order authorized under Rule 26(c). The court, after affording an opportunity to be heard, may require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. *Fed. R. Civ. P. 37(a)(5)(B).*

[3] If Motion Is Granted in Part and Denied in Part

If motion for order compelling disclosure or discovery is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c). The court, after affording an opportunity to be heard, may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. *Fed. R. Civ. P. 37(a)(5)(C).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.02 -37.23.*

- *Federal Litigation Guide P 22.05*.
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 17.
- *Fed. R. Civ. P. 37(a)* (motions to compel).
- *ClearValue, Inc. v. Pearl River Polymers, Inc., 560 F.3d 1291, 1309 (Fed. Cir. 2009)* (district court should not resort to imposition of sanctions for discovery violations under its inherent power when Rule 37 provides an adequate remedy).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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PART N: SEEKING ORDER UNDER RULE 37(a) TO COMPEL MANDATORY DISCLOSURE OR DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.70

§ 8.70 Opposing Expense-Shifting Sanctions on Motion to Compel Mandatory Disclosure or Discovery

If a party's position on a motion to compel is unsuccessful, the party may oppose imposition of expense-shifting sanctions on the following grounds:

1. The unsuccessful position was substantially justified;

2. Other circumstances may the imposition of sanctions unjust;

3. The prevailing party did not make a good-faith pre-motion attempt at resolving the issues; or

4. The amount requested is excessive.

See Fed. R. Civ. P. 37(a)(5).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.02 -37.23.*
- *Federal Litigation Guide P 22.06.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 17.
- *Fed. R. Civ. P. 37(a)* (motions to compel).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 8 DISCOVERY
PART O: SEEKING SANCTIONS UNDER RULE 37(b) FOR FAILURE TO COMPLY WITH ORDER COMPELLING MANDATORY DISCLOSURE OR DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.71

§ 8.71 Checklist for Rule 37(b) Sanctions

☐ Bringing motion to request imposition of Rule 37(b) sanctions. *See § 8.72 below*.

- ○ Review Rule 37(b).
- ○ Determine if party failed to obey a court order for discovery.
- ○ Follow local rules regarding discovery motions, including meet-and-confer requirements.
- ○ Draft motion and file and serve motion papers.
- ○ If monetary sanctions requested, prepare documentation for amount of sanctions requested.

☐ Opposing imposition of Rule 37(b) sanctions. *See § 8.73 below*.

- ○ If appropriate, seek a protective order. *Fed. R. Civ. P. 26(c)*.
- ○ Determine grounds to oppose motion for sanctions, including failure was substantially justified, other circumstances make monetary sanctions unjust, underlying order was not issued, underlying order was not disobeyed, or sanctions are unrelated to disobeyed order.
- ○ If monetary sanctions are sought, argue that other circumstances make the

imposition of sanctions unjust or the amount requested is excessive.

- ○ Draft opposition papers and file and serve accordingly.

☐ **Search by Topic:** Civil Procedure > Discovery > Misconduct

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMotions to Compel



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1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.72

§ 8.72 Bringing Motion For Rule 37(b) Sanctions

[1] Circumstances Warranting Imposition of Rule 37(b) Sanctions

[a] Deponent Fails to Obey Court Order

If the court where discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. *See Fed. R. Civ. P. 37(b)(1).*

[b] Party or Witness Disobeys Court Order to Permit or Provide Discovery

If a party or a party's officer, director, or managing agent, or a witness designated under Rule 30(b)(6) or 31(a)(4), fails to obey an order to provide or permit discovery, the court where the action is pending may issue the following orders:

i. Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

ii. Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

iii. Striking pleadings in whole or in part;

iv. Staying further proceedings until the order is obeyed;

v. Dismissing the action or proceeding in whole or in part;

vi. Rendering a default judgment against the disobedient party; or

vii. Treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A).

Instead of or in addition to these orders, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust. *Fed. R. Civ. P. 37(b)(2)(C).*

[c] Party Fails to Comply With Order to Produce Person for Examination

If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person. *Fed. R. Civ. P. 37(b)(2)(B)*; *see § 8.72[2] above*.

Instead of or in addition to these orders, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust. *Fed. R. Civ. P. 37(b)(2)(C).*

[2] Moving for Rule 37(b) Sanctions

A motion for sanctions under Rule 37(b) must describe the alleged violation of the order with enough specificity to enable the accused party to understand the charges, so that he or she is given a fair opportunity to develop a defense. *See Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41-42 (4th Cir. 1995)* .

If the motion seeks an award of expenses, including attorney's fees, it should describe the causal connection between the expenses and the alleged violation of the underlying court order.

Timing:

Rule 37(b) motions must be filed within a reasonable time after the alleged violation of the underlying discovery order occurred, was discovered, or should have been discovered through reasonable diligence. What constitutes "reasonable time" will vary with the circumstances, but long delays will significantly reduce the likelihood that the motion will be granted. *Brandt v. Vulcan, Inc., 30 F.3d 752, 756-757 (7th Cir. 1994)* (motion made at jury instruction conference after five years of litigation was untimely).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.40 -37.51.*
- *Federal Litigation Guide PP 22.20 -22.25.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Bender's Federal Practice Forms* Form Nos. 37:100-37:104.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 37(b)* (discovery sanctions; failure to comply with court order).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMotions to CompelCriminal Law & ProcedureDiscovery & InspectionDiscovery MisconductGeneral Overview



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Chapter 8 DISCOVERY
PART O: SEEKING SANCTIONS UNDER RULE 37(b) FOR FAILURE TO COMPLY WITH ORDER COMPELLING MANDATORY DISCLOSURE OR DISCOVERY

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.73

§ 8.73 Opposing Motion For Rule 37(b) Sanctions

A party that is unable to comply with a discovery order should promptly inform the court and the other parties. The party should explain the circumstances well before the discovery deadline and request a modification of the original order from the court.

To oppose a motion for monetary sanctions, the disobedient party has the burden of proving that the failure was substantially justified. Additionally, the disobedient party may argue that other circumstances make an award of expenses unjust. *Fed. R. Civ. P. 37(b)(2)*. A disobedient party may also argue that the underlying order was not issued or that the party did not disobey any order and that the sanction is unrelated to particular discovery order that was disobeyed.

To oppose civil contempt, a disobedient party may argue that there was substantial compliance with the court order or that it is impossible to comply with the order.

Finally, a disobedient party may argue that there are less severe sanctions that are appropriate under the circumstances. The disobedient party may also argue that the amount requested is unreasonable or that the expenses were incurred outside the context of the failure to obey the court order.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.40 -37.51*.
- *Federal Litigation Guide PP 22.20 -22.25*.
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.

- *Fed. R. Civ. P. 37(b)* (discovery sanctions; failure to comply with court order).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMotions to CompelCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview



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Chapter 8 DISCOVERY
PART P: SEEKING SANCTIONS UNDER RULE 37(c)(1) FOR FAILURE TO MAKE MANDATORY DISCLOSURE OR FAILURE TO SUPPLEMENT DISCOVERY RESPONSES

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.74

§ 8.74 Checklist for Rule 37(c)(1) Sanctions

☐ Moving for sanctions under Rule 37(c)(1). *See § 8.75 below*.

- ○ Review Rule 37(c)(1).
- ○ Determine if party who failed to provide information or identify a witness as required by Rule 26(a) or Rule 26(e) has attempted to use that information or witness to supply evidence.
- ○ Raise the issue with the court.
- ○ Review local rule requirements for discovery motions.
- ○ Draft motion papers and file and serve accordingly.
- ○ Document amount of sanctions requested.

☐ Opposing a motion for Rule 37(c)(1) sanctions. *See § 8.76 below*.

- ○ Determine whether grounds to oppose preclusion exist, including that failure was substantially justified, that failure was harmless, that factors weigh against sanctions, or that sanctions are too severe.
- ○ Draft opposition to motion and file and serve accordingly.

☐ **Search by Topic:** Civil Procedure > Discovery > Misconduct

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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Chapter 8 DISCOVERY
PART P: SEEKING SANCTIONS UNDER RULE 37(c)(1) FOR FAILURE TO MAKE MANDATORY DISCLOSURE OR FAILURE TO SUPPLEMENT DISCOVERY RESPONSES

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.75

§ 8.75 Bringing Motion for Rule 37(c)(1) Sanctions

If a party fails to provide information or identify a witness as required by Rule 26(a) (disclosure) or Rule 26(e) (supplementation of disclosures or responses), the party is not allowed to use that information or witness to supply evidence on a motion, at hearing, or at a trial unless the failure was substantially justified or harmless. *Fed. R. Civ. P. 37(c)(1).*

In addition to, or instead of the preclusion sanction, the court, on motion and after giving an opportunity to be heard, may:

1. Order the payment of the reasonable expenses, including attorney's fees, caused by the failure;

2. May inform the jury of the party's failure; and

3. May impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). *See § 8.72[1][b] above.*

Fed. R. Civ. P. 37(c)(1).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.60 -37.63.*
- *Federal Litigation Guide PP 22.40 -22.45.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Bender's Federal Practice Forms* Form No. 37:200.

- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 26(a)* (disclosures).
- *Fed. R. Civ. P. 26(e)* (supplementation of disclosures and responses).
- *Fed. R. Civ. P. 37(c)(1)* (failure to disclose or supplement).
- *Wade v. Soo Line R.R., 500 F.3d 559, 564 (7th Cir. 2007)* (although dismissal is harsh remedy for discovery misconduct, district court did not abuse its discretion in dismissing action as sanction for party's failure to turn over highly relevant documents, and court was further justified in requiring plaintiff's attorney to personally pay defendant's costs and fees).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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PART P: SEEKING SANCTIONS UNDER RULE 37(c)(1) FOR FAILURE TO MAKE MANDATORY DISCLOSURE OR FAILURE TO SUPPLEMENT DISCOVERY RESPONSES

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.76

§ 8.76 Opposing Motion for Rule 37(c)(1) Sanctions

A party may oppose a motion for Rule 37(c)(1) sanctions on the following grounds:

- The failure to disclose was substantially justified;
- The failure to disclose or supplement was harmless; or
- That the requested sanctions are too severe.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.60 -37.63*.
- *Federal Litigation Guide PP 22.40 -22.45*.
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 37(c)(1)* (failure to disclose or supplement).
- *Bessemer & Lake Erie R.R. Co. v. Seaway Marine Transp., 596 F.3d 357, 370 (6th Cir. 2010)* (test under Rule 37(c) "is very simple: the sanction is mandatory unless there is a reasonable explanation of why Rule 26 was not complied with or the mistake was harmless").

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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Chapter 8 DISCOVERY
PART Q: SEEKING SANCTIONS UNDER RULE 37(c)(2) FOR UNREASONABLE FAILURE TO ADMIT GENUINENESS OF DOCUMENT OR TRUTH OF MATTER

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.77

§ 8.77 Checklist for Rule 37(c)(2) Sanctions

☐ Moving for sanctions under Rule 37(c)(2). *See § 8.78 below*.

- ○ Review Rule 37(c)(2).
- ○ Determine if a party failed to admit the genuineness of any matter that was later proved.
- ○ Review local rule requirements for discovery motions.
- ○ Draft motion and file and serve motion papers.

☐ Opposing a motion for sanctions under Rule 37(c)(2). *See § 8.79 below*.

- ○ Determine whether unadmitted matter was not proved.
- ○ Determine whether motion is premature.
- ○ Determine whether request was objectionable pursuant to Rule 36(a).
- ○ Determine whether admission was of no substantial importance.
- ○ Determine whether there was reasonable ground to believe that the party would prevail on the matter.

- Determine whether there was a good reason for failure to admit.
- Determine whether the sanctions requested are excessive.
- Determine whether the moving papers and procedures did not comply with local rules.

☐ **Search by Topic:**

- Civil Procedure > Discovery > Misconduct
- Civil Procedure > Discovery > Methods > Admission

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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Chapter 8 DISCOVERY
PART Q: SEEKING SANCTIONS UNDER RULE 37(c)(2) FOR UNREASONABLE FAILURE TO ADMIT GENUINENESS OF DOCUMENT OR TRUTH OF MATTER

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.78

§ 8.78 Bringing Motion for Rule 37(c)(2) Sanctions

If a party fails to admit the genuineness of any document or the truth of any matter, as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, then the requesting party may move for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorneys' fees. *Fed. R. Civ. P. 37(c)(2).*

A court must make the order unless the court finds that:

1. The request was held objectionable;

2. The admission sought was of no substantial importance;

3. The party failing to admit had reasonable ground to believe that the party might prevail on the matter; or

4. There was other good reason for the failure to admit.

Fed. R. Civ. P. 37(c)(2).

Expense shifting sanctions for unreasonably denying or unreasonably refusing to admit or deny a legitimate request for admissions may be imposed only on parties, and not on counsel. *See, e.g., Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 19 F.3d 431, 438 n.8 (8th Cir. 1994)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.70 -37.76.*
- *Federal Litigation Guide PP 22.60 -22.64.*

- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 37(c)(2)* (failure to admit).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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Chapter 8 DISCOVERY
PART Q: SEEKING SANCTIONS UNDER RULE 37(c)(2) FOR UNREASONABLE FAILURE TO ADMIT GENUINENESS OF DOCUMENT OR TRUTH OF MATTER

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.79

§ 8.79 Opposing Motion for Rule 37(c)(2) Sanctions

A party seeking to avoid sanctions may argue, *inter alia,* the following:

1. That the request for admission was held objectionable on an earlier motion to determine the sufficiency of responses;

2. The admission sought was of no substantial importance;

3. The responding party had reasonable ground to believe that the party might prevail on the matter;

4. There was other good reason for failure to admit; or

5. Claimed expenses would have been incurred even if the matter had been admitted and the claimed expenses are in excess of reasonable amounts.

Generally, expenses will be awarded unless the failure to admit was justifiable. *Fed. R. Civ. P. 37(c)(2).* A justifiable failure may include the request was held objectionable pursuant to Rule 36, the admission sought was of no substantial importance, the responding party had reasonable ground to believe that the party might prevail on the matter or there was other good reason.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.70 -37.76.*
- *Federal Litigation Guide PP 22.60 -22.64.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.

- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 37(c)(2)* (failure to admit).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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Chapter 8 DISCOVERY
PART R: SEEKING SANCTIONS UNDER RULE 37(d) FOR FAILURE TO APPEAR AT DEPOSITION OR TO RESPOND TO DISCOVERY REQUESTS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.80

§ 8.80 Checklist for Rule 37(d) Sanctions

☐ Moving for sanctions under Rule 37(d). *See § 8.81 below*.

- ○ Review Rule 37(d).
- ○ Determine whether there are grounds for motion for sanctions, i.e., person failed to appear at deposition or person failed to respond to discovery request.
- ○ Draft motion for sanctions, including documentation for the amount of sanctions.

☐ Opposing imposition of Rule 37(d) sanctions. *See § 8.82 below*.

- ○ Determine whether grounds to argue that the failure to comply with the request was substantially justified, that other circumstances make the imposition of sanctions unjust, that the moving party did not meet and confer to resolve the issue or that the amount of sanctions requested is excessive.
- ○ Draft opposition and file and serve on all parties.

☐ **Search by Topic:** Civil Procedure > Discovery > Misconduct

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil

ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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Chapter 8 DISCOVERY
PART R: SEEKING SANCTIONS UNDER RULE 37(d) FOR FAILURE TO APPEAR AT DEPOSITION OR TO RESPOND TO DISCOVERY REQUESTS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.81

§ 8.81 Bringing Motion for Rule 37(d) Sanctions

The court where an action is pending may, on motion, order sanctions if:

> 1. A party or a party's officer, director, or managing agent, or a person designated under *Fed. R. Civ. P. 30(b)(6)* or Rule 31(a)(4) fails, after being served with proper notice, to appear for that person's deposition; or
>
> 2. A party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34 fails to serve its answers, objections, or written response.

Fed. R. Civ. P. 37(d)(1)(A).



Warning:

Courts have interpreted Rule 30(b)(6) as imposing a duty on an entity receiving a Rule 30(b)(6) notice of deposition to prepare a witness or witnesses to be able to answer questions on behalf of the entity as to all subject matters listed in the deposition notice. Courts have imposed sanctions under Rule 37(d) for failure to provide a properly prepared witness, reasoning that sending an unprepared witness is tantamount to not appearing for the deposition. *See Lincoln Diagnostics, Inc. v. Panatrex, Inc., 2009 U.S. Dist. LEXIS 11984, at *23 (C.D. Ill. 2009)* (district court barred entity from changing the deposition transcript of its Rule 30(b)(6) witness as a sanction for sending an unprepared witness).

Failure to answer or respond is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for protective order under Rule 26(c). *Fed. R. Civ. P. 37(d)(2)*; *see Fed. R. Civ. P. 26(c).*

A motion for Rule 37(d) sanctions must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action. *Fed. R. Civ. P. 37(d)(1)(B).*

Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(v). *Fed. R. Civ. P. 37(d)(3)*; *see Fed. R. Civ. P. 37(b)(2)(A)*; *see also § 8.72[1][b]*. Instead of, or in addition to, these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust. *Fed. R. Civ. P. 37(d)(3)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.90 -37.99*.
- *Federal Litigation Guide PP 22.80 -22.85*.
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Bender's Federal Practice Forms* Form Nos. 37:400-37:403.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 37(d)* (party's failure to attend its own deposition, serve answers to interrogatories, or respond to request for inspection).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelLegal EthicsSanctionsGeneral Overview



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Chapter 8 DISCOVERY
PART R: SEEKING SANCTIONS UNDER RULE 37(d) FOR FAILURE TO APPEAR AT DEPOSITION OR TO RESPOND TO DISCOVERY REQUESTS

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.82

§ 8.82 Opposing Motion for Rule 37(d) Sanctions

Unless a party failing to act has a pending motion for a protective order under Rule 26(c), a failure to act as described in Rule 37(d) may not be excused on the ground that the discovery sought is objectionable. *Fed. R. Civ. P. 37(d)(2).*

A party may avoid the expense-shifting sanctions of Rule 37(d) if the court finds that the failure was substantially justified. The burden of establishing substantial justification is on the party who failed to respond to discovery pursuant to Rule 37(d). *Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group, 55 F.3d 463, 466 (9th Cir. 1995)* (affirming sanctions for failure to appear at deposition); *Lockette v. American Broad. Cos., Inc., 118 F.R.D. 88, 90-91 (N.D. Ill. 1987)* (refusing to award Rule 37(d) sanctions because failure to produce documents was substantially justified).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.90 -37.99.*
- *Federal Litigation Guide PP 22.80 -22.85.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 37(d)* (party's failure to attend its own deposition, serve answers to interrogatories, or respond to request for inspection).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions

to CompelCivil ProcedureDiscoveryProtective Orders



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Chapter 8 DISCOVERY
PART S: SEEKING SANCTIONS UNDER RULE 37(f) FOR FAILURE TO PARTICIPATE IN A DISCOVERY PLAN

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.83

§ 8.83 Checklist for Motion for Rule 37(f) Sanctions

☐ Moving for sanctions under Rule 37(f). *See § 8.84 below*.

- ○ Review Rule 37(f).
- ○ Determine whether grounds exist to bring a motion for sanctions under Rule 37(f) for failure to participate in a discovery plan.
- ○ Review local rules for requirements to meet and confer.
- ○ Draft motion and file and serve motion papers.

☐ Opposing a motion for Rule 37(f) sanctions. *See § 8.85 below*.

- ○ Review motion and determine grounds to oppose the motion for Rule 37(f) sanctions, i.e., no opportunity to be heard, sanctions sought are excessive, failure to follow the local rules, and procedures.
- ○ Draft opposition and file and serve opposition papers.

☐ **Search by Topic:** Civil Procedure > Discovery > Misconduct

Legal Topics:

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

Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel



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Chapter 8 DISCOVERY
PART S: SEEKING SANCTIONS UNDER RULE 37(f) FOR FAILURE TO PARTICIPATE IN A DISCOVERY PLAN

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.84

§ 8.84 Bringing Motion for Rule 37(f) Sanctions

If a party fails to participate in developing a discovery plan pursuant to Rule 26(f), the court may require the party to pay the other party its reasonable expenses, including attorneys' fees. *Fed. R. Civ. P. 37(f).*

Parties in a civil action must develop a discovery plan relating to, *inter alia,* the following issues:

1. Timing and form of initial disclosures pursuant to Rule 26(a);

2. Subject matter and topics for discovery, including timetable;

3. Form of electronically stored information;

4. Claims of privilege and work product;

5. Limitations on discovery; and

6. Orders from the court pursuant to Rule 16(b) and (c) or 26(c).

Fed. R. Civ. P. 26(f).

Counsel may raise the issue of sanctions under Rule 37(f) although the court may award sanctions on its own. *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.*

- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Bender's Federal Practice Forms* Form No. 37:500.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 37(f)* (failure to participate in framing of discovery plan).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewLegal EthicsSanctionsGeneral Overview



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Chapter 8 DISCOVERY
PART S: SEEKING SANCTIONS UNDER RULE 37(f) FOR FAILURE TO PARTICIPATE IN A DISCOVERY PLAN

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.85

§ 8.85 Opposing Motion for Rule 37(f) Sanctions

A party subject to sanctions under Rule 37(f) may raise procedural defects for not being afforded the opportunity to be heard or a violation of local rules. Moreover, sanctions sought must be the reasonable expenses incurred by the other party as a result of the party's failure to participate in developing a discovery plan.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.110, 37.111.*
- *Federal Litigation Guide PP 22.100 -22.102.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 37(f)* (failure to participate in framing of discovery plan).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 8 DISCOVERY
PART T: SEEKING SANCTIONS FOR SPOLIATION OF EVIDENCE

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.86

§ 8.86 Checklist for Bringing Motion for Sanctions for Spoliation of Evidence

☐ Moving for sanctions for spoliation of evidence. *See § 8.87 below*.

○ Determine whether grounds for seeking spoliation sanctions exist, e.g., party destroyed evidence.

○ Draft motion and file and serve motion papers.

☐ Opposing motion for sanctions for spoliation of evidence. *See § 8.88 below*.

○ Review motion seeking sanctions.

○ Determine whether moving party's papers and procedure comply with local rules.

○ Determine whether opposing party had a duty to preserve the evidence in question.

○ Determine whether preserving the evidence would have posed an undue burden to opposing party.

○ If electronically stored information was destroyed, determine whether such information was lost because of routine, good faith operation of an electronic information system (in which case, sanctions are only available under extraordinary circumstances).

○ Draft opposition and file and serve opposition papers.

☐ **Search by Topic:** Civil Procedure > Discovery > Misconduct

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductEvidenceRelevanceSpoliationLegal EthicsSanctionsGeneral Overview



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Chapter 8 DISCOVERY
PART T: SEEKING SANCTIONS FOR SPOLIATION OF EVIDENCE

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.87

§ 8.87 Bringing Motion for Sanctions for Spoliation of Evidence

Spoliation of evidence is the destruction or alteration of evidence, or the knowing failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)* .

A court has inherent power to sanction a party for spoliation of evidence. A court may also base spoliation sanctions on a specific violation of Rule 37, if failure to produce evidence because of spoliation violated the rule. *See, e.g., General Envtl. Science Corp. v. Horsfall, 141 F.R.D. 443, 450-455 (N.D. Ohio 1992)* .

Courts may consider a number of factors in determining whether sanctions for spoliation of evidence are appropriate, including:

1. Whether a party was prejudiced as a result of the destruction of the evidence;

2. Whether the prejudice can be cured;

3. The practical importance of the evidence;

4. Whether the party responsible for the destruction acted in bad faith; and

5. The potential for abuse if the evidence is not excluded.

See Driggin v. American Sec. Alarm Co., 141 F. Supp. 2d 113, 120 n.7 (D. Me. 2000) .

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 evidence. First, the court must assess the party's level of culpability. That is, was the party's conduct of discovery acceptable or was it negligent, grossly negligent, or willful. The second step is to assess 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: (a) the spoliating party had control over the evidence and an obligation to preserve it at the time of destruction or loss; (b) the spoliating party acted with a culpable state of mind upon destroying or losing the evidence; and (c) 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, 467 (S.D.N.Y. 2010)* ; *but see Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010)* (holding that severe sanctions, including adverse inference instructions, may not be imposed absent finding of bad faith or willful destruction of evidence).

Warning:

Absent exceptional circumstances, a court may not impose sanctions under the Civil Rules on a party for failing to provide electronically stored information lost as the result of the routine, good-faith operation of an electronic information system. *Fed. R. Civ. P. 37(e).*

A wide range of sanctions is available for spoliation of evidence under the court's inherent powers, including:

1. Dismissal. *See, e.g., Thiele v. Oddy's Auto & Marine, Inc., 906 F. Supp. 158, 161-163 (W.D.N.Y. 1995)* ;

2. Default judgment. *See, e.g., Telectron Inc. v. Overhead Door Corp., 116 F.R.D. 107, 126-133 (S.D. Fla. 1987)* ;

3. Monetary awards. *See, e.g., Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 78 (S.D.N.Y. 1991)* ; and

4. Exclusion of evidence. *See, e.g., Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368-369 (9th Cir. 1982)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.120 -37.121A.*
- *Federal Litigation Guide PP 22.110 -22.112.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 9.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 37(e)* (failure to provide electronically stored information).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductEvidenceRelevanceSpoliationLegal EthicsSanctionsGeneral Overview



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Chapter 8 DISCOVERY
PART T: SEEKING SANCTIONS FOR SPOLIATION OF EVIDENCE

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.88

§ 8.88 Opposing Motion for Sanctions for Spoliation of Evidence

A party may oppose the charge of spoliation of evidence by showing there was no duty to preserve the evidence. For example, the party may show that the potential evidence was destroyed before there was any reasonable indication that litigation would be brought relative to that evidence. A party may also show undue burden in preserving documents in a certain form.

If electronically stored information was lost during the course of routine operations, counsel should argue that Rule 37(e) applies. *See Fed. R. Civ. P. 37(e)* (permitting sanctions only "exceptional" circumstances); *see § 8.87 above*.

In opposing the imposition of severe sanctions for spoliation of evidence under the court's inherent power, a party may assert any of the following:

1. The absence of willfulness, fault, or bad faith;

2. The lack of nexus among the sanction, misconduct, and matters in controversy;

3. The absence of prejudice to the opposing party; or

4. The availability of less severe sanctions.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.120 -37.121A.*
- *Federal Litigation Guide PP 22.110 -22.112.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 9.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductEvidenceRelevanceSpoliationLegal EthicsSanctionsGeneral Overview



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Chapter 8 DISCOVERY
PART U: SEEKING SANCTIONS UNDER RULE 26(g) FOR IMPROPER CERTIFICATION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.89

§ 8.89 Checklist for Rule 26(g) Sanctions

☐ Moving for Rule 26(g) sanctions. *See §§ 8.90, 8.91 below.*

- ○ Review Rule 26(g).
- ○ If motion will relate to other party's disclosure, determine whether disclosure was complete and correct as of the time it was made.
- ○ If motion will relate to other party's discovery request, response, or objection, determine whether it meets one of the criteria stated in Rule 26(g)(1)(B).
- ○ Follow the district's informal dispute resolution rules, if any.
- ○ If appropriate, draft and file and serve motion papers.

☐ Opposing motion for Rule 26(g) sanctions. *See § 8.92 below.*

- ○ Determine whether grounds in moving papers are justified.
- ○ Determine whether moving party has complied with local rules concerning dispute-resolution procedures.
- ○ If appropriate, draft objections refuting facts asserted in moving papers.
- ○ If appropriate, draft opposition papers explaining the substantial justification for the

request, response, objection, or disclosure.

○ Prepare and serve papers in opposition to motion.

☐ **Search by Topic:** Civil Procedure > Discovery > Misconduct

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview



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Chapter 8 DISCOVERY
PART U: SEEKING SANCTIONS UNDER RULE 26(g) FOR IMPROPER CERTIFICATION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.90

§ 8.90 Signing Disclosures, Requests, Responses, and Objections

Every disclosure made pursuant to *Fed. R. Civ. P. 26(a)(1)* or *(a)(3)* and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's individual name, along with the attorney's address. An unrepresented party must sign the disclosure and state the party's address. *Fed. R. Civ. P. 26(a)(1)*.

A Rule 26(g) signature on a disclosure made pursuant to *Fed. R. Civ. P. 26(a)(1)* or *(a)(3)* constitutes a certification that, to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made. *Fed. R. Civ. P. 26(g)(1)(A)*.

A Rule 26(g) signature on a discovery request, response, or objection constitutes a certification that the paper is:

1. Consistent with the Federal Rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law;

2. Not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

3. Neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

Fed. R. Civ. P. 26(g)(1)(B).

Warning:

Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention. *Fed. R. Civ. P. 26(g)(1)(2)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.151 -26.153*.
- *Federal Litigation Guide PP 22.120 -22.124*.
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 26(g)* (certification requirement).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryUndue BurdensLegal EthicsSanctionsGeneral Overview



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Chapter 8 DISCOVERY
PART U: SEEKING SANCTIONS UNDER RULE 26(g) FOR IMPROPER CERTIFICATION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.91

§ 8.91 Seeking Sanctions for Improper Certification

If a Rule 26(g) certification violates Rule 26(g) without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including the attorney's fees, caused by the violation. *Fed. R. Civ. P. 26(g)(3).*

Before moving for sanctions under Rule 26(g)(3), consult local rules, which may require counsel to make a good-faith attempt to reach an informal resolution of the matter prior to filing the motion.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.154, 26.155.*
- *Federal Litigation Guide PP 22.120 -22.124.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 26(g)* (certification requirement).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview



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Chapter 8 DISCOVERY
PART U: SEEKING SANCTIONS UNDER RULE 26(g) FOR IMPROPER CERTIFICATION

1-8 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 8.92

§ 8.92 Opposing Imposition of Rule 26(g) Sanctions

To oppose a motion for Rule 26(g) sanctions, a party should attempt to show that the certification was substantially justified, and argue facts showing that the asserted grounds for imposition of sanctions are inapplicable. The showing will depend on the grounds claimed by the moving party and the specific facts of the case. *See Fed. R. Civ. P. 26(g).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.154, 26.155.*
- *Federal Litigation Guide PP 22.120 -22.124.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 7.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 6.
- *Fed. R. Civ. P. 26(g)* (certification requirement).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview



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Chapter 9 PRETRIAL MOTION PRACTICE

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation 9.syn

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Chapter 9 PRETRIAL MOTION PRACTICE
PART A: PROCEDURAL CONTEXT

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.01

§ 9.01 Procedural Context--Motion Practice

A motion is a request to the court for an order. All motions must be in writing unless made during a recorded hearing or trial. *Fed. R. Civ. P. 7(b)(1)(A)*. Related to motions are applications, petitions, and orders to show cause; the purpose of each is to bring a matter to the court's attention for decision.

Pretrial motions may be used to test the strengths and weaknesses of a case, to narrow issues before trial, or to resolve cases without the need for trial. When used effectively, pretrial motions reduce litigation costs and time expenditures.

Some motions are specifically identified in the Federal Rules of Civil Procedure. The Civil Rules do not limit the variety of motions that may be made, and parties may file a motion as to any matter requiring a ruling or order from the court.

Motions should be titled to reflect the order sought. For example, if a party is about to destroy relevant evidence, a motion designated "Motion for Order to Preserve Evidence" would be appropriate.

Although a party may bring a series of motions to control the focus and pace of the case, federal district judges have little patience for frivolous motions, or motions designed to delay or harass. *See Fed. R. Civ. P. 11(b)*. In fact, many local district court rules contain specific warnings against bringing such motions, under penalty of sanctions.

When filing or responding to a motion, the practitioner must consult the district court's local rules and any judge's rules, because these rules may govern procedural issues not addressed in the Federal Rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePretrial MattersMotions in LimineGeneral OverviewCivil ProcedureSanctionsBaseless FilingsBad Faith Motions



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Chapter 9 PRETRIAL MOTION PRACTICE
PART B: MAKING PRETRIAL MOTIONS GENERALLY

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.02

§ 9.02 Checklist for Pretrial Motions

☐ Determine governing law. *See § 9.03 below*.

☐ Consider availability of oral motion. *See § 9.04[1] below*.

☐ Consider availability of stipulation. *See § 9.04[2] below*.

☐ Consider ex parte application. *See § 9.04[3] below*.

☐ Determine whether to make noticed motion. *See § 9.05 below*.

- ○ Review and comply with procedural prerequisites under district court rules and any individual judge's rules.
- ○ Review applicable timing requirements for filing and serving motions under Federal Rules of Civil Procedure and local district court rules.

☐ Prepare motion papers. *See § 9.05 below*.

- ○ Combine motion and notice of motion in a single paper, unless local rules direct otherwise. *See § 9.05[2] below*.
- ○ Prepare notice of motion and motion so that it provides requisite notice to court and parties. *See § 9.06 below*.

- ○ Understand Rule 11 implications of attorney signature on motion papers. *See § 9.05[5] below*.
- ○ Prepare memorandum of law. *See § 9.05[6] below*.
- ○ Prepare sworn affidavits or declarations and other supporting documentary evidence, as required or desired. *See § 9.05[6] below*.

☐ File and serve motion papers. *See §§ 9.06, 9.07 below*.

☐ Changing hearing dates and extending time periods.

- ○ If seeking expedited hearing date, make ex parte application and consider pre-motion conference if prompt or immediate court intervention is necessary. *See § 9.06[4] below*.
- ○ If request to extend time is permissible and is timely made, court may grant request without motion or notice. *See § 9.09 below*.

☐ Opposing party: file and serve opposition to motion, complying with district court rules and local rules. *See § 9.11[1], [2] below*.

☐ Opposing party: in opposing motion, decide whether to file cross- motion or counter-motion. *See § 9.11[3] below*.

☐ Draft concise and persuasive reply brief, checking local rules and judge's rules governing reply papers. *See § 9.12 below*.

☐ Check local rules and judge's rules regarding oral arguments. *See § 9.13 below*.

☐ Consider motion for reconsideration, checking local rules governing reconsideration motions. *See § 9.10 below*.

☐ Prepare order, if required by local rules or judge's rules. *See § 9.14 below*.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePretrial MattersMotions in LimineGeneral Overview



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Chapter 9 PRETRIAL MOTION PRACTICE
PART B: MAKING PRETRIAL MOTIONS GENERALLY

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.03

§ 9.03 Determining Governing Law

Motion practice is generally governed by the following rules:

1. Rule 5: service and filing of motions;

2. Rule 6(c): timing of motions;

3. Rule 7(b): form of motions and other papers; and

4. Rule 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. For example, Rule 56 governs motions for summary judgment.

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; and

5. Service and filing of papers.

Judges may also establish their own practical rules and procedures, frequently referred to as standing orders, provided these rules are consistent with federal law, the rules adopted under *18 U.S.C. §§ 2072*, *2075*, and the district's local rules. *See Fed. R. Civ. P. 83(b)*.

Judges' standing orders that govern motion practice often regulate the following:

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.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.
- *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. 11* (signing motions).
- *Fed. R. Civ. P. 83* (rules by district courts and judge's directives).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial MattersMotions in LimineGeneral Overview



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Chapter 9 PRETRIAL MOTION PRACTICE
PART B: MAKING PRETRIAL MOTIONS GENERALLY

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.04

§ 9.04 Considering Alternatives to Noticed Motion

[1] Making Oral Motion

Motions generally must be made in writing. However motions may be made orally during a hearing or trial. *See Fed. R. Civ. P. 7(b)(1)(A)*; *United States v. Vulpis, 961 F.2d 368, 371 (2d Cir. 1992)* .

Warning:

Oral motions are generally authorized by judges, 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. Counsel should not rely on being able to present an oral motion.

[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 admission about all matters that can reasonably be anticipated for discussion at the pretrial conference. *See Fed. R. Civ. P. 16(c)(1)*.

Warning:

Stipulations expressly authorized in the Federal Rules of Civil Procedure should generally 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 Civil 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.

[3] Using Ex Parte Applications for Expedited Relief

An ex parte application typically involves contact with the court without the advance knowledge or contemporaneous participation of all other parties. An ex parte application is commonly used to extend the time 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).*

Warning:

Counsel should review the applicable local rules for procedure on ex parte motions.

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

An application for ex parte relief typically includes the application, a memorandum of law, supporting affidavits or declarations, and a proposed form of order. Papers in support of the application should place particular focus on the reasons justifying immediate relief.

Warning:

Many ex parte motions are denied not because the underlying request is unwarranted, but because the papers do not show that bypassing the regular noticed motion procedure is necessary.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03.*
- *Federal Litigation Guide PP 2.02 -2.04, 2.10, 2.11, 2.21, 2.33.*
- *Bender's Federal Practice Forms* Form Nos. 6:1-6:3, 6:41.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsStipulationsCivil ProcedurePretrial MattersMotions in LimineGeneral Overview



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Chapter 9 PRETRIAL MOTION PRACTICE
PART B: MAKING PRETRIAL MOTIONS GENERALLY

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.05

§ 9.05 Preparing Noticed Motion

[1] Complying With Pre-Motion Procedures

Before filing a motion, comply with any preliminary procedures required by the Federal Rules, local district court rules, or rules or procedures of the assigned judge.

For example, before filing a motion for an order compelling disclosure or discovery, a movant must in good faith confer or attempt to confer with the party not making the disclosure in an effort to secure the disclosure without court action. *Fed. R. Civ. P. 37(a)(1)*; *see also § 8.67 above*.

[2] Combining Motion and Notice of Motion Into Single Document

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)* (Civil Rules do not require separate documents for motion and notice of motion).

[3] Stating Grounds For Motion With Particularity

A written motion must state with particularity the grounds for seeking the order and state the relief sought. *Fed. R. Civ. P. 7(b)(1)(B), (C)*.



Strategic Point:

The relief requested should be tailored to the facts of the motion and should not be stated too broadly, or the movant will risk denial of the motion. The papers submitted in support of the motion must justify the relief.

[4] Formatting Motion Papers

Motion papers must be formatted in the same manner as pleadings. *Fed. R. Civ. P. 7(b)(2)*. A motion paper must contain a caption with the following:

1. Court's name;

2. Title of the action;

3. Docket number; and

4. Designation of the type of motion.

See Fed. R. Civ. P. 7(b)(2), 10(a); see also Fed. R. Civ. P. Appendix of Forms, Form 1 (Caption).

Local rules may prescribe other requirements, e.g., 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.

The clerk must not refuse to file a motion solely because it is not presented in proper form as required by the Federal Rules of Civil Procedure or by any local rule or practice. *Fed. R. Civ. P. 5(d)(4), 83(a)(2), (b)*; *see McClellon v. Lone Star Gas Co., 66 F.3d 98, 101 (5th Cir. 1995)* (former Fed. R. Civ. P. 5(e) (*now see Fed. R. Civ. P. 5(d)(4)*) mandates that clerk accept documents despite technical violations).

[5] Complying With Signature Requirement

Written motions must be signed by at least one attorney of record in the attorney's individual name, or by a party personally if the party is unrepresented. The paper must also state the signer's address, e-mail address, and telephone number. *Fed. R. Civ. P. 11(a)*.

Warning:

Signing a motion presented to the court certifies that, to the best of the signer's knowledge based on a reasonable inquiry, the document is not being presented for an improper purpose and that it has a basis in law and in fact. *See Fed. R. Civ. P. 11(b)*.

The court must strike an unsigned motion, unless the omission is promptly corrected after being called to the attorney's or party's attention. *Fed. R. Civ. P. 11(a)*. A Rule 11 violation is sanctionable. *Fed. R. Civ. P. 11(c)*; *see also* Ch. 11 *below*.

A district court may, by local rule, permit or require motions to be signed by electronic means.

Warning:

Consult local rules, as each district may have additional requirements for signatures and signature blocks.

[6] Including Supporting Papers

Notice of the hearing on a written motion generally must be served on every party. Ex parte motions are excepted from this rule. *See Fed. R. Civ. P. 5(a)(1)(D)*.

The Federal Rules of Civil Procedure do not further 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 must include:

1. Notice of motion;

2. Memorandum of law;

3. Supporting affidavits or affidavit substitutes; and

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

Warning:

Consult local rules for required supporting papers.

The notice of motion should list the papers that are submitted in support of the motion. Although the Civil Rules do not require filing a memorandum of law, local district court rules generally do.

A motion may be supported by an affidavit, which must be sworn before a notary public or other person empowered to administer oaths. In lieu of an affidavit, a motion may 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, 982 F.2d 686, 689 (1st Cir. 1993)* .

Warning:

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).*

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

Affidavits or declarations used to support or oppose summary judgment motions, for example, must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. *Fed. R. Civ. P. 56(c)(4).*

[7] Submitting Evidence in Support of Motion

Documents, such as deposition transcripts, responses to written discovery, transcripts from other proceedings, stipulations, and other documentary evidence may be submitted in support of a motion if they are authenticated by an affidavit or affidavit substitute of an individual having first-hand knowledge of the documents.

Strategic Point:

The documents should be attached as an exhibit to the authenticated affidavit or affidavit substitute, and should be clearly labeled with an exhibit tab.

[8] 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.

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

In addition, the filing 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. *Fed. R. Civ. P. 5.1(a)(2).*

The court will, under *28 U.S.C. § 2403*, certify the U.S. Attorney General that there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute. *Fed. R. Civ. P. 5.1(b).*

Unless the court sets a later time, the attorney general may intervene within 60 days after the notice of constitutional question is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional. *Fed. R. Civ. P. 5.1(c).*

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. *Fed. R. Civ. P. 5.1(d).* However, when the parties and the court fail to make the required notification, the appellate court has discretion to vacate a district court's judgment, allow intervention on appeal, or otherwise ensure that the United States is notified of the constitutional challenge. *See Oklahoma ex rel. Edmondson v. Pope, 516 F.3d 1214, 1216 (10th Cir. 2008)* (circuit court vacated district court's judgment and remanded with directions to notify U.S. Attorney General of constitutional challenge when both defendant and district court failed to make required notification).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 5.1.02 et seq.*
- *Federal Litigation Guide PP 1.43, 2.24.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.
- *28 U.S.C. § 2403* (intervention by United States on question of constitutionality).
- *Fed. R. Civ. P. 5.1* (constitutional challenge to statute).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview



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Chapter 9 PRETRIAL MOTION PRACTICE
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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.06

§ 9.06 Scheduling Motion Return Date

[1] Timing for Serving Motion and Notice

A written motion and notice of hearing generally must be served at least 14 days before the hearing date. *Fed. R. Civ. P. 6(c)(1)*.

The 14-day notice period does not apply when:

1. The motion is ex parte;

2. Another Federal Rule of Civil Procedure provides the applicable time; or

3. A court order sets a different time.

Fed. R. Civ. P. 6(c)(1)(A)-(C).

Warning:

Timing requirements vary among districts and among judges. Local court rules typically require a longer notice period. District courts enforce the local rules (not the federal rules) for timing. Therefore, the importance of reviewing the local court rules cannot be overstated.

[2] Calculating Notice Period

Calculating the notice period for a noticed motion requires:

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 Rule 6's rules for computing time.

In computing the advance notice required for motions, the following rules apply:

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 runs from the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the clerk's office is inaccessible.

Fed. R. Civ. P. 6(a)(1), (a)(3).

Legal holidays include New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President or the Congress, or by the state where the district court is located. *Fed. R. Civ. P. 6(a)(6).*

Warning:

Judges' rules generally govern the procedure for placing the motion on the 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. If it is important to have the motion heard on a particular date, contact the judge's courtroom deputy to ascertain that the judge will be available on that date.

[3] Three-Day Extension When Service Made by Specified Methods

If service is made by any of the following methods, the time to respond is extended by three days:

1. Mail;

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

3. Electronic means, with written consent.

Fed. R. Civ. P. 6(d); see Fed. R. Civ. P. 5(b)(2)(C)-(F); see also § 9.07[2], below.

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

[4] Shortening Notice Period

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).* Parties may also shorten the notice period by stipulation.



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 the opposing counsel to respond promptly with the facts and arguments in opposition. Some judges prefer a request for a telephone conference.



Warning:

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[2], [3].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.
- *Fed. R. Civ. P. 6(c)* (timing for motions, notices of hearing, and affidavits).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime Limitations



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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.07

§ 9.07 Serving Motion Papers

[1] Serving Every Party

All written motions, except for ex parte motions, must be served on every party. *Fed. R. Civ. P. 5(a)(1)(D)*; *Lehman v. Kornblau, 206 F.R.D. 345, 346-347 (E.D.N.Y. 2001)* , *aff'd*, *2003 U.S. App. LEXIS 9809 (2d Cir. 2003)* (rule does not apply to nonparties).

Supporting or opposing papers must be served with the written motions and must be served on every party. *See Fed. R. Civ. P. 5(a)(1)*.

Warning:

Counsel must consult local rules, because each district has additional requirements for serving motions.

If the party is represented by an attorney, service of motion papers must be made on the attorney, unless the court orders service on the party. *Fed. R. Civ. P. 5(b)(1)*. Service must be made directly on all parties 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).

[2] Choosing Service Method

Service of motion papers must be made by one of the following methods:

1. Handing a copy to the person;

2. Leaving a copy at the person's office with a clerk or other person in charge;

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

4. Leaving a copy at the person'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 person's last known address;

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

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

8. Delivering a copy by any other means that the person 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 person has consented in writing.

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

Warning:

Use of several of these methods of service (e.g., service by mail) will extend the time for response by three days. *Fed. R. Civ. P. 6(d)*; *see also § 9.06[3] above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 5.02[4], 6.05*.
- *Federal Litigation Guide PP 2.60 -2.62*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.
- *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).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.08

§ 9.08 Filing Motion

[1] Certificate of Service Required

Motions must be filed with the court with a certificate of service. The certificate of service must be filed within a reasonable time after service. *Fed. R. Civ. P. 5(d)(1).*

The Federal Rules do not provide specific requirements for the certificate of service, but at a minimum the certificate should contain the date of service, manner of service, and certificate by the serving party that service of the pleading or paper was made.

Warning:

Consult local rules for additional requirements.

[2] Electronic Filing May Be Allowed Under District Court Rules

A court may, by local rule, allow motions to be filed, signed, or verified by electronic means that are consistent with specified standards, provided reasonable exceptions are allowed. *See Fed. R. Civ. P. 5(d)(3).* A paper filed electronically in compliance with local rule constitutes a written paper. *Fed. R. Civ. P. 5(d)(3).*

Warning:

Consult local rules, 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.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 5.20.*
- *Federal Litigation Guide PP 2.63 -2.67*; *8B.01* et seq.

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.
- *Fed. R. Civ. P. 5(d)* (filing).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticeService of ProcessProofCertificates



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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.09

§ 9.09 Making Motion to Extend Time

A party may want to extend the time when an act may or must be done. *See Fed. R. Civ. P. 6(b)(1).*

Exceptions:

The court may not extend the time to act under Rule 50(b) (motions for judgment as a matter of law), Rule 59(b), (d) (motions for new trial), Rule 59(e) (motions to alter or amend judgments), or Rule 60(b) (motions for relief from judgment). *Fed. R. Civ. P. 6(b)(2).*

If a request to extend time is made before the original time or its extension expires, the court may grant the request without motion or notice. *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. *Fed. R. Civ. P. 6(b)(1)(B).*

The standard for excusable neglect is a four-part test that takes account of all relevant circumstances surrounding the party's omission. *See Pioneer Inv. Servs. Co v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) .*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 6.06.*
- *Federal Litigation Guide PP 2.50 -2.53.*
- *Bender's Federal Practice Forms* Form Nos. 6:1, 6:10, 6:12, 6:41, 6:50.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.
- *Fed. R. Civ. P. 6(b)* (extending time).

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.10

§ 9.10 Making Motion for Reconsideration

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

Warning:

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

PRACTICE RESOURCES:

- *Bender's Federal Practice Forms* Form No. 7:451.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.11

§ 9.11 Opposing Noticed Motions

[1] Formatting Opposition Papers

The basic format requirements for moving papers apply to opposition papers. *See Fed. R. Civ. P. 7(b)(2), 10(a)*; *see also § 9.05[4] above*.

Warning:

Consult local rules, because each district may have additional requirements for formatting motions and opposition papers.

[2] Filing and Serving Opposition Papers

Opposition papers are served using the same methods available for service of motion papers. *See Fed. R. Civ. P. 5(b)(2)*; *see also § 9.07 above*. Opposition papers must be filed with the clerk of the court, together with proof of service. *Fed. R. Civ. P. 5(d)(1)*.

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

[3] Making Cross-Motions or Counter-Motions

The terms *cross-motion* and *counter-motion* are interchangeable. A cross-motion or counter-motion is a motion filed in response to a different motion, that seeks a separate order regarding issues related to the subject matter of the original motion. *Reiffin v. Microsoft Corp., 1998 U.S. Dist. LEXIS 10518, at *4-*6 (N.D. Cal. 1999)* , *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.

Warning:

Determine whether local rules, and any judges' rules, permit cross-motions and counter-motions. If so, those motions may also serve as opposition to the original motion, provided the papers clearly state their dual purpose. The cross-motion or counter-motion should be served and filed 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, counsel should ask for an extension.

PRACTICE RESOURCES:

- *Federal Litigation Guide PP 2.80 -2.85, 2.90 -2.94.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime Limitations



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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.12

§ 9.12 Replying to Opposition Papers

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 reply brief may not be used to introduce either new facts or a different legal argument. *Lujan v. National Wildlife Fed'n, 497 U.S. 871, 894-895, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)* .



Strategic Point:

There is an advantage to having the first and last word on any issue. The moving party should generally file a reply, even if it is extremely short. If permission must be granted to file a reply, the request itself should make the points counsel wants to make in the reply.



Warning:

Consult judges' rules to determine whether reply briefs will be accepted. Some judges permit reply papers only in limited circumstances.

PRACTICE RESOURCES:

- *Federal Litigation Guide PP 2.100, 2.101.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.13

§ 9.13 Arguing Oral Motions

The Federal Rules of Civil Procedure do not address arguing oral motions. Instead, local rules and judges' rules generally regulate oral argument. *See Fed. R. Civ. P. 78(a).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 78.02.*
- *Federal Litigation Guide PP 2.110, 2.111.*
- *Bender's Federal Practice Forms* Form No. 7:300.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.
- *Fed. R. Civ. P. 78(a)* (court may establish regular times and places for oral hearings on motions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview



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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.14

§ 9.14 Converting Decision on Motion into Order

An "order" is any directive by the court other than a judgment. Local district court rules or judge's rules may require the prevailing party to prepare a proposed order in accordance with the court's ruling. The Federal Rules are silent on the order's required contents. Absent a local district court rule, the order should include:

1. Case caption, including case number;

2. Order's title;

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.

PRACTICE RESOURCES:

- *Federal Litigation Guide P 2.120*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 1.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 9 PRETRIAL MOTION PRACTICE
PART C: DEFAULTS AND MOTIONS FOR RELIEF FROM DEFAULT

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.15

§ 9.15 Checklist for Entry of Default and Obtaining Default Judgment

☐ Determine whether adverse party is in default. *See § 9.16[1] below*.

☐ If adverse party is in default, prepare and file written application to clerk for entry of default. *See § 9.16[2] below*.

☐ If pleading against defaulting party also asserts claims against another party that has not defaulted, consider whether application for judgment against defaulting party should be delayed until adjudication of remaining party's liability. *See § 9.16[5][b] below*.

☐ Determine whether to apply to clerk or to court for entry of default judgment. *See § 9.16[4][a] below*.

☐ If applying to clerk for entry of default judgment, prepare and file written application and supporting documents, complying with any local rules. *See § 9.16[4][b] below*.

☐ If applying to court for entry of default judgment, prepare and file written application and supporting documents, complying with any local rules. *See § 9.16[5][a] below*.

☐ Prepare for and attend hearing on application to court for entry of default judgment. *See § 9.16[5][b] below*.

☐ If default (but not default judgment) has been entered, determine whether grounds exist to set aside default and prepare written motion to set aside default. *See § 9.17[1] below*.

☐ If application for default judgment is pending, determine whether grounds exist to oppose entry of default judgment. *See § 9.17[2] below*.

☐ If default judgment has been entered, determine whether grounds exist to vacate default judgment. *See § 9.17[3] below*.

☐ If default judgment has been entered, move to set aside default judgment. *See § 9.17[4] below*.

☐ **Search by Topic:** Civil Procedure > Pretrial Judgments > Default

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From Default



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Chapter 9 PRETRIAL MOTION PRACTICE
PART C: DEFAULTS AND MOTIONS FOR RELIEF FROM DEFAULT

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.16

§ 9.16 Entering Default and Default Judgment

[1] Reviewing Definitions

Generally, a party is in "default" if the party has failed to plead or "otherwise defend" in a timely fashion to a pleading seeking affirmative relief against the party. *See Fed. R. Civ. P. 55(a).*

Required responsive pleadings are:

1. An answer to a complaint;

2. An answer to a counterclaim designated as a counterclaim;

3. An answer to a crossclaim;

4. An answer to a third-party complaint; and

5. A reply to an answer, if the court orders one.

Fed. R. Civ. P. 7(a).

To "otherwise defend" in order to avoid default, a party may bring a motion to dismiss or a motion for summary judgment. *See Ashby v. McKenna, 331 F.3d 1148, 1152 (10th Cir. 2003)* ; *Rashidi v. Albright, 818 F. Supp. 1354, 1356 (D. Nev. 1993)* , *aff'd*, *39 F.3d 1188 (9th Cir. 1994)* .

"Entering a default judgment" occurs when the court clerk enters a party's default on the clerk's record of the case. *Fed. R. Civ. P. 55(b)(1).* If plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the court must enter a default judgment for that amount and costs on plaintiff's request with an affidavit showing the amount due. *See Fed. R. Civ. P. 55(b)(1).* A "default judgment" is a final judgment against the defaulting party. *See Fed. R. Civ. P. 55(b).*

Warning:

A party's misconduct during the litigation may justify the entry of default as a sanction. *Fed. R. Civ. P. 16(f), 37(b)(2)(C).* In addition, courts have inherent equitable powers to enter default judgments for failure to prosecute, contempt of court, or abusive litigation practices. *Yusov v. Yusuf, 892 F.2d 784, 787 (9th Cir. 1989)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.10, 55.11.*
- *Federal Litigation Guide PP 44.50, 44.51.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 10.
- *Fed. R. Civ. P. 55* (default and default judgment).

[2] Applying to Clerk to Enter Default

In applying to have the clerk enter default, a party must show the clerk that the defaulting party has failed to plead or otherwise defend. *Fed. R. Civ. P. 55(a).*

The defaulting party's failure to plead to otherwise defend must be shown "by affidavit or otherwise". *Fed. R. Civ. P. 55(a).*

The plaintiff should file a written application requesting entry of default, accompanied by an affidavit or declaration (*see 28 U.S.C. § 1746*) of a person with actual knowledge setting out the following facts:

1. The defaulting party was properly served with the complaint or other pleading seeking affirmative relief;

2. The defaulting party has failed to serve or file a responsive pleading or motion; and

3. The applicable time for serving a responsive pleading or motion, including any extensions, has expired.

In addition, the plaintiff should include the following exhibits:

1. A copy of the pleading seeking affirmative relief that was served on the defaulting party;

2. A copy of the proof of service; and

3. Copies of any court orders extending the time to respond.

There is no requirement that the plaintiff notify the defaulting party of the application for entering a default. *See Fed. R. Civ. P. 55(a); Hawaii Carpenters' Trust Funds v. Stone, 794 F.2d 508, 512 (9th Cir. 1986)* .

Strategic Point:

If plaintiff's counsel has been contact with the defaulting party or its attorney, plaintiff's counsel should consider providing notice of the application for entering a default. In these circumstances, the default may be less vulnerable to being set aside.

If the application for entering a default makes the required showing, the clerk must enter the default into the case record. *See Fed. R. Civ. P. 55(a).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.10 -55.13.*
- *Federal Litigation Guide PP 44.50 -44.52.*
- *Bender's Federal Practice Forms* Form Nos. 55:1, 55:2.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 10.
- *Fed. R. Civ. P. 55* (default and default judgment).

[3] Understanding Effects of Entering Default

Once a default has been entered, the allegations in the plaintiff's pleading regarding liability are deemed admitted and the defaulting party will not be permitted to introduce evidence to controvert those allegations. *See Fed. R. Civ. P. 8(b)(6)*; *Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975)* ("The defendant, by his default, admits the plaintiff's well-pleaded allegations of fact, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established.").

Exceptions:
A default judgment may be entered against the United States, its officer or its agencies *only if* the claimant establishes a claim or right to relief by evidence that satisfies the court. *See 28 U.S.C. § 1608(e)*; *Fed. R. Civ. P. 55(d).*

Entering a default does not constitute an admission of damages. Rather, plaintiff must prove damages when seeking a default judgment. *See Fed. R. Civ. P. 8(d), 55(b)(2)*; *Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc., 722 F.2d 1319, 1323 (7th Cir. 1983)* (default judgment may not be entered without hearing on damages unless amount claimed is liquidated or capable of ascertainment from definite figures contained in documentary evidence or in detailed affidavits).

Once a default has been entered, the default is treated as a waiver of affirmative defenses. *See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158-159 (2d Cir. 1992)* .

The defaulting party may not obtain direct appellate review of the default; rather, the defaulting party must file a motion in the trial court to set aside the default. *Investors Thrift v. Lam (In re Lam), 192 F.3d 1309, 1311 (9th Cir. 1999)* ; *see Fed. R. Civ. P. 55(c).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 55.13.*

- *Federal Litigation Guide PP 44.50, 44.51.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 10.
- *Fed. R. Civ. P. 55* (default and default judgment).

[4] Obtaining Default Judgment From Clerk

[a] Understanding Circumstances in Which Clerk May Enter Default Judgment

The clerk may enter a default judgment against the defaulting party, on the plaintiff's application, if:

1. The plaintiff's claim is for a sum certain or a sum that can be made certain by computation. *Fed. R. Civ. P. 55(b)(1).*

2. The defendant defaulted for "not appearing," as opposed to misconduct during the litigation. *See Fed. R. Civ. P. 55(b)(1).*

3. The defendant is not any of the following:

a. A minor. *See Fed. R. Civ. P. 55(b)(1).*

b. An incompetent person. *See Fed. R. Civ. P. 55(b)(1).*

c. Currently serving in the military. *See 50 U.S.C. App. § 521.*

d. The United States, its officers, or its agencies. *See Fed. R. Civ. P. 55(d).*

e. A foreign state or its political subdivisions, agencies, or instrumentalities. *See 28 U.S.C. § 1608(e).*

In cases in which default judgment is *not* available from the clerk (e.g., defendant is a minor), the plaintiff may apply to the court for entry of a default judgment. *See § 9.16[5] below.*

[b] Applying for Default Judgment Entered by Clerk

In order for the clerk to enter a default judgment under *Fed. R. Civ. P. 55(b)(1)*, the plaintiff must submit the following:

1. An application for entering a default judgment;

2. A proposed form of judgment;

3. An affidavit or declaration identifying the defaulting party and the pleading to which default was entered, and establishing the date the default was entered and the fact that the default was entered for a failure to appear. *See Fed. R. Civ. P. 55(b)(1)*;

4. An affidavit showing the amount due, which cannot exceed the amount demanded in the plaintiff's pleading. *See Fed. R. Civ. P. 54(c), 55(b)(1)*;

5. An affidavit or declaration showing that the defaulting party is not in the military service and not a

minor or incompetent person. *See Fed. R. Civ. P. 55(b)(1)*; *50 U.S.C. App. § 521*;

6. An affidavit or declaration showing that the defaulting party is not the United States, its agencies or officers, or a foreign state, its political subdivisions, agencies, or instrumentalities. *See 28 U.S.C. § 1608(e)*; *Fed. R. Civ. P. 55(d)*; and

7. An itemization of the costs claimed. *See Fed. R. Civ. P. 54(d)(1)*, *55(b)(1)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.20 -55.25*.
- *Bender's Federal Practice Forms* Form Nos. 55:10-55:15.
- *Federal Litigation Guide P 44.53*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 10.
- *28 U.S.C. § 1608(e)* (default judgment against foreign state).
- *50 U.S.C. App. § 521* (Servicemembers Civil Relief Act, protecting servicemembers against default judgments).
- *Fed. R. Civ. P. 55(b)(1)* (default judgment by clerk).

[5] Obtaining Default Judgment Entered by Court

[a] Submitting Papers and Giving Notice

To obtain a default judgment entered by the court, the plaintiff should submit the same application and supporting material that plaintiff would submit for a default judgment entered by the clerk. *See Fed. R. Civ. P. 55(b)*; *see also § 9.16[4][b] above*.

Additionally, the plaintiff should submit:

1. Affidavits or declarations establishing the existence of facts and underlying equitable factors that weigh in favor of entering a default judgment; and

2. An affidavit or declaration establishing that notice has been served on the defaulting party, if required. *See Fed. R. Civ. P. 55(b)(2)*.

Notice generally must be given only to those defaulting parties who have appeared, either personally or by representative. *See Fed. R. Civ. P. 55(b)(2)*.

Circuit Split:

Circuits are split on whether anything less than a formal appearance is necessary to actuate the Rule 55(b)(2)'s notice requirement. The prevailing view is that the notice requirement applies not only to parties who have formally appeared, but also to "those parties who, although delaying in a formal sense by failing to file pleadings within the 21-day period, have otherwise indicated to the moving party a clear purpose to defend the suit". *Rogers v. Hartford Life & Accident Ins. Co., 167 F.3d 933, 936-937 (5th*

Cir. 1999) ; *In re Roxford Foods, Inc., 12 F.3d 875, 881 (9th Cir. 1993)* ; *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970)* (per curiam). The Seventh Circuit, by contrast, has "rejected this broad interpretation of Rule 55(b)(2)" and strictly construes the term "appearance" to require a party to make "some presentation or submission to the district court in the pending action". *Zuelzke Tool & Eng'g Co. v. Anderson Die Castings, Inc., 925 F.2d 226, 230 (7th Cir. 1991)* .

Written notice of the application for a default judgment must be served at least seven days before the hearing on the application. *Fed. R. Civ. P. 55(b)(2)*; *see New York v. Green, 420 F.3d 99, 105 (2d Cir. 2005)* .

Warning:

Failure to provide the required notice to a party that has appeared is a serious procedural irregularity that ordinarily will result in denying or vacating the default judgment. *Wilson v. Moore & Assocs., Inc., 564 F.2d 366, 369 (9th Cir. 1977)* .

[b] Understanding Factors Court Will Consider In Granting or Denying Default Judgment

The court may conduct a hearing or make referrals when, to enter or effectuate judgment, the court needs 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.

Fed. R. Civ. P. 55(b)(2).

If damages cannot be computed and are not liquidated, they ordinarily must be established by the plaintiff in an evidentiary hearing. *See Fed. R. Civ. P. 55(b)(2)*; *Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc., 722 F.2d 1319, 1323 (7th Cir. 1983)* (citing **Moore's**).

Warning--Court's Discretion:

The existence of a default does not compel the district court to enter a default judgment. *See Lewis v. Lynn, 236 F.3d 766, 767 (5th Cir. 2001)* . The court has discretion to require the plaintiff to submit proof on liability issues. *Fed. R. Civ. P. 55(b)(2)*; *see Lewis v. Lynn, 236 F.3d 766, 767 (5th Cir. 2001)* .

Exceptions--United States or Foreign State As Defendant:

The plaintiff must establish a claim or right to relief (i.e., liability) by evidence that satisfies the court if the defaulting party is the United States, its officers, or its agencies. *Fed. R. Civ. P. 55(d)*. If the defaulting party is a foreign state, its political subdivisions agencies, or instrumentalities, the plaintiff must adduce evidence of liability, and the defaulting party is entitled to appear at the hearing. *28 U.S.C. § 1608(e)*.

Factors a court will consider in ruling on an application for a default judgment include:

1. The possibility of prejudice to the plaintiff if a default judgment is denied;

2. The substantive merits of the claim against the defaulting party;

3. The sufficiency of the complaint or other pleading asserting the claim against the defaulting party;

4. The sum of money at stake in the action;

5. The possibility of a dispute concerning material facts;

6. Whether the default was the result of excusable neglect;

7. Whether the default was technical or de minimis; and

8. The strong public policy favoring decisions on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471-1472 (9th Cir. 1986) (citing **Moore's**).

If the court grants a default judgment, the judgment may not be different in kind from, or exceed in amount, what is demanded in the pleadings. *Fed. R. Civ. P. 54(c).* The court may award punitive damages (if pleaded) if the court finds them an appropriate remedy. *See Action S.A. v. Marc Rich & Co., 951 F.2d 504, 509 (2d Cir. 1991)* .

If there are multiple defendants, but only some have defaulted, the court may award a default judgment against the defaulting parties only if the court expressly determines that there is no just reason for delay. *Fed. R. Civ. P. 54(b).*

Warning:

In situations in which the liability of one defendant necessarily depends on the liability of others, a default judgment will not be entered until after the liability of the nondefaulting defendants has been determined. *Frow v. De La Vega, 82 U.S. 552, 554, 21 L. Ed. 60 (1872)* ; *see State Farm Mut. Auto. Ins. Co. v. Grafman, 2007 U.S. Dist. LEXIS 9541, at *3-*4 (E.D.N.Y. 2007)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.30 -55.37.*
- *Bender's Federal Practice Forms* Form Nos. 55:20-55:31.
- *Federal Litigation Guide P 44.53.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 10.
- *Fed. R. Civ. P. 55(b)(2)* (default judgment by court).

[6] Effect of Entering Default Judgment

A default judgment is a final, appealable judgment. *Recreational Props., Inc. v. Southwest Mortgage, 804 F.2d 311, 313 (5th Cir. 1986)* .

Warning:

The party against whom the judgment was entered may not appeal to obtain relief from the judgment on

> the basis of insufficient service unless that party has first filed a motion to set aside the default judgment in the court in which the default was entered. *Consorzio Del Prosciutto di Parma v. Domain Name Clearing Co., 346 F.3d 1193, 1195 (9th Cir. 2003)* ; *see Fed. R. Civ. P. 55(c), 60(b).*

A default judgment is considered a final judgment on the merits for purposes of the claim-preclusion (res judicata) doctrine. *Riehle v. Margolies, 279 U.S. 218, 225, 49 S. Ct. 310, 73 L. Ed. 669 (1929)* . Because liability issues ordinarily are not actually litigated in a case of default, a default judgment does not preclude litigation of those 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.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 10.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata



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Chapter 9 PRETRIAL MOTION PRACTICE
PART C: DEFAULTS AND MOTIONS FOR RELIEF FROM DEFAULT

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.17

§ 9.17 Obtaining Relief from Default

[1] Moving to Set Aside Default

The court may set aside an entry of default for "good cause". *Fed. R. Civ. P. 55(c)*. For example, the court may set aside a default if the pleading on which default was entered was not properly served on the party against whom default was entered, or if that party did, in fact, serve a timely responsive pleading or motion. *See Fed. R. Civ. P. 55(a)*.

A motion to set aside the entry of default must be brought within a reasonable time. *Dow Chem. Pac. Ltd. v. Rascator Maritime, S.A., 782 F.2d 329, 336 (2d Cir. 1986)* . In granting a motion to set aside a default, the court may impose conditions, such as requiring the defaulting party to post security for costs or for the amount of the eventual judgment. *Powerserve Int'l, Inc. v. Lavi, 239 F.3d 508, 514-516 (2d Cir. 2001)* ; *see also Coon v. Grenier, 867 F.2d 73, 79 (1st Cir. 1989)* (remanded with directions to vacate default judgment, remove default, and permit action to proceed conditioned on defendant's payment of $900 to plaintiff to offset plaintiff's reasonable fees and costs incurred in securing entry of default and default judgment).

[2] Opposing Application for Default Judgment

The existence of a default does not compel the district court to enter a default judgment. *See Draper v. Coombs, 792 F.2d 915, 924-925 (9th Cir. 1986)* . Moreover, default judgments are generally disfavored, and whenever reasonably possible, a case should be decided on its merits. *Enron Oil Corp. v. Masonori Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993)* (when doubt exists as to whether default or default judgment should be granted or vacated, doubt should be resolved in favor of defaulting party).



Strategic Point:

The defaulting party can argue that the court should exercise its discretion and refuse to grant the application for a default judgment.

For a list of factors a court will consider when ruling on an application for default judgment, *see § 9.16[5][b] above*.

Even if the defaulting party lacks a basis to oppose, or elects not to oppose, a default judgment, the defaulting party may contest the amount of unliquidated damages claimed by the plaintiff. *See Fed. R. Civ. P. 55(b)(2).*

[3] Grounds for Vacating Default Judgment

The district court may relieve a party from a judgment or order for reason of "mistake, inadvertence, surprise, or excusable neglect," provided that the party moves for relief not more than a year after the judgment was entered. *See Fed. R. Civ. P. 55(c), 60(b)(1), (c).*

Circuit Split:

In the Ninth Circuit, a showing of lack of culpability sufficient to meet the Rule 55(c) "good cause" standard for setting aside default is ordinarily sufficient to demonstrate the "excusable neglect" or "mistake" criteria under *Fed. R. Civ. P. 60(b)(1)* for setting aside a default judgment. *See Franchise Holding II, LLC v. Huntington Restaurants Group, Inc., 375 F.3d 922, 926 (9th Cir. 2004)* ("good cause" standard that governs vacating entry of default under Rule 55(c) is same standard that governs vacating default judgment under Rule 60(b). Other circuits hold that the "good cause" standard under Rule 55(c) is a more lenient standard than the "excusable neglect" standard under Rule 60(b)(1). *See American Alliance Ins. Co. v. Eagle Ins. Co., 92 F.3d 57, 59 (2d Cir. 1996)* ; *EEOC v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524, 528 (11th Cir. 1990)* .

A default judgment may be set aside if it is void, for example, if the rendering court lacked subject matter or personal jurisdiction, or if the court acted in manner inconsistent with due process of law. *See Fed. R. Civ. P. 55(c), 60(b)(4); see O'Rourke Bros. v. Nesbitt Burns, Inc., 201 F.3d 948, 951 (7th Cir. 2000)* .

Warning:

If the defendant appears to contest the amount of damages at the hearing on the application for a default judgment, issues of improper service and lack of personal jurisdiction will be waived unless the defendant expressly reserves those issues. *See Trustees of Cent. Laborers' Welfare Fund v. Lowery, 924 F.2d 731, 733-734 (7th Cir. 1991)* .

In addition to specific grounds for relief specified by rule or statute, a court may grant relief from a judgment for "any other reason that justifies relief". *Fed. R. Civ. P. 60(b)(6), see Liljeberg v. Health Servs. Acquisition Corp. 486 U.S. 847, 863-864, n.11, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* ; *Klapprott v. United States (1949) 335 U.S. 601, 604-609, 69 S. Ct. 384, 93 L. Ed. 266 (1949)* . The court also has discretion to vacate a default judgment that was entered through the fraud, misrepresentation, or misconduct of an opposing party. *See Fed. R. Civ. P. 55(c), 60(b)(3).*

A judgment rendered against a defaulting party while in the military service, or within 60 days after leaving the service, may be reopened on application of the defaulting party or his or her representative. *50 U.S.C. App. § 521(g)(1).*

[4] Moving to Vacate Default Judgment

A motion to set aside a default judgment generally must be brought within a reasonable time. *Fed. R. Civ. P. 55(c), 60(c)(1).* If the judgment is set aside based on mistake, surprise, and inadvertence, or excusable neglect, the "reasonable time" is defined as no more than one year after the entry of the judgment. *Fed. R. Civ. P. 60(c)(1).*

Warning:

A motion is not timely merely because it has been filed within one year of the judgment. A motion may still be untimely if the delay in making the motion, even within the one-year time period, is determined to be unreasonable. *See, e.g., White v. American Airlines, Inc., 915 F.2d 1414, 1425 (10th Cir. 1990)* (no

abuse of discretion in denying motion as untimely because defendant did not offer sufficient justification of delay in filing until almost one year after judgment was entered).

A motion to set aside a default judgment because it is void may be brought at any time. *See Fed. R. Civ. P. 60(b)(4), (c)(1); Briley v. Hidalgo, 981 F.2d 246, 249 (5th Cir. 1993)* .

A motion to set aside a judgment rendered against a defaulting party while he or she was in military service must be brought not later than 90 days after the defaulting party is terminated or release from service. *50 U.S.C. App. § 521(g)(2).*

A motion to set aside a default judgment should assert and document the applicable grounds for relief. *See Fed. R. Civ. P. 60(b)*. The motion should include an application to set aside the entry of default. *See Fed. R. Civ. P. 55(c); § 9.17[1] above* .



Warning:

Because some defenses may be waived if not asserted at the first opportunity (*see Fed. R. Civ. P. 12(h)(1)*), a motion to set aside a default judgment generally should assert all applicable defenses. *See Fed. R. Civ. P. 12(g); American Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107 (9th Cir. 2000)* (party must raise all defenses specified in Rule 12(h) in first filing to court).

The defaulting party must prove the existence of conditions that justify setting aside the default judgment. *Cummings v. GMC, 365 F.3d 944, 955 (10th Cir. 2004)* . However, because there is a "preference for resolving disputes on the merits," doubts "should be resolved in favor of the defaulting party". *Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96-98 (2d Cir. 1993)* ("good cause" and criteria of Rule 60(b) set aside should be "construed generously," citing **Moore's**).

In granting relief from a default judgment, the district court has inherent power to impose reasonable conditions on the vacatur in order to avoid undue prejudice to the opposing party. For example, the court has discretion to order the defaulting party to post security for costs or the amount of the eventual judgment. *Fed. R. Civ. P. 60(b); see Powerserve Int'l, Inc. v. Lavi, 239 F.3d 508, 515 (2d Cir. 2001)* .



Strategic Point:

If the default is neither obviously willful nor egregious, and if the plaintiff cannot show specific prejudice, it may be counterproductive to resist reinstating the action. In these circumstance, the default likely will be set aside, and plaintiff's resistance may leave the court with the impression that plaintiff is seeking an unfair or disproportionate benefit. On the other hand, if the default is set aside, the plaintiff should seek terms that are fair and justified under the circumstances.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.70 -55.84.*
- *Federal Litigation Guide P 44.54.*
- *Bender's Federal Practice Forms* Form Nos. 55:40-55:44.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 10.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From Default



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Chapter 9 PRETRIAL MOTION PRACTICE
PART D: DISMISSAL FOR DELAY IN BRINGING TO TRIAL

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.18

§ 9.18 Checklist for Involuntary Dismissal

☐ Consider moving for involuntary dismissal of claimant's action or claim. *See § 9.19[1] below*.

☐ In moving for involuntary dismissal:

- ○ Request order dismissing claimant's action or claim. *See § 9.19[2] below*.
- ○ State ground for dismissal. *See § 9.19[1] -[3] below*.

☐ In opposing involuntary dismissal:

- ○ Determine grounds for opposing dismissal. *See § 9.20 below*.
- ○ Consider that any pro se plaintiff will be held to a lower standard of compliance with respect to pleading requirements. *See § 9.20[5] below*.

☐ **Search by Topic:** Civil Procedure > Dismissals > Involuntary Dismissals

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions



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Chapter 9 PRETRIAL MOTION PRACTICE
PART D: DISMISSAL FOR DELAY IN BRINGING TO TRIAL

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.19

§ 9.19 Obtaining Involuntary Dismissal

[1] Meeting Prerequisites for Involuntary Dismissal

A defendant may move to dismiss an action or any claim against it if the plaintiff:

1. Fails to prosecute;

2. Fails to comply with the Federal Rules of Civil Procedure; or

3. Fails to comply with a court order.

Fed. R. Civ. P. 41(b).

In ruling on the motion to dismiss, the court will balance the interests of efficient docket management with the public policy of deciding cases on their merits. *Mann v. Lewis, 108 F.3d 145, 147 (8th Cir. 1997)* .

These rules apply to the dismissal of any counterclaim, cross-claim, or third party claim. *Fed. R. Civ. P. 41(c).*

[2] Obtaining Involuntary Dismissal

There is no prescribed procedure for a defendant's motion to dismiss. *See Fed. R. Civ. P. 41(b).* However, the moving party should clearly state the ground for dismissal. *See § 9.19[1] above.* The judge may hold a hearing to "resolve factual disputes on the basis of credibility findings". *See Colon v. Mack, 56 F.3d 5, 7 (2d Cir. 1995)* .

A court may sua sponte dismiss an action. *See Link v. Wabash R.R. Co., 370 U.S. 626, 630-632, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)* . The absence of notice or the failure to hold an adversary hearing does not necessarily render a sua sponte dismissal void. *Link v. Wabash R.R. Co., 370 U.S. 626, 632, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)* .

[3] Dismissing Action as Sanction

A Rule 41(b) dismissal is based on the totality of circumstances confronting the district court. The court will consider a

variety of factors, including the following:

1. The public's interest in expeditious resolution of litigation;

2. The court's need to manage its docket;

3. The risk of prejudice to the defendants;

4. The public policy favoring disposition of cases on their merits;

5. The duration of plaintiff's failures; and

6. The availability of less drastic alternatives.

See Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) ; *Valentin v. Dinkins, 121 F.3d 72, 76 (2d Cir. 1997)* .



Warning:

Before dismissing a complaint, a district court may be required to warn the plaintiff of an imminent dismissal; however an express warning regarding the possibility of dismissal is *not* required when dismissal follows a Rule 41(b) noticed motion. *See, e.g., In re Eisen, 31 F.3d 1447, 1455-1456 (9th Cir. 1994)* .

To prove prejudice, a defendant must establish that plaintiff's actions impaired defendant's ability to proceed to trial or threatened to interfere with the rightful decision of the case. *Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 43 (2d Cir. 1982)* .



Strategic Point:

The defendant can optimize the chances for dismissal by showing that the defendant was tangibly prejudiced by the delay.

In cases implicating important public policy concerns, the court will weigh the public interest in the case and the preference for disposing of cases on their merits before granting dismissal. *Dahl v. City of Huntington Beach, 84 F.3d 363, 366 (9th Cir. 1996)* (case brought under *42 U.S.C. § 1983*).

Before dismissing a complaint, the district judge should first consider less drastic alternatives. *Callip v. Harris County Child Welfare Dep't, 757 F.2d 1513, 1519 (5th Cir. 1985)* . However, the court need not exhaust lesser sanctions before finally dismissing a case. *McHenry v. Renne, 84 F.3d 1172, 1178-1179 (9th Cir. 1996)* .

Dismissal based on delay may result whether the delay is caused by the attorney, the client, or both. The client cannot avoid dismissal by arguing that the attorney is at fault. *See Link v. Wabash R.R. Co., 370 U.S. 626, 633-634, n10, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)* . However, if the client did not act in a willfully disobedient way to delay the action, and failure to comply was due solely to his attorney's failure to take prompt action, dismissal without prejudice may be a more fitting sanction. *See, e.g., Mann v. Lewis, 108 F.3d 145, 147-148 (8th Cir. 1997)* .

[4] Effect of Involuntary Dismissal

Unless otherwise specified in the court order, any dismissal (whether under Rule 41(b) or not) generally operates as an

adjudication on the merits. *See 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).

Exceptions:

Exceptions include a dismissal for the following:

1. Lack of jurisdiction;

2. Improper venue; or

3. Failure to join a required party under Rule 19.

Fed. R. Civ. P. 41(b).

Rule 41(b)'s "lack of jurisdiction" exception encompasses dismissals based on a plaintiff's "failure to comply with a precondition requisite" to the court's determining the merits of the substantive claim. *Costello v. United States, 365 U.S. 265, 285, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961)* .

The phrase "adjudication on the merits" (*see Fed. R. Civ. P. 41(b)*) does not necessarily mean a judgment entitled to claim-preclusion effect. "Adjudication on the merits" means that plaintiff is barred from returning later, to the same court, with the same underlying claim. *See Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 41.50 -41.53.*
- *Bender's Federal Practice Forms* Form Nos. 41:50-41:55.
- *Federal Litigation Guide PP 6.30 -6.36.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505-506, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)* (claim-preclusive effect of statute-of-limitations dismissal in diversity case is not governed by *Fed. R. Civ. P. 41(b)*, but rather by federal common law, which incorporates state law).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions



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Chapter 9 PRETRIAL MOTION PRACTICE
PART D: DISMISSAL FOR DELAY IN BRINGING TO TRIAL

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.20

§ 9.20 Opposing Involuntary Dismissal

[1] Establishing Delay Was Reasonable or Justified

To dismiss a case for lack of prosecution, the court must find unreasonable delay. *Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 43 (2d Cir. 1982)* . Therefore, in opposing the motion, the plaintiff must establish that the delay was reasonable or justified. *See, e.g., Martens v. Thomann, 273 F.3d 159, 180-182 (2d Cir. 2001)* . This approach may be particularly successful early in the proceedings. *See, e.g., Tolbert v. Leighton, 623 F.2d 585, 587 (9th Cir. 1980)* .

[2] Suggesting That Court Consider Less Drastic Measures

In response to a motion to dismiss, plaintiff may want to suggest that the court consider less drastic measures. If the court dismisses the case without any opportunity for the plaintiff to submit papers or to be heard, the plaintiff can file a motion for reconsideration and make the less-drastic-alternatives argument.

[3] Determining Whether Notice Is Required

A plaintiff opposing a Rule 41(b) dismissal should determine whether the district court is required, under the circumstances, to provide notice of imminent dismissal. *See, e.g., Oliva v. Sullivan, 958 F.2d 272, 274 (9th Cir. 1992)* . A sua sponte dismissal may be particularly vulnerable to reversal if the court does not first consider less drastic alternatives and/or give the plaintiff a warning and time in which to rectify its conduct. *See, e.g. Oliva v. Sullivan, 958 F.2d 272, 274 (9th Cir. 1992)* .

Warning:

An express warning regarding the possibility of dismissal is not required when dismissal follows a Rule 41(b) noticed motion. *See, e.g., In re Eisen, 31 F.3d 1447, 1455-1456 (9th Cir. 1994)* .

[4] Other Grounds for Opposing Motion to Dismiss

Plaintiff also may oppose a motion to dismiss by asserting that:

1. Defendant has failed to specify the basis for the motion. *See, e.g., Florens Container v. Cho Yang Shipping, 245 F. Supp. 2d 1086, 1089 (N.D. Cal. 2000)* .

2. Plaintiff did not violate the specified order. *See Idema v. Dreamworks Inc., 162 F. Supp. 2d 1129, 1138 (C.D. Cal. 2001)* .

3. Plaintiff's failure to comply with a rule was an isolated incident. *Betty K Agencies, LTD v. M/V Monada, 432 F.3d 1333, 1337-1340 (11th Cir. 2005)* .

4. The sanctionable conduct was primarily that of counsel, not plaintiff. *Mann v. Lewis, 108 F.3d 145, 147-148 (8th Cir. 1997)* .

[5] Arguments Available to Pro Se Litigants

Allegations in a pro se litigant's complaint are held to less stringent standards than formal pleadings drafted by lawyers. *Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980)* ; *Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987)* (this rule was particularly important in civil rights case brought by incarcerated pro se litigant).

A pro se plaintiff may oppose dismissal on the grounds that:

1. Any deficiency in pleadings can be cured by extending the deadline in which to file amended or supplemental pleadings; and

2. Because plaintiff is not an attorney, he or she is entitled to more leeway in making pleading errors than is a party represented by counsel.

See Eldridge v. Block, 832 F.2d 1132, 1137-1138 (9th Cir. 1987) .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 41.50.*
- *Federal Litigation Guide P 6.36.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions



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Chapter 9 PRETRIAL MOTION PRACTICE
PART E: SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.21

§ 9.21 Checklist for Summary Judgment

☐ Determine whether motion for summary judgment or for partial summary judgment is appropriate. *See § 9.22[1], [2] below.*

☐ Prepare, serve and file summary judgment motion.

○ Prepare and file motion, including affidavits or declarations. *See § 9.22[2] -[4][c], [5] below.*

○ Submit proposed order granting summary judgment. *See § 9.22[4][d] below.*

☐ Prepare, serve and file opposition to summary judgment motion. *See § 9.23[1] below.*

○ Prepare and file opposition papers, including proper evidentiary materials. *See § 9.23[2], [3] below.*

○ Consider motion for continuance to conduct further discovery. *See § 9.23[4] below.*

○ Serve and file opposition *See § 9.23[5] below.*

☐ Draft reply to opposition to motion for summary judgment if desired, in accordance with local rules. *§ 9.24 below .*

☐ Attend hearing on motion and obtain ruling. *See § 9.25[1] below.*

☐ Consider challenging court's determination of motion for summary judgment. *See § 9.26 below*.

○ Consider seeking reconsideration of ruling on summary judgment motion under either Rule 59(e) or Rule 60(b). *See § 9.26[1] below*.

○ Consider renewing summary judgment motion. *See § 9.26[1] below*.

○ Once final judgment is entered, file notice of appeal from summary judgment as required by appellate rules. *See § 9.26[2] below*.

☐ **Search by Topic:** Civil Procedure > Summary Judgment

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentOral MotionsCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentOppositionGeneral Overview



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Chapter 9 PRETRIAL MOTION PRACTICE
PART E: SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.21A

§ 9.21A 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.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentOral MotionsCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentOppositionGeneral Overview



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Chapter 9 PRETRIAL MOTION PRACTICE
PART E: SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.22

§ 9.22 Moving for Summary Judgment

[1] Either Party May Move for Summary Judgment

Either party may move for summary judgment on any claim or defense, or part of any claim or defense. *Fed. R. Civ. P. 56(a).*

[2] Determining Whether Summary Judgment Is Appropriate

Summary judgment is appropriate if the record, read in the light most favorable to the nonmoving party, demonstrates the absence of a genuine dispute as to any material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* . 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)* . A 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)* .

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).*

Warning:

In 2010, *Fed. R. Civ. P. 56*, was amended and reorganized to, among other things, move the summary judgment standard from former subdivision (c) to subdivision (a). In addition, the phrase "genuine issue as to any material fact" was replaced with "genuine dispute as to any material fact." Nevertheless, 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; *see also § 9.21A, above.*

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)*.



Strategic Point:

If desired, the parties may stipulate to facts for purposes of the summary judgment motion only. *See Fed. R. Civ. P. 56(c)(1)(A)*.

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)*.

[3] Timing of Motion for Summary Judgment

A party generally may move for summary judgment at any time until 30 days after the close of all discovery. However, a different time may be set by local rule or by a court order in the case. *Fed. R. Civ. P. 56(b)*.



Strategic Point:

When a party files a summary judgment motion early in the litigation, the district court may grant a continuance to permit the nonmoving party to obtain affidavits, take depositions, or conduct discovery. *See Fed. R. Civ. P. 56(d)(2)*; *see also § 9.23[4] below*.



Warning:

Scheduling orders are likely to supersede Rule 56's timing provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. *See Fed. R. Civ. P. 56*, Committtee Note of 2009.

[4] Preparing Motion

[a] Filing Written Motion and Supporting Papers

A party seeking summary judgment typically must file a written motion with the court. *See Fed. R. Civ. P. 7(b)(1)(A)*, *56(a)*. The moving party can satisfy the writing requirements both for a motion and for a Rule 6(c)(1) notice with a single written document. *See Fed. R. Civ. P. 6(c)(1)*.



Warning:

Appellate courts have, on occasion, "rescued" moving parties who failed to file written motions by relying on the district court's power to enter summary judgment *sua sponte*, provided that the losing party has had a full and fair opportunity to be heard. *First Fin. Ins. Co. v. Allstate Interior Demolition Corp., 193 F.3d 109, 114 (2d Cir. 1999)* . However, the better practice is for a moving party to file and serve a written motion.

Typically, a party moving for summary judgment files the following motion papers with the district court clerk's office. *See Fed. R. Civ. P. 7(b)(1)*, *56(a)*, *(c)*.

1. A notice of motion specifying the date, time, and location of the hearing on the motion;

2. A motion specifying which party seeks summary judgment, the claims involved, and the legal and factual grounds for the motion;

3. Any supporting affidavits or declarations; and

4. A proposed order granting summary judgment as requested by the moving party.

Warning:

Local rules may impose additional or different requirements on the materials to be filed.

Strategic Point:

2010 amendments to Rule 56 provide that a formal affidavit in support of, or in opposition to, a motion for summary judgment is not 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)*; *see also 28 U.S.C. § 1746*.

At a minimum, a motion for summary judgment must state with particularity the grounds for seeking the order and the relief sought. *See Fed. R. Civ. P. 7(b)(1)*. The rules governing captions and other matter of form in pleadings apply to motions for summary judgment. *See Fed. R. Civ. P. 7(b)(2)*; *see also § 9.05 above*.

Warning:

Local rules may impose additional format requirements.

Strategic Point:

Although a moving party may comply with the writing requirement by filing a notice of the hearing on the motion (*see Fed. R. Civ. P. 6(c)(1)*), the better practice is to combine a notice with a motion by setting out the grounds for the motion, the relief or order sought, and the time and date for the hearing on the motion.

[b] Drafting Memorandum of Points and Authorities

Although not explicitly required by the Federal Rules, local rules may require moving parties to file a brief or memorandum of points and authorities in support of the motion.

In general, a brief or memorandum in support of a summary judgment motion should contain the following:

1. The issues or grounds on which the party seeks summary judgment;

2. A brief procedural history;

3. A statement of facts; and

4. Concise legal argument supporting summary judgment.



Strategic Point:

Counsel for the moving party should not overstate or exaggerate the supporting evidence and thus risk losing credibility with the judge. Counsel also should acknowledge facts favoring the opponent, while demonstrating that those facts do not preclude granting summary judgment. Counsel should not misstate the law.

[c] Drafting Statement of Undisputed, Uncontroverted, or Material Facts

Although not explicitly required by the Federal Rules (*see Fed. R. Civ. P. 56*), local districts may require a party filing a motion for summary judgment to file an accompanying statement of undisputed, uncontroverted, or material facts. In general, these statements list the material facts relied on in support of the motion. The statements also cite the portions of the pleadings, affidavits, depositions, interrogatory answers, admissions, or other evidence relied on to establish the specific facts.



Strategic Point:

Courts will appreciate joint or stipulated statements of undisputed facts whenever the parties can make them. The parties may stipulate to facts for purposes of the summary judgment motion only. *See Fed. R. Civ. P. 56(c)(1)(A)*. In such a case, the facts would not be binding on the parties in the event the summary judgment motion is not granted.

[d] Attaching Proposed Judgment or Order

Although not explicitly required by the Federal Rules, district courts may require a party filing a motion for summary judgment to file with the motion a proposed judgment or order for the court's use in ruling on the motion.

[e] Offering Supporting Evidence

A summary judgment motion may be supported by sworn affidavits. *See Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (no express requirement that moving party attach supporting affidavits).



Warning:

Counsel should exercise caution in attaching affidavits in support of a client's motion for summary judgment. Attorney affidavits must be made on personal knowledge. *See Fed. R. Civ. P. 56(c)(4)*. Typically, attorneys are not competent to testify to matters that occur before the attorney becomes involved with the case. Moreover, an attorney may not acquire personal knowledge based on hearsay. *See, e.g., Sea-Land Serv., Inc. v. Atlantic Pac. Int'l, Inc., 61 F. Supp. 2d 1102, 1110 (D. Haw. 1999)* .

A summary judgment motion also may be supported by an unsworn declaration. *See Fed. R. Civ. P. 56(c)(4)*; *see also Jack v. Trans World Airlines, Inc., 854 F. Supp. 654, 658 (N.D. Cal. 1994)* ; *see 28 U.S.C. § 1746*. To be valid, declarations must be in a dated writing, in substantially the form set out in *28 U.S.C. § 1746*.



Warning:

Some federal district courts require parties to support their summary judgment papers with declarations rather than affidavits.

Papers attached to motions for summary judgment need not 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 material in determining the summary judgment motion. *See Fed. R. Civ. P. 56(c)(4)* (affidavits and declarations must be made on personal knowledge and set out only facts that would be admissible in evidence).

Warning:

Local rules may require copies of documentary evidence submitted in support of the motion to be served and filed with the motion or notice of motion.

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)*.

Strategic Point:

Counsel for moving party should consider compiling a "chambers copy" of the portions of the record filed with the motion that counsel wants the judge to review in determining the summary judgment motion. The chambers copy is not the official copy of the evidence filed with the motion. The chambers copy 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 to assisting the judge in finding the documents in the official court records.

Strategic Point:

On receiving the motion papers, counsel for the opposing party should carefully review the moving party's evidence and file and serve written objections to any evidence that is inadmissible, is not properly authenticated, or would otherwise be improperly considered in ruling on the motion. During the hearing on the motion, opposing party's counsel should request and obtain the court's ruling on each objection.

[5] Filing and Serving Motion

The current version of Rule 56, adopted in 2010, simply provides that a motion for summary judgment may be filed 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. *Fed. R. Civ. P. 56(b)*.

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 requiring a great deal more than the minimum 10-day period set out in former Rule 56(c). 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).

Rule 56 also provides that a court may take action on a motion for summary judgment after "giving notice and a reasonable time to respond." *Fed. R. Civ. P. 56(f).*



Warning:

Keep in mind that a great deal of former case law refers to the "10-day notice" requirement discussed above. Although the rule no longer specifies a notice period, much of the case law regarding the requirement to give notice will remain valid.

A party serving a motion or notice of motion for summary judgment on an opposing party 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).* The moving party must also file with the court a certificate of service. *See Fed. R. Civ. P. 5(d)(1).*



Warning:

In some district courts, counsel must confer with the opposing party before serving and filing a motion for summary judgment.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.10 -56.14, 56.30 -56.32.*
- *Federal Litigation Guide PP 5.10 -5.17.*
- *Bender's Federal Practice Forms* Rule 56.
- *Fed. R. Civ. P. 56* (summary judgment).
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 9.
- *Celotex Corp. v. Catrett, 477 U.S. 317, 322-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (summary judgment movant need not submit affidavits negating claim, but could discharge burden by demonstrating absence of support for essential element of claim).
- *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (expressly applying "substantial evidence" test utilized for deciding directed verdict (judgment as a matter of law) motions to summary judgment determinations as well).
- *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (if factual context makes non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is genuine issue for trial).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentOral MotionsCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNotices



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Chapter 9 PRETRIAL MOTION PRACTICE
PART E: SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.23

§ 9.23 Responding to Motion for Summary Judgment

[1] Understanding Strategic Options

The opposing party must respond to the summary judgment motion by filing with the court a written opposition to the motion. To avoid summary judgment, the evidence presented must be such that a reasonable trier of fact could return a verdict in the opposing party's favor. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* . The opposing party may rely on pleadings, discovery and disclosure materials, and any affidavits. *See Fed. R. Civ. P. 56(c).*

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)*; *see also § 9.25[2], below.*

Opposition papers may include a brief or memorandum of points and authorities, a statement of genuine issues or of disputed or controverted facts, and documentary evidence supporting the opposition to the motion. *See Fed. R. Civ. P. 56(c), (e).* If the opposing party lacks sufficient information to respond to the summary judgment motion, it may request a continuance to permit further discovery before the court rules on the motion. *See Fed. R. Civ. P. 56(d)*; *see also § 9.23[3] below.*

[2] Drafting Opposition to Motion

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 § 9.23[3], 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 may resist a summary judgment motion (and the court should deny a summary judgment motion) only on the ground that the moving party has failed to meet its burden to demonstrate the absence of triable issues of fact. A court may not grant summary judgment merely because there is no opposition, even when the failure to oppose violates a local rule. *Reed v. Nellcor Puritan Bennett, 312 F.3d 1190, 1194-1195 (10th Cir. 2002)* (party's failure to file response to summary judgment motion is not, by itself, sufficient basis on which to enter judgment against party). Similarly, an opposing party's failure to timely file opposition papers does not justify entry of summary judgment without regard to whether genuine issues of material fact exist. The district court must make the additional determination that judgment for the moving party is "appropriate". *See Fed. R. Civ. P. 56(e)(3); Reed v. Nellcor Puritan Bennett, 312 F.3d 1190, 1195-1196 (10th Cir. 2002)* ("If the evidence produced in support of the summary judgment motion does not meet this burden, summary judgment must be denied even if no opposing evidentiary matter is presented").

Circuit Split:

Circuits are split on whether trial courts have an obligation to search the entire case file for evidence establishing a genuine issue of fact. *See, e.g., Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1030-1031 (9th Cir. 2001)* (district court is not required to search record in case to discern some factual dispute that party has failed to identify); *Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 930 (1st Cir. 1983)* (district court has statutory duty to determine whether record in case shows there is no genuine issue as to any material fact). A 2010 amendment to Rule 56 seems to have resolved this circuit split. The rule now specifically provides that a court need consider only cited materials, but it may consider other materials in the record. *Fed. R. Civ. P. 56(c)(3).*



Strategic Point:

Opposition papers must 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.



Warning:

Local rules may require, or permit, a party opposing a summary judgment motion to file and serve a brief or memorandum of points and authorities opposing a summary judgment motion.

[3] Offering Evidence in Opposition

In response to a properly supported 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).*

Affidavits or declarations must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. *Fed. R. Civ. P. 56(c)(4).*

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)(2), (4).*

If an opposing party shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may deny the summary judgment motion. *Fed. R. Civ. P. 56(d)(1).* The court also has the option to defer considering the motion, or to allow time to obtain affidavits or declarations or to take discovery. *Fed. R. Civ. P. 56(d)(1), (2)*; *see also § 9.23[4], below*. The court also may issue any other appropriate order. *Fed. R. Civ. P. 56(d)(3).*

[4] Moving for Continuance for Further Discovery

To obtain a continuance, the party opposing summary judgment must file a timely motion that shows the party's need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information. *Ball v. Union Carbide Corp., 385 F.3d 713, 719-720 (6th Cir. 2004)* (grant of summary judgment is improper if opposing party is given insufficient opportunity for discovery); *see Fed. R. Civ. P. 56(d)(2).* The facts supporting the motion must be set out in an accompanying affidavit. *Price v. Western Resources, Inc., 232 F.3d 779, 783 (10th Cir. 2000)* .



Strategic Point:

To be successful, the motion for continuance and accompanying affidavits and proof must:

1. Point to specific information that would be revealed by further discovery;

2. Make a showing that the evidence actually exists;

3. Explain the relevance of the evidence to the case;

4. Explain how discovery of the evidence would counter the moving party's summary judgment motion; and

5. Detail the opposing party's efforts to diligently pursue discovery before seeking the continuance.

See, e.g., Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co. 353 F.3d 1125, 1129 (9th Cir. 2004) (appellants were not entitled to discovery that was irrelevant to narrow issue addressed by motion for summary judgment).

The motion must be brought before the summary judgment hearing. *See Massachusetts Sch. Of Law v. ABA, 142 F.3d 26, 44 (1st Cir. 1998)* .



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, district courts generally grant a Rule 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.").

The Rule 56(d) motion must be filed and served as provided by the rules governing filing and service of motions generally. *See Fed. R. Civ. P. 5, 6.*

[5] Serving and Filing Opposition Papers

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).

An opposing party may not file late affidavits without filing a Rule 56(d) motion indicating why the party cannot timely file the required affidavits. *Carpenter v. Universal Star Shipping, S.A., 924 F.2d 1539, 1547 (9th Cir. 1991)* ; *see also § 9.23[4] above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.10[3], [8], 56.13*.
- *Federal Litigation Guide PP 5.30 -5.37*.
- *Bender's Federal Practice Forms* Form Nos. 56:50-56:54, 56:160-56:180.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 9.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentOppositionMemoranda in Opposition



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Chapter 9 PRETRIAL MOTION PRACTICE
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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.24

§ 9.24 Replying to Opposition

Rule 56 does not specify procedures or timing requirements for replying to the nonmovant's opposition papers. Local rules usually impose specific requirements regarding the content and format of replies, and the time 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.*



Strategic Point:

To facilitate the reply to a nonmovant's statement of undisputed facts, counsel may wish to employ a three-column format. The first column lists the undisputed facts set forth in the movant's original statement of undisputed facts. The second column lays out the points made in the opposition. The third column should demonstrate how each issue or fact remains undisputed, and should cite to the evidence in the record.

In general, a reply brief or memorandum should not contain new issues, evidence, or argument that the movant could have raised in its moving papers. A trial court may properly strike new material included in a reply that the movant did not include in its original statement of facts. *See, e.g., Chale v. Allstate Life Ins. Co., 353 F.3d 742, 750 (9th Cir. 2003)* .

Exception:

A trial court does not abuse its discretion when it considers new information raised for the first time in a reply brief. *Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1164 (10th Cir. 1998)* .

A reply may include the moving party's objections, if any, to the admissibility of evidence submitted by the nonmoving party in opposition to the summary judgment motion. *See, e.g., Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003)* . Failure to object or to move to strike the evidence may result in waiver of evidentiary defects. *See FDIC v. New Hampshire Ins. Co., 953 F.2d 478, 484 (9th Cir. 1991)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.10[2][a].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 9.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentOppositionMemoranda in Opposition



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Chapter 9 PRETRIAL MOTION PRACTICE
PART E: SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.25

§ 9.25 Court Determination of Motion for Summary Judgment

[1] Hearing on Motion

Trial courts may hold a hearing on the summary judgment motion before determining the motion. However, courts are empowered to determine motions without an oral hearing. *See Fed. R. Civ. P. 78, 83.* In the absence of an objection or request for oral argument by the nonmoving party, oral argument may be waived. *See Mahon v. Credit Bureau of Placer County Inc., 171 F.3d 1197, 1200 (9th Cir. 1999)* . In addition, trial 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 on the motion, rather than repeat facts or argument presented in the brief or memorandum, counsel should concentrate on highlighting the main points, and the evidence--or lack of evidence--in the record supporting those points, and on responding to the court's questions.

District courts have discretion to take oral testimony on a summary judgment motion under *Fed. R. Civ. P. 43(c).* However, taking oral testimony on summary judgment motions is generally disfavored. *Seamons v. Snow, 206 F.3d 1021, 1026 (10th Cir. 2000)* . Local rules may impose additional constraints on oral testimony in connection with the court's determination of a summary judgment motion.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.15.*
- *Federal Litigation Guide P 5.16.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 9.

- *Fed. R. Civ. P. 56(c)* (proceedings on summary judgment motion).

[2] General Standards Governing Trial Court's Determination of Motion

Rule 56 imposes a burden of production on the moving party. The manner in which the moving party may make this showing depends on which party bears the burden of persuasion at trial on the challenged claim. *See Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (Brennan, J., dissenting).

If the moving party bears the burden of persuasion at trial, that party must support its motion with credible evidence showing there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(a)*; *National State Bank v. Federal Reserve Bank, 979 F.2d 1579, 1581-1582 (3d Cir. 1992)* .

In contrast, if the *nonmoving* party has the burden of persuasion at trial on a dispositive issue, the moving party may either (1) submit affirmative evidence negating an essential element of the nonmoving party's claim; or (2) demonstrate that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000)* . If the nonmoving party is unable to muster sufficient evidence to make out its claim, trial would be useless, and the moving party is entitled to summary judgment as a matter of law. *See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact, the court may take any of the following actions:

1. Give an opportunity to properly support or address the fact.

2. Consider the fact undisputed for purposes of the motion.

3. Grant summary judgment if the motion and supporting materials show that the movant is entitled to it.

4. Issue any other appropriate order.

See Fed. R. Civ. P. 56(e).

The court also has the power to make a judgment independent of the motion for summary judgment. The court must first give notice and a reasonable opportunity to respond. Then the court may take any of the following actions:

1. Grant summary judgment for a nonmovant.

2. Grant the motion on grounds not raised by a party.

3. Consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

See Fed. R. Civ. P. 56(f).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.13.*

- *Federal Litigation Guide P 5.16.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 9.
- *Fed. R. Civ. P. 56(c)* (proceedings on summary judgment motion).

[3] Ruling on Cross Motions for Summary Judgment

The mere fact that both parties file cross-motions for summary judgment does not necessarily mean there are no disputed issues of material fact. Nor does it necessarily permit the judge to render judgment in favor of one side or the other. *Greer v. United States, 207 F.3d 322, 326 (6th Cir. 2000)* . In ruling on cross-motions for summary judgment, the court must evaluate each motion separately to determine if the nonmovant presents genuine issues of material fact for trial. *See ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1097 (9th Cir. 2003)* .



Strategic Point:

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 Vetter v. Frosch, 599 F.2d 630, 632 (5th Cir. 1979)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.10[6].*
- *Federal Litigation Guide P 5.35.*
- *Bender's Federal Practice Forms* Form Nos. 56:240, 56:241.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 9.

[4] Entering Judgment

A trial court's order granting a summary judgment motion is not a judgment. A 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 Entm't, Ltd., 183 F.3d 922, 930 (9th Cir. 1999)* .

Typically, a trial court granting summary judgment requires the moving party to submit to the court and to serve on the nonmovant a proposed judgment consistent with the court's order. The court may require the parties to agree on the proposed judgment to be submitted. If they cannot, the court may require that the nonmovant file and serve a written opposition to the proposed judgment within a certain date after the court signs the order. It may also require the movant to submit a reply after being served with the opposition. *See, e.g., 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).*

In general, the district court need not make findings of fact and conclusions of law when deciding a summary judgment motion. *Hanson v. Aetna Life and Casualty, 625 F.2d 573, 575 (5th Cir. 1980)* ; *see Fed. R. Civ. P. 52(a)(3).* However, when its underlying holdings would otherwise be ambiguous or unascertainable, the court does have the burden of stating 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 advises the court that it "should state on the record the reasons for granting or denying the motion." *Fed. R. Civ. P. 56(a).*



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.

If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact that is not genuinely in dispute and treating the fact as established. This may include an item of damages or other relief. *Fed. R. Civ. P. 56(g).*



Strategic Point:

If the court denies the motion for summary judgment, consider requesting that the court include such findings in its order. However, before doing so, the party requesting the findings must be certain that it knows enough at the summary judgment stage about all of the facts it wants and does not want established at trial.



Warning:

Local rules may provide that statements 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.) § 56.40.*
- *Bender's Federal Practice Forms* Form Nos. 56:260, 56:269.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 9.
- *Fed. R. Civ. P. 56(g)* (order treating facts as established).
- *Fed. R. Civ. P. 58(d)* (request for entry of judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentHearingsOral ArgumentsCivil ProcedureSummary JudgmentHearingsRequests for HearingsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten Motions



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Chapter 9 PRETRIAL MOTION PRACTICE
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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.26

§ 9.26 Challenging Ruling on Motion

[1] Renewing Motion or Moving for Reconsideration in Trial Court

A moving party may 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. *Whitford v. Boglino, 63 F.3d 527, 530 (7th Cir. 1995)* .

A party may appropriately bring a motion for reconsideration of summary judgment under either *Fed. R. Civ. P. 59(e)* or *60(b)*. *Hinton v. NMI Pac. Enters., 5 F.3d 391, 395 (9th Cir. 1993)* . However, Rule 59(e) offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources. *Tahoe v. Northwestern Med. Faculty Found., Inc., 273 F.3d 757, 762 (7th Cir. 2001)* .



Strategic Point:

A party seeking reconsideration may file a motion invoking both rules. Counsel should consider doing so if the facts support a motion to reconsider under both rules.



Warning:

Local rules may impose additional requirements on motions for reconsideration. Counsel must become familiar with and adhere to the local rules in the district in which the case is filed.

To be timely, a Rule 59(e) motion for reconsideration must be filed within 28 days after entry of the judgment at issue. *United States v. Deutsch, 981 F.2d 299, 301 (7th Cir. 1992)* (construing former 10-day period); *see Fed. R. Civ. P. 59(e)*. A Rule 60(b) motion to reconsider must be brought within a reasonable time. *Fed. R. Civ. P. 60(c)(1)* (outer time limit is one-year from entry of judgment, if Rule 60(b) motion brought on specified grounds).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.10[2][c], 59.30, 59.31, 60.40, 60.65.*
- *Federal Litigation Guide P 44.46[2].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 9.
- *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).

[2] Obtaining Appellate Review

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)*. In contrast, orders granting partial summary judgment generally are not appealable final orders because they do not dispose of all claims and do not end the litigation on the merits. *Williamson v. UNUM Life Ins. Co. of Am., 160 F.3d 1247, 1250 (9th Cir. 1998)* . However, appellate review of an order granting partial summary judgment may be available under *28 U.S.C. § 1292(b)* or if the court directs entry of a separate final judgment. *See Fed. R. Civ. P. 54(b)*.

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. Though 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. *Orion Fin. Corp. v. American Foods Group, Inc., 201 F.3d 1047, 1049 (8th Cir. 2000)* .

An order denying summary judgment generally is a nonappealable 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, e.g., Mitchell v. Forsyth, 472 U.S. 511, 525, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)* .

In general, a notice of appeal must be filed with the district clerk within 30 days after the trial court enters the judgment or order appealed from. *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)*.

Exceptions:

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. *Moody Nat'l Bank of Galveston v. G.E.Life and Annuity Assur. Co., 383 F.3d 249, 250 (5th Cir. 2004)* ; *see Fed. R. App. P. 4(a)(4)(A)(iv)*. However, 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)* .

The 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. *Fed. R. App. P.*

4(a)(5).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.41.*
- *Federal Litigation Guide P 48.11.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 9.
- *Fed. R. App. P. 4(a)* (appeal in civil case).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureSummary JudgmentAppellate ReviewStandards of ReviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten Motions



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Chapter 9 PRETRIAL MOTION PRACTICE
PART F: VOLUNTARY DISMISSAL

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.27

§ 9.27 Checklist for Voluntary Dismissal

☐ Determine whether plaintiff can voluntarily dismiss action without court order: *See § 9.28[1] below*.

- ○ If no answer or motion for summary judgment has been filed, prepare and file notice of dismissal. *See § 9.28[2] below*.
- ○ If all parties appearing in action agree, draft stipulation for dismissal and file with court. *See § 9.28[4] below*.

☐ Determine whether court order is required for voluntary dismissal. *See § 9.29[1] below*.

- ○ Use noticed motion procedure to obtain court order. *See § 9.29[3] below*.
- ○ Be prepared to oppose defense arguments that dismissal will result in legal prejudice and that conditions should be imposed. *See § 9.29[2], [3] below*.

☐ **Search by Topic:** Civil Procedure > Dismissals > Voluntary Dismissals

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotionsCivil ProcedureDismissalsVoluntary DismissalsStipulations



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Chapter 9 PRETRIAL MOTION PRACTICE
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1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.28

§ 9.28 Obtaining Voluntary Dismissal Without Court Order

[1] Voluntary Dismissal by Notice of Dismissal or Stipulation

As a general rule, a plaintiff may dismiss an action without order of court by filing:

1. A notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment, whichever first occurs; or

2. A stipulation of dismissal signed by all parties who have appeared in the action.

Fed. R. Civ. P. 41(a)(1)(A).

This general right to voluntary dismissal is subject to "any applicable federal statute" creating an exception, as well as specified exceptions in the following rules:

1. *Fed. R. Civ. P. 23(e)* (voluntary dismissal of class actions requires court approval).

2. *Fed. R. Civ. P. 23.1(c)* (voluntary dismissal of derivative action requires court approval).

3. *Fed. R. Civ. P. 23.2* (voluntary dismissal of actions relating to unincorporated associations must correspond with Rule 23(e), which requires court approval).

4. *Fed. R. Civ. P. 66* (action in which receiver has been appointed may be dismissed only by court order).

Fed. R. Civ. P. 41(a)(1)(A).

The plaintiff's right to file a notice of dismissal is absolute only when the defendant has not yet served an answer or a summary judgment motion. Once the plaintiff files the voluntary dismissal, the defendant has no recourse and the court lacks jurisdiction to act in any manner. *See Netwig v. Georgia Pacific Corp., 375 F.3d 1009, 1010-1011 (10th Cir.*

2004) .

Warning:

When Rule 12(b)(6) motions to dismiss are supported by materials that are outside the pleadings, the court will treat the motion to dismiss as a *motion for summary judgment*. *See Fed. R. Civ. P. 12(d)*. Until the court converts the motion from a motion to dismiss to a motion for summary judgment, a plaintiff may still file a notice of dismissal pursuant to *Fed. R. Civ. P. 41(a)(1)*. *See Marques v. Federal Reserve Bank of Chicago, 286 F.3d 1014, 1017-1018 (7th Cir. 2002)* .

Rule 41(a)(1)(A) provides that "the plaintiff may dismiss an action", but does not provide that fewer than all claims or all defendants may be dismissed. However, the plaintiff may choose to dismiss some or all of the defendants through a Rule 41(a)(1) notice. *Fed. R. Civ. P. 41(a)(1)*; *see Wilson v. City of San Jose, 111 F.3d 688, 692 (9th Cir. 1997)* .

The plaintiff cannot use Rule 41(a)(1) to voluntarily withdraw individual claims against a defendant remaining in the case. Withdrawals of individual claims against a defendant remaining in the case are governed by *Fed. R. Civ. P. 15*, the amended pleadings rule. *See General Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1513 (9th Cir. 1995)* ; *Gronholz v. Sears, Roebuck & Co., 836 F.2d 515, 518 (Fed. Cir. 1987)* ; *see also § 4.36 above*.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. *Fed. R. Civ. P. 41(a)(1)*. This "two dismissal rule" means that a notice of dismissal operates as an adjudication on the merits if the plaintiff has previously dismissed an action based on or including the same claim. *Fed. R. Civ. P. 41(a)(1)*.

Distinguish:

The "two dismissal rule" rule applies only to *notices* of voluntary dismissal, not to *stipulations* of voluntary dismissal (*see Fed. R. Civ. P. 41(a)(1)*) and not to dismissals by court order under *Fed. R. Civ. P. 41(a)(2)*. *See Estate of Migliaccio v. Midland Nat'l Life Ins. Co., 436 F. Supp. 2d 1095, 1101-1103 (C.D. Cal. 2006)* (citing **Moore's**).

Fed. R. Civ. P. 41 applies to the dismissal of any counterclaim, crossclaim, or third-party claim. *Fed. R. Civ. P. 41(c)*. A voluntary dismissal by the claimant alone must be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing. *Fed. R. Civ. P. 41(c)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 41.30 -41.34*.
- *Federal Litigation Guide PP 6.01 -6.06*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Fed. R. Civ. P. 41(a)(1)* (voluntary dismissal by plaintiff).

[2] Notice of Voluntary Dismissal

A plaintiff must file a notice of dismissal for the dismissal to be effective. Mere service is not sufficient. *Fed. R. Civ. P. 41(a)(1)*; *Wilson v. City of San Jose, 111 F.3d 688, 693 (9th Cir. 1997)* . Service is also unnecessary. Notice to the defendants is not required to effectuate the dismissal. *Diamond v. United States, 267 F.2d 23, 25 (5th Cir. 1959)* .



Strategic Point:

Although service is not required to effectuate the dismissal, Rule 5(a) requires that once a party has been served, any paper filed in court must be served on that party. *Fed. R. Civ. P. 5(a)*. Service may also avoid a collateral motion by the defendant for costs, attorney's fees, or other relief for the plaintiff's failure to serve a notice of dismissal if those costs or fees could have been avoided.

PRACTICE RESOURCES:

- *Moore's Federal Practice § 41.33*.
- *Bender's Federal Practice Forms* Form Nos. 41:1, 41:2.
- *Federal Litigation Guide P 6.03*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Fed. R. Civ. P. 41(a)(1)* (voluntary dismissal by plaintiff).

[3] Effect of Voluntary Dismissal

A dismissal by the plaintiff without court order is effective on filing. No court order is required. *See Fed. R. Civ. P. 41(a)(1)*; *Janssen v. Harris, 321 F.3d 998, 1000-1001 (10th Cir. 2003)* . The proper filing of a notice to dismiss an action leaves no role for the court to play. *Netwig v. Georgia-Pacific Corp., 375 F.3d 1009, 1010-1011 (10th Cir. 2004)* .

Exception:

The court retains jurisdiction over collateral matters, such as sanctions and attorney's fees. *See, e.g., Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* ; *Sequa Corp. v. Cooper, 245 F.3d 1036, 1037 (8th Cir. 2001)* .

Filing a notice of voluntary dismissal automatically terminates the action as to the defendants who are the subjects of the notice. Unless otherwise stated, the plaintiff may commence another action for the same cause against the same defendants. The dismissal leaves the parties as though no action had been brought. *Wilson v. City of San Jose, 111 F.3d 688, 692 (9th Cir. 1997)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 41.33[6].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Fed. R. Civ. P. 41(a)(1)* (voluntary dismissal by plaintiff).
- *Qureshi v. United States, 600 F.3d 523, 525 (5th Cir. 2010)* (notice of dismissal under Rule 41(a)(1)(A)(i) is "immediately self-effectuating").

[4] Drafting Stipulation of Voluntary Dismissal

A plaintiff may use a stipulation of voluntary dismissal in several situations. It is most commonly used in connection with a settlement. It is also used when the plaintiff cannot dismiss by a mere notice, and the defendants are willing to stipulate to dismissal. Finally, it is used when the time for filing a notice of dismissal has lapsed. Unlike a notice to dismiss under subdivision (i) of Rule 41(a)(1), parties may stipulate to dismiss an action under subdivision (ii) at any time. *See Fed. R. Civ. P. 41(a)(1)*. A stipulation of dismissal must be signed by all plaintiffs and all defendants who have appeared in the action. *See Fed. R. Civ. P. 41(a)(1)(A)(ii)*.



Strategic Point:

In multi-party litigation, a stipulation that purports to dismiss the entire action without the consent of all parties may be deemed ineffective. *Green v. Nevers, 111 F.3d 1295, 1300 (6th Cir. 1997)* . In that case, if one or more defendants refuse to stipulate to dismissal, the plaintiff should resort to a motion to dismiss.

A stipulation of dismissal is not self-executing, meaning that the stipulation must be filed with the court in order to effectuate the dismissal.

Exception:
An oral stipulation in open court may effectuate the dismissal. *See Fed. R. Civ. P. 41(a)(1)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 41.34*.
- *Federal Litigation Guide P 6.04*.
- *Bender's Federal Practice Forms* Form Nos. 41:10-41:15.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Fed. R. Civ. P. 41(a)(1)* (voluntary dismissal by plaintiff).

[5] Appellate Review Following Notice of Dismissal

The appealability of a voluntary dismissal ordinarily depends on whether the action was dismissed with or without prejudice. A voluntary dismissal without prejudice is ordinarily not a final judgment from which the plaintiff may appeal. *See Concha v. London, 62 F.3d 1493, 1507 (9th Cir. 1995)* . A dismissal with prejudice is appealable, whether voluntary or involuntary. *Concha v. London, 62 F.3d 1493, 1507 (9th Cir. 1995)* . The court of appeals may analyze the effect of the voluntary dismissal in determining whether it should be treated as a dismissal with or without prejudice, for purposes of establishing appealability. The wording on the notice of dismissal or related documents is therefore not necessarily determinative. *See, e.g., Concha v. London, 62 F.3d 1493, 1508-1509 (9th Cir. 1995)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 41.33[8]*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotionsCivil ProcedureDismissalsVoluntary DismissalsStipulations



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Chapter 9 PRETRIAL MOTION PRACTICE
PART F: VOLUNTARY DISMISSAL

1-9 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 9.29

§ 9.29 Obtaining Voluntary Dismissal by Court Order

[1] Obtaining Dismissal When Dismissal by Notice or Stipulation Is Not Available

When dismissal by notice or stipulation, as discussed in *§ 9.28 above*, is unavailable, a plaintiff may wish to dismiss the action by court order. The plaintiff must seek a court order in the following circumstances:

1. The plaintiff seeks to dismiss the action, but one defendant has already filed an answer or a motion for summary judgment, and the plaintiff is unable to obtain a stipulation of dismissal from all parties;

2. The claimant seeks to dismiss a counterclaim, crossclaim, or third-party claim, but a responsive pleading has been served, or evidence has already been introduced at the trial or hearing, and the claimant is unable to obtain a stipulation of dismissal from all parties; or

3. The action is of a type that may not be dismissed without court order.

See Fed. R. Civ. P. 41(a).

The court exercises its discretion in determining whether to allow dismissal, and considers factors including whether dismissal is appropriate at all, whether the dismissal should be with or without prejudice, and whether any terms or conditions should be imposed on the dismissal. *See Fed. R. Civ. P. 41(a)(2).*

The following types of actions may *not* be voluntarily discontinued without court approval:

1. Class actions. *See Fed. R. Civ. P. 23(e)*;

2. Shareholder derivative suits. *See Fed. R. Civ. P. 23.1(c)*;

3. Actions relating to unincorporated associations. *See Fed. R. Civ. P. 23.2*;

4. Actions in which a receiver has been appointed; and *Fed. R. Civ. P. 66.*

5. Actions in which court approval is required pursuant to federal statute.

Fed. R. Civ. P. 41(a)(1)(A).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 41.32, 41.40.*
- *Federal Litigation Guide PP 6.20, 6.21.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.

[2] Terms and Conditions of Dismissal

The dismissal may be conditioned on terms that are proper or necessary to avoid prejudice to the defendant. *See Fed. R. Civ. P. 41(a)(2).* The plaintiff has a reasonable period of time within which either to refuse the conditional voluntary dismissal by withdrawing the motion for dismissal or to accept the dismissal despite the imposition of conditions. *Beard v. Sheet Metal Workers Union, Local 150, 908 F.2d 474, 476 (9th Cir. 1990)* (remanding to give plaintiff opportunity to choose).

A court-ordered dismissal under Rule 41(a)(2) must dismiss all claims against any one or more defendants and cannot be used to dismiss individual claims against a defendant remaining in the case. *Hells Canyon Pres. Council v. United States Forest Serv., 403 F.3d 683, 688 (9th Cir. 2005)* .

A district court may condition a dismissal under *Fed. R. Civ. P. 41(a)(2)* on the payment of costs. *See, e.g., Koch v. Hankins, 8 F.3d 650, 652 (9th Cir. 1993)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 41.40[10].*
- *Federal Litigation Guide P 6.22.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.

[3] Moving for Voluntary Dismissal

A motion for voluntary dismissal under *Fed. R. Civ. P. 41(a)(2)* is addressed to the district court's sound discretion. A motion for voluntary dismissal should be granted unless the defendant shows it will suffer some plain legal prejudice as a result. *Catanzano v. Wing, 277 F.3d 99, 109-110 (2d Cir. 2001)* . The defendant generally must show either some blameworthy conduct by the plaintiff or that defendant's interests would be prejudiced by dismissal. *United States ex rel Doe v. Dow Chem. Co., 343 F.3d 325, 330 (5th Cir. 2003)* ; *Correspondent Servs. Corp. v. First Equities Corp., 338 F.3d 119, 126-127 (2d Cir. 2003)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 41.40[5], [6].*

- *Bender's Federal Practice Forms* Form Nos. 41:20-41:22.
- *Federal Litigation Guide PP 6.30 -6.36*.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.

[4] Seeking Payment of Costs for Previously Dismissed Action

If a plaintiff who has once dismissed an action in any court commences an action based on or including the same claim against the same defendant, the court may make an order for the payment of costs of the action previously dismissed and may stay the proceedings in the action until the plaintiff has complied with that order. *Fed. R. Civ. P. 41(d)*. Although neither is mandatory, federal courts enjoy broad discretion to order stays and payment of costs. *See Fed. R. Civ. P. 41(d)*; *Esquivel v. Arau, 913 F. Supp. 1382, 1386 (C.D. Cal. 1996)* (Rule 41(d) is intended to serve as deterrent to forum shopping and vexatious litigation).



Strategic Point:

Before filing a second action following a voluntary dismissal, plaintiff's counsel should consider whether the court is likely to order payment of costs incurred by defendant in defending the first action.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 41.70*.
- *Bender's Federal Practice Forms* Form Nos. 41:70-41:81.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.
- *Fed. R. Civ. P. 41(d)* (costs of previously dismissed action).

[5] Appeal Following Order for Voluntary Dismissal

Although the procedure for obtaining a voluntary dismissal under *Fed. R. Civ. P. 41(a)(1)* is different from the procedure for obtaining voluntary dismissal under *Fed. R. Civ. P. 41(a)(2)*, the rules regarding appealability are generally the same. *See Concha v. London, 62 F.3d 1493, 1506 (9th Cir. 1995)* . *See § 9.28[5] above*.



Strategic Point:

If parties stipulate to dismiss so that they can take their dispute to an appellate court, the parties fully expect and intend to continue their litigation in that forum. In that situation, the voluntary dismissal does not moot the case. *See Oregon Bureau of Labor & Indus. ex rel. Richardson v. U.S. W. Communications, Inc., 288 F.3d 414, 416-417 (9th Cir. 2002)* (involving stipulation for voluntary dismissal with prejudice under *Fed. R. Civ. P. 41(a)(2)*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 41.40[11].*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 3.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotionsCivil ProcedureDismissalsVoluntary DismissalsStipulations



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Chapter 10 SETTLEMENT AGREEMENTS AND OFFERS OF JUDGMENT

1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation 10.syn

§ 10.syn Synopsis to Chapter 10: SETTLEMENT AGREEMENTS AND OFFERS OF JUDGMENT

§ 10.01 Procedural Context--Settlement Agreements and Offers of Judgment

§ 10.02 Checklist for Preparing for Settlement

§ 10.03 Making Initial Considerations Regarding Settlement

§ 10.04 Considering Advantages and Incentives of Settlement at Early Stage of Litigation

[1] Settlement Provides Certainty

[2] "Bar Order" Can Shield Defendants from Additional Liability

§ 10.05 Engaging in Settlement Procedures Mandated by Court

[1] Court Backlogs Necessitate Mandatory Procedures

[2] Failure to Participate May Be Basis for Sanctions or Default Judgment

§ 10.06 Using Third-Party Settlement Facilitators

[1] Parties May Discuss Settlement Without Intermediary

[2] Parties May Choose Neutral Judge or Nonjudicial Mediator

[3] Trial Judge May Serve As Settlement Officer

§ 10.07 Preparation for Settlement Discussions Must Be Thorough

[1] Analyzing the Case for Settlement Purposes

[2] Valuing the Case for Settlement

[3] Preparing for Settlement Discussions Using Online Resources

[4] Communicating With Client About Settlement

[5] Understanding Opponent's Objectives

§ 10.08 Understanding Ethical Duties and Considerations During Settlement

[1] Obtaining Client's Authority to Settle

[2] Communicating Offers and Demands to Client

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[4] Avoiding Conflicts of Interest

§ 10.09 Understanding Special Protections Afforded Settlement Negotiations

§ 10.10 Checklist for Offers of Judgment

§ 10.11 Understanding Rule 68 Offers of Judgment

§ 10.12 Analyzing Potential Cost Recovery Under Rule 68

[1] Rule 68 Can Shift Costs and Some Fees

[2] In Diversity Cases, State Law May Affect Recovery

[a] Preliminary Erie Determination Required

[b] Expert Witness Fees Procedural Under Erie

[c] Attorney's Fees and Costs Are Substantive Under Erie

[3] Underlying Statute Governs Plaintiff's Ability to Recover Post-Offer Attorney's Fees

[a] Plaintiff May Not Recover Post-Offer Attorney's Fees When Statute Defines Fees As Costs

[b] Plaintiff May Recover Post-Offer Attorney's Fees When Statute Distinguishes Fees From Costs

[4] Attorney's Fees As Part of Costs May Be Available to Offeror

[5] Specificity In Offer Can Affect Amount of Fees and Costs Available

[6] Rule 68 Inapplicable if Defendant Wins

[7] Court Determines Whether Judgment Is More Favorable

§ 10.13 Making Rule 68 Offers

[1] Only Defending Parties May Make Rule 68 Offers

[2] Defending Party Serves Offer of Judgment in Writing on Opposing Party

[3] Offer May Be Conditional on Acceptance by All Parties

[4] Making Timely Offer

[a] General Rule: Offer of Judgment Must Be Made at Least 14 Days Before Trial

[b] When Party Found Liable, It May Make Offer of Judgment As If 14 Days Before Trial

[5] Multiple Offers of Judgment Are Possible

§ 10.14 Applying Ordinary Contract Principles to Offer of Judgment

[1] Effect of Ambiguity in Offer of Judgment

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[1] Motion to Strike Is Appropriate for Procedural or Substantive Defects

[2] Deadline for Filing Motion to Strike

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§ 10.16 Rejecting Rule 68 Offer

§ 10.17 Accepting Rule 68 Offer

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§ 10.21 Considering Types of Settlements Available

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§ 10.22 Including Common Settlement Agreement Provisions

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[2] Recitation of Disputed Matters

[3] Recitation of the Parties' Obligations

[4] Release Provisions

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[7] Signatures

§ 10.23 Putting Oral Settlement on Record

§ 10.24 Terminating Action to Implement Settlement

§ 10.25 Obtaining Judicial Approval of Settlement

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§ 10.27 Considering Options and Strategy When Settlement Agreement Must Be Enforced

§ 10.28 Showing Settlement Agreement Is Legally Valid

[1] Construction of Settlement Agreement

[a] Settlement Agreement Is Enforceable Contract

[b] Settlement Agreement Interpreted According to State Contract Law

[c] Void Terms Will Not Be Enforced

[2] Complete Agreement Must Have Existed Between Parties

[a] Both Parties Must Have Agreed to Terms of Settlement or Authorized Counsel to Settle Dispute

[b] Client May Grant Authority to Make Binding Settlement on Its Behalf

[c] Client's Signature on Agreement Not Required

[3] Court May Require Evidentiary Hearing on Question of Formation of Contract

§ 10.29 Enforcing Settlement Agreement In District Court

[1] Independent Basis of Jurisdiction Must Exist

[2] Enforcement While Case Still Pending Before Court

[3] Post-Dismissal Enforcement Possible Only If Court Explicitly Retains Jurisdiction

[4] If Jurisdiction Retained, Party May Be Able to Bring Contempt Proceedings

§ 10.30 Enforcing Settlement Agreement Elsewhere

[1] Party Seeking Enforcement May Bring Separate Action

[2] Federal Arbitration Act May Govern If Agreement Provides for Arbitration

[3] Injunctions to Enjoin Inconsistent Actions May Be Available

[4] Party May Raise Settlement Agreement Bar to Further Litigation

§ 10.31 Opposing Enforcement of Settlement Agreement

§ 10.32 Appeal of Enforcement of Settlement Agreement



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Chapter 10 SETTLEMENT AGREEMENTS AND OFFERS OF JUDGMENT
PART A: PROCEDURAL CONTEXT

1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.01

§ 10.01 Procedural Context--Settlement Agreements and Offers of Judgment

Successfully negotiating and implementing a settlement are fundamental aspects of the effective representation of a client. Very few actions proceed to trial. Moreover, with the increasing backlog in the federal courts, the districts have developed mandatory procedures for encouraging settlement between parties.

Parties will approach settlement discussions in different ways. Counsel for plaintiff will wish to develop the case to maximize the liability of the defendant and highlight all damages, including those that may be less obvious. Counsel for the defendant will develop the facts and theories that will most undercut the plaintiff's case.

A realistic settlement valuation should be assessed at the outset and updated regularly. Attorneys should not permit their clients to assume that their most favorable view of the case will prevail, because unrealistically optimistic clients may not settle at opportune times and may become embittered when an eventual settlement or judgment is not what they expected.

The local rules of every district court require some sort of early procedure aimed at settlement-oriented assessment of the case. Often they permit further procedures at the request of the parties. Take advantage of these procedures, and of *Fed. R. Civ. P. 68*'s provision for offers of judgment, to achieve early resolution of the case.

Legal Topics:

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



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Chapter 10 SETTLEMENT AGREEMENTS AND OFFERS OF JUDGMENT
PART B: PREPARING FOR SETTLEMENT AND SETTLEMENT CONFERENCES

1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.02

§ 10.02 Checklist for Preparing for Settlement

☐ Consider benefits of settlement.

- ○ Certainty. *See § 10.04[1] below*.
- ○ Availability of a "bar order." *See § 10.04[2] below*.
- ○ Review mandatory settlement procedures available in district court. *See § 10.05 below*.

☐ Consider types of settlement procedures.

- ○ Direct negotiations between parties. *See § 10.06[1] below*.
- ○ Negotiations with a third party intermediary. *See § 10.06[2] below*.
- ○ Negotiations before trial judge. *See § 10.06[3] below*.

☐ Prepare thoroughly for settlement negotiations.

- ○ Analyze the facts and law of your case for settlement purposes. *See § 10.07[1] below*.
- ○ Value the case. *See § 10.07[2], [3] below*.

- ○ Communicate with client about settlement. *See § 10.07[4] below*.
- ○ Understand opponent's objectives. *See § 10.07[5] below*.

☐ Comply with ethical duties.

- ○ Obtain client's authority to settle. *See § 10.08[1] below*.
- ○ Communicate offers and demands to client. *See § 10.08[2] below*.
- ○ Refrain from communicating with represented parties. *See § 10.08[3] below*.
- ○ Avoid conflicts of interest in settlement negotiations. *See § 10.08[4] below*.
- ○ Maintain confidentiality of settlement negotiations. *See § 10.09 below*.

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewGovernmentsCourtsRule Application & InterpretationLegal EthicsClient RelationsConflicts of Interest



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Chapter 10 SETTLEMENT AGREEMENTS AND OFFERS OF JUDGMENT
PART B: PREPARING FOR SETTLEMENT AND SETTLEMENT CONFERENCES

1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.03

§ 10.03 Making Initial Considerations Regarding Settlement

Federal courts favor settlement before trial. *See Fed. R. Civ. P. 16(c)*, Committee Note of 1993; *Fed. R. Evid. 408*, Committee Note of 1975. Litigation settlements offer parties and their counsel relief from the burdens and uncertainties inherent in trial. *Franklin v. Kaypro Corp., 884 F.2d 1222, 1225 (9th Cir. 1989)* .

The following litigation techniques may lead to productive settlement discussions:

1. Ask for a firm trial date;

2. Seriously evaluate and consider all potential forms of alternate dispute resolution (ADR) in addition to court-mandated settlement conferences, particularly use of mediators;

3. After exhaustion of other ADR procedures, or in lieu of them, ask for settlement conference, usually before a separate judge;

4. Consider the exchange of settlement conference statements and offers with other parties in advance of the conference;

5. Make sure that parties, not just counsel, participate in settlement discussions;

6. Make sure insurance carriers that may provide coverage are involved;

7. If experts have been identified, consider whether the presence of experts would be useful at the conference; and

8. Ask for severance and early trial of issues that could lead to resolution of the entire matter.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.04*, *16.13*, *16.35*.
- *Federal Litigation Guide PP 49.01 -49.04*.
- *Manual for Complex Litigation (4th ed.)* §§ 13.11, 13.12.
- *Effective Legal Negotiation and Settlement (5th ed.)* Ch. 12.
- *Fed. R. Civ. P. 16(c)* (pretrial conferences).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview



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Chapter 10 SETTLEMENT AGREEMENTS AND OFFERS OF JUDGMENT
PART B: PREPARING FOR SETTLEMENT AND SETTLEMENT CONFERENCES

1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.04

§ 10.04 Considering Advantages and Incentives of Settlement at Early Stage of Litigation

[1] Settlement Provides Certainty

In litigation, the adverse consequences of a potential defeat provide the parties with an incentive to settle in advance of trial, because settlement provides certainty. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 352, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* .

[2] "Bar Order" Can Shield Defendants from Additional Liability

A "bar order" is another incentive for settlement in complex litigation. A "bar order" will prohibit contribution from settling defendants of any amount in excess of their proportionate share of fault or liability as determined by the trier of fact. Use of a "bar order" is permissible so long as the court instructs the jury to determine the percent of culpability of settling and nonsettling defendants without mention or reference to any settlement agreement or bar order. *See Franklin v. Kaypro Corp., 884 F.2d 1222, 1231 (9th Cir. 1989)* .

PRACTICE RESOURCES:

- *Federal Litigation Guide PP 49.01 -49.04.*
- *Manual for Complex Litigation (4th ed.)* § 13.13.
- *Effective Legal Negotiation and Settlement (5th ed.)* Ch. 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewTortsProcedureMultiple DefendantsContributionGeneral Overview



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Chapter 10 SETTLEMENT AGREEMENTS AND OFFERS OF JUDGMENT
PART B: PREPARING FOR SETTLEMENT AND SETTLEMENT CONFERENCES

1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.05

§ 10.05 Engaging in Settlement Procedures Mandated by Court

[1] Court Backlogs Necessitate Mandatory Procedures

Because of the serious case backlog in the federal court system, judicial intervention in the settlement process is a necessity. Federal courts seek methods other than litigation for resolving disputes. As a result, a party filing suit in federal court today will be asked to consider settlement through either mandatory settlement procedures or some form of court-annexed ADR.

Warning:

Federal courts are required to devise, implement, and administer an ADR program to be used in civil actions. *See 28 U.S.C. § 651*. As a result, most federal civil lawsuits may be subject to referral for some type of ADR process during the litigation. At minimum, every federal litigator will need to be familiar with the local district court ADR processes and rules and any standing orders pertaining to ADR of the particular judge assigned to the case.

[2] Failure to Participate May Be Basis for Sanctions or Default Judgment

Failure to attend a mandatory settlement conference, just like failure to participate in litigation more generally, can be grounds for issuing sanctions. *Ampro v. Forgey, 2007 U.S. App. LEXIS 3002, at *4-*6 (5th Cir. 2007)* (monetary sanctions; unpublished case); *Hallum v. Trans. States Lines, Inc., 2000 U.S. App. LEXIS 14491, at *4 (6th Cir. 2000)* (dismissal sanction; unpublished case).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.04, 16.34, 16.90 -16.94.*
- *Federal Litigation Guide P 50.01 et seq.*
- *Effective Legal Negotiation and Settlement (5th ed.)* Ch. 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview



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Chapter 10 SETTLEMENT AGREEMENTS AND OFFERS OF JUDGMENT
PART B: PREPARING FOR SETTLEMENT AND SETTLEMENT CONFERENCES

1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.06

§ 10.06 Using Third-Party Settlement Facilitators

[1] Parties May Discuss Settlement Without Intermediary

Before pursuing more formal procedures involving intermediaries, the counsel and parties may wish to engage in settlement negotiations on their own. Such procedures avoid the potential expense of a third party mediator. For detailed coverage of the settlement negotiation process, see *Effective Legal Negotation and Settlement (5th ed.)*.

Note that the federal courts exclude evidence of proposed or accepted compromises when is offered to prove the validity or invalidity of a claim or the amount of damage. *Federal Rule of Evidence 408(a)* extends the exclusionary treatment to cover evidence of "conduct and statements made in compromise negotiations" as well as the terms of the result of such negotations. The Rule excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. *See Fed. R. Evid. 408(a)*.

Warning:

While not permitted to prove the existence or amount of liability, efforts to settle may be introduced by opposing counsel for other purposes. *See Fed. R. Evid. 408(b)* (permissible uses include proving a witness's bias or prejudice, negating a contention of undue delay, and proving an effort to obstruct a criminal investigation or prosecution).

[2] Parties May Choose Neutral Judge or Nonjudicial Mediator

If an intermediary for settlement purposes is required, counsel can select a nonjudicial third party or judge other than the trial judge. Some districts now provide explicitly for nonjudicial settlement officers.

[3] Trial Judge May Serve As Settlement Officer

The trial judge may, with the parties' consent, act as the settlement officer; although some judges will not agree to do so even when the parties consent. The advantage to such a procedure is that the judge will be familiar with the case and thus can facilitate settlement discussions. If a judge is willing, the parties will have a difficult choice. Before giving or withholding consent, each party must explore how comfortable they will be with involving the judge in settlement

negotiations if those negotiations fail and the case must be tried. Even if the case will be tried with a jury, the decision involves weighing the potential dangers of allowing the district judge to hear and participate in settlement negotiations against potential awkwardness in withholding consent. Most attorneys and judges believe that it is preferable to have the court appoint a magistrate judge or another district judge to conduct the settlement conference. On the other hand, these judicial officers rarely have all of the time that may be needed for the settlement process. Given the number of highly skilled attorneys and former judges serving as neutrals, many lawyers prefer a nonjudicial mediator.



Strategic Point:

One primary disadvantage to the trial judge's acting as a settlement officer is that the judge will be introduced to the parties' confidential thought processes about the case, and may become familiar with evidence that may not be introduced at trial. A second disadvantage is that the judge may form opinions about the merits of the case based on ex parte communications one opposing party or its counsel. Finally, a negotiation strategy can be more complicated when the judge is involved in settlement discussions. A party runs the risk of being perceived by the judge as "unreasonable" in connection with positions taken in settlement negotiations and may wonder whether this perception might adversely influence the judge in pretrial rulings and at trial.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.50*, *16.53*, *16.55*.
- *Weinstein's Federal Evidence (2d ed.)* Ch. 408.
- *Federal Litigation Guide P 50.01 et seq*.
- *Effective Legal Negotiation and Settlement (5th ed.)* Ch. 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewEvidenceRelevanceCompromise & Settlement Negotiations



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.07

§ 10.07 Preparation for Settlement Discussions Must Be Thorough

[1] Analyzing the Case for Settlement Purposes

As with any part of the litigation process, success in settling a case requires careful preparation. Settlement discussions are most likely to be productive after the parties have identified the legal issues and obtained and evaluated the most importantl evidence on those issues. Therefore, prior to settlement discussions counsel must research, understand, and be able to articulate:

1. Issues in controversy;

2. Facts surrounding the controverted issues;

3. Law applicable to the facts and issues in controversy;

4. Client's objectives and priorities;

5. Objectives of the opposing party and opposing counsel;

6. Monetary value of the case; and

7. Any obstacles to settlement, such as historical animosity between the parties or counsel.

Careful selection of the person who will conduct settlement conferences or mediation sessions is very important. It is in all parties' interest to agree on and request a specific judge or magistrate judge, or a particular neutral, to assure that they will get the combination of skills, time, and commitment necessary for success. The parties' confidence in the settlement officer or mediator substantially increases the chances of meaningful preparation for and success resulting from the settlement discussions. During the selection or after the court selects the settlement officer or nonjudicial mediator, counsel should consult with others who have had experience in settlement conferences or mediation sessions with this judge or mediator.

[2] Valuing the Case for Settlement

After evaluating the facts, issues, litigation history, and law applicable to the case, counsel must--except in cases involving primarily injunctive relief--determine its monetary value. Although every case is unique, some general factors to be considered in attempting to place monetary value on the claims at issue include:

1. Present economic damages suffered by the plaintiff, including lost income, medical or other bills, lost profits, replacement costs, and interest;

2. Future damages reasonably certain to be incurred by the plaintiff, including the present value of future damages;

3. Non-monetary damages such as pain and suffering, or loss of goodwill, incurred by the plaintiff;

4. The strength of the case, taking into account whether any legal issues create potential obstacles;

5. Whether the plaintiff will be seen as sympathetic by the court or jury;

6. Whether money damages will compensate the plaintiffs at all (e.g., in a suit for injunctive relief);

7. Any possible set-offs that may apply, by way of counterclaims, mitigation, or otherwise;

8. The economic cost to the plaintiff of protracted litigation;

9. The defendant's ability to pay, both actual and apparent;

10. Availability of insurance;

11. Case venue: Whether in an area known to be "liberal" or "conservative" in terms of awards; and

12. The reputation, ability, and expertise of the attorneys in the case.

For insight into the potential value of the case, review cases reported in jury verdict reporters with similar fact patterns (remaining aware that the value of jury verdicts can be reduced directly or indirectly by the trial judge or on appeal). Counsel may also consider discussing the case discreetly (client confidences and privileged communications must be preserved) with attorneys experienced in the type of litigation involved to get an idea of how those attorneys would value the case.

[3] Preparing for Settlement Discussions Using Online Resources

Many resources are available online for researching recent verdicts and settlements that can help counsel propose a reasonable demand for damages or assess the opponent's demand. *See § Intro.09 above*.

[4] Communicating With Client About Settlement

Counsel should understand the client's objectives. At a minimum, what must the client obtain to settle the case? Ideally, what would the client wish to achieve in settling the case?

Money--rather than principle--often matters most to clients, but clients may have non-monetary goals as well. For example, a client alleging gender-based discrimination may be willing to accept a smaller monetary settlement in exchange for the ability to publicize the fact and terms of the settlement.

Consider innovative solutions such as structured pay-outs, payment in kind, future commercial relations, concessions, apologies, admissions, establishment of training and recruitment programs, or correction of a defect. For example, in an environmental action, non-monetary objectives may dominate, and counsel should look for creative ways to use monetary settlements (paid to neutral third entities) to achieve environmental compliance or improvements.

Before engaging in settlement discussions, provide the client with an honest assessment of:

1. The likelihood of success at trial;

2. The amount of damages likely to be awarded;

3. The time and expenses likely to be incurred if the case settles later or goes to trial;

4. The physical and emotional toll litigation may exact on the client;

5. The amount of the client's time or, in the case of corporate clients, the amount of the client's executives' time, consumed by litigation;

6. The difficulties of enforcing a judgment against the opposing party or parties; and

7. The likelihood of an appeal by the opposing party if the client prevails at trial or on summary judgment.

Counsel also should prepare the client for the settlement process itself. In particular, counsel needs to educate the client as to various negotiation strategies that may shape offers presented to the client or reactions to the offers presented by the client. The client needs to understand the importance of not abandoning the settlement process by over-reacting when obstacles appear.

[5] Understanding Opponent's Objectives

Understanding an opposing party's thoughts and feelings regarding a case may be as important as analyzing the legal issues. The opposing party's real objectives in the litigation may not always be what they seem on the face of the pleadings, or from what opposing counsel says.

Accordingly, counsel should be alert for indications of the real objectives of the opposing party in initiating or defending against litigation. The potential for a successful settlement increases when at least some of the objectives of all the parties are met by the terms of a proposed settlement. Furthermore, a proposed settlement may be presented more convincingly when the proponent is in a position to fully explain all of the advantages of the proposed settlement to the opponent.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.90 -16.94.*
- *Federal Litigation Guide P 49.03.*
- *Effective Legal Negotiation and Settlement (5th ed.)* Chs. 4, 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral Overview



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.08

§ 10.08 Understanding Ethical Duties and Considerations During Settlement

[1] Obtaining Client's Authority to Settle

The decision to settle a case rests with the client, not the attorney. A client does not automatically bestow the authority to settle a case merely by retaining counsel. ABA Model Rule 1.2(a).

An attorney must have either actual, implied, or apparent authority from the client to settle a case. *Harris v. Arkansas State Highway & Transp. Dep't, 437 F.3d 749, 751 (8th Cir. 2006)* . Whether a third party may rely on the apparent authority of the attorney to settle is a matter of state law. *See Cristobal v. Siegel, 26 F.3d 1488, 1495 (9th Cir. 1993)* .

[2] Communicating Offers and Demands to Client

As a general ethical rule, attorneys must promptly inform clients of any decision or circumstance with respect to which the client's informed consent is required. ABA Model Rule 1.4(a)(1); *see also Byes v. Telecheck Recovery Servs., 173 F.R.D. 421, 428 (E.D. La. 1997)* (client must have sufficient information to participate intelligently in settlements and/or settlement negotiations).

Warning:

To avoid subsequent problems with clients and litigation over apparent, rather than actual authority, it is best to communicate *all* offers of settlement to the client.

[3] Refraining From Communicating With Represented Parties

In representing a client, a lawyer must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. ABA Model Rule 4.2.

Warning:

When representing a corporation, bear in mind that contact with an adverse party by any of the corporation's departments may violate the prohibition against ex parte contact, particularly if the contact

is made with the knowledge and acquiescence of the legal department and may result in information that can be used in the corporation's litigation strategy. *See, e.g., Partida v. Union Pac. R.R. Co., 221 F.R.D. 623, 629 (C.D. Cal. 2004)* .

[4] Avoiding Conflicts of Interest

An attorney must not allow his or her own interests, financial or otherwise, to influence the attorney's professional advice. Accordingly, an attorney must evaluate a settlement offer on the basis of the client's interest alone, without regard to the attorney's own interest in obtaining a fee. *See Evans v. Jeff D., 475 U.S. 717, 728 n14, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986)* (*citing* ABA Model Code Prof Responsibility EC 7-7-EC 7-9; ABA Model Rule 1.2(a)). For instance, a conflict regarding a settlement and attorney's fees may arise when the defendant seeks to settle claims for attorney's fees and the merits with one lump sum.



Strategic Point:

A contingent fee engagement letter needs to include provisions applicable in the event of a settlement. The engagement letter may provide that settlement will not bar counsel from recovering fees, or that client's recovery will come only after reasonable attorney's fees have been recovered.

When attorney's fees are a separate issue, counsel may avoid conflicts and facilitate settlement by negotiating the merits first, and fees only after reaching a resolution in principle on the merits. Cf. *Manual for Complex Litigation (4th ed.)* § 13.24 (simultaneous negotiation "problematic," but not absolutely prohibited).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 809.07.*
- *Federal Litigation Guide P 49.04.*
- *Manual for Complex Litigation (4th ed.)* § 13.24.
- *Effective Legal Negotiation and Settlement (5th ed.)* Ch. 17.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency FeesLegal EthicsProfessional ConductOpposing Counsel & Parties



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.09

§ 10.09 Understanding Special Protections Afforded Settlement Negotiations

Settlements would be a rare occurrence if statements, offers, arguments, concessions, and other negotiation stances could later be held against parties who have attempted to settle a case. Therefore, offers of compromise and conduct and statements made in compromise negotiations are not admissible as evidence to prove liability for or the invalidity of a claim. *Fed. R. Evid. 408*. However, in order to encourage settlements, many courts provide additional protections. Local rules often require confidentiality for virtually all aspects of settlement proceedings as well. Statements of offers made, or conduct observed, in settlement proceedings may not be disclosed or reported except to the extent that all parties consent or a court authorizes or compels disclosure.

Settlement agreements are another matter. The terms of a judgment based on a settlement agreement, whether reached by settlement or by trial, are usually matters of public record. If the terms of a settlement resulting in the dismissal of a case have been put on the record, those terms generally are matters of public record. *See § 10.22[5] below*.

Otherwise discoverable evidence is not excludable merely because it is presented in the course of settlement negotiations. Likewise, exclusion is not required when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. *Fed. R. Evid. 408*. Proving apparent authority to settle may be a reason for admitting evidence of settlement discussions. *See, e.g., Lockwood v. Wolf Corp., 629 F.2d 603, 609 (9th Cir. 1980)* . Evidence of settlements by other parties may be admissible in order to allow the jury to reduce an award for damages already received.

Warning:

Efforts to settle can often be introduced by opposing counsel as evidence for reasons other than those prohibited by Rule 408, doing the damage the Rule intended to protect against. If this is unavoidable, counsel may wish to request a limiting instruction to the jury.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.56.*

- *Weinstein's Federal Evidence (2d ed.)* Ch. 408.
- *Manual for Complex Litigation (4th ed.)* § 10.21.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewEvidenceProcedural ConsiderationsLimited AdmissibilityEvidenceRelevanceCompromise & Settlement NegotiationsGovernmentsCourtsCourt Records



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.10

§ 10.10 Checklist for Offers of Judgment

☐ If making offer.

- ○ Confer with client concerning utility and terms of offer. *See § 10.11 below*.
- ○ Review general requirements for offer. *See §§ 10.12 -10.13 below*.
- ○ Be aware that judgment to an individual party may not be sufficient to obtain dismissal and avoid class certification. *See § 10.11 below*.
- ○ Draft offer specifically to include costs and to include or exclude attorney's fees. *See § 10.12[5] below*.
- ○ Serve offer of judgment on all adverse parties. *See § 10.13[2] below*.
- ○ File any accepted offer of judgment. *See § 10.18 below*.
- ○ Seek costs (and potentially attorney's fees) for any unaccepted offer of judgment; bar costs and fees from offeree. *See § 10.12 below*.

☐ If responding to offer.

- ○ Verify offer of judgment served pursuant to Rule 5 on all adverse parties. *See § 10.13[2] below*.

○ Review terms of offer of judgment, including proposed judgment, costs, and attorney's fees. *See § 10.12 below*.

○ Decide whether to accept, seek clarification of offer of judgment, or move to strike. *See § 10.14 below*.

○ If appropriate, move to strike offer of judgment. *See § 10.15 below*.

○ If appropriate, serve and file any accepted offer of judgment, keeping in mind that acceptance must be in writing and unconditional. *See §§ 10.17*, *10.18 below*.

☐ **Search by Topic:** Civil Procedure > Settlements > Offers of Judgment

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.11

§ 10.11 Understanding Rule 68 Offers of Judgment

A party defending against a claim may use a Rule 68 offer of judgment to shift costs--and potentially attorney's fees--to a claimant. An offer of judgment can be especially useful when a claimant appears unwilling to engage in realistic settlement discussions.

Rule 68 provides that at any time at least 14 days before the date set for trial, a party "defending against a claim" can serve on the adverse party an offer to allow judgment to be taken against the defending party for the money or property or as otherwise specified in the offer, "with the costs then accrued". *Fed. R. Civ. P. 68(a)*. If within 14 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment. *Fed. R. Civ. P. 68(a)*. An offer not accepted is "considered withdrawn," and evidence of it is not admissible except in a proceeding to determine costs. *Fed. R. Civ. P. 68(b)*. If the offeree finally obtains a judgment that is not more favorable than the offer, the offeree must pay the costs incurred after the offer was made. *Fed. R. Civ. P. 68(d)*.

The purpose of Rule 68 is to encourage settlement and avoid litigation. *Marek v. Chesny (1985) 473 U.S. 1, 6-7, 105 S. Ct. 3012, 87 L. Ed. 2d 1* . Only offers made pursuant to the Rule are subject to its cost-shifting provisions. *Berkla v. Corel Corp., 302 F.3d 909, 922 (9th Cir. 2002)* .

Offers of judgment under Rule 68 serve as cost-shifting tools designed to encourage settlement by forcing a plaintiff to weigh the risk of incurring post-offer costs and fees even if successful on the claim. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 352, n.8, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* (citing **Moore's**). Normally, a prevailing plaintiff is entitled to recover costs as a matter of course. *Fed. R. Civ. P. 54(d)(1)*. Rule 68 varies this general rule by providing that if the judgment is less than or equal to the offer, the plaintiff may not recover costs incurred from the date the offer was made to the end of the suit. *Marek v. Chesny, 473 U.S. 1, 8-9, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* . Moreover, the plaintiff must pay the costs incurred by the defendant from the date the offer was made to the end of the suit. *Fed. R. Civ. P. 68(d)*.

Warning:

Courts have been reluctant to permit defendants to use Rule 68 in class action litigation, permitting defendants to terminate a class action by offering complete individual relief to a plaintiff who has also

sought class certification and class relief. The concern is that Rule 68 would permit the defendant to pick off strong, capable class representatives and waste judicial resources by forcing other injured parties to bring successive suits. *Deposit Guarantee Nat'l Bank v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)* ; *Weiss v. Regal Collections, 385 F.3d 337, 345 (3d Cir. 2004)* . Most courts have concluded that the claims of a plaintiff seeking class relief may not be mooted by a Rule 68 offer for complete individual relief once a motion for class certification is pending. *See, e.g., Kremnitzer v. Cabrera & Rephen, PC, 202 F.R.D. 239, 243 (N.D. Ill. 2001)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.64[1][b], 68.02.*
- *Federal Litigation Guide P 49.20 et seq.*
- *Fed. R. Civ. P. 68* (offer of judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentTime LimitationsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.12

§ 10.12 Analyzing Potential Cost Recovery Under Rule 68

[1] Rule 68 Can Shift Costs and Some Fees

As used in Rule 68, the term "costs" refers to all costs properly awardable in an action under the relevant law, including expert witness fees and, in some instances, attorney's fees. *See Marek v. Chesny, 473 U.S. 1, 9, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* .

[2] In Diversity Cases, State Law May Affect Recovery

[a] Preliminary *Erie* Determination Required

When applying Rule 68 in a diversity case, one must first ascertain whether the award of fees or costs at issue is procedural or substantive. *See Hanna v. Plumer, 380 U.S. 460, 473, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* ; *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77-80, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

Under *Erie* and *Hanna*, the state's substantive law will govern in a diversity action, but the procedural rules of the action will be those of the federal court if they are consistent with the Rules Enabling Act and the Constitution. *See Hanna v. Plumer, 380 U.S. 460, 473, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* .

[b] Expert Witness Fees Procedural Under *Erie*

Recovery of expert witness fees pursuant to the cost-shifting provisions of Rule 68 is procedural, and thus may be imposed under federal law in a diversity action. *See Aceves v. Allstate Ins. Co., 68 F.3d 1160, 1167-1168 (9th Cir. 1995)* .

[c] Attorney's Fees and Costs Are Substantive Under *Erie*

In a diversity action, entitlement to attorney's fees and costs for purposes of computing the judgment finally obtained will be determined under state law. *Alyeska Pipeline Svs. Co. v. Wilderness Society, 421 U.S. 240, 259 n.31, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)* .

Warning:

Counsel for offerees in a diversity action should be aware that an offer of judgment may have cost- and fee-shifting consequences under state law in addition to those in the federal rule. *See MRO Communs., Inc. v. AT&T Co., 197 F.3d 1276, 1281 (9th Cir. 1999)* ; *Gil De-Rebollo v. Miami Heat Ass'ns, 137 F.3d 56, 66 (1st Cir. 1998)* .

[3] Underlying Statute Governs Plaintiff's Ability to Recover Post-Offer Attorney's Fees

[a] Plaintiff May Not Recover Post-Offer Attorney's Fees When Statute Defines Fees As Costs

When the plaintiff or other Rule 68 offeree has rejected an offer and then obtains a judgment equal or less than the rejected Rule 68 offer, the plaintiff's ability to recover attorney's fees under a statute awarding attorney's fees to the prevailing party may be limited. Federal statutes may permit an award of attorney's fees to a prevailing party, and a plaintiff who obtained a favorable judgment, even though it is not more favorable than the Rule 68 offer, is still the prevailing party. However, the ability to recover post-offer attorney's fees depends on whether the underlying federal statute awards attorney's fees to a prevailing party as part of the costs. When, as is common, the statute awards the prevailing party fees as part of the costs, a claimant who rejected a Rule 68 offer may not recover post-offer fees. They are barred by Rule 68. *Marek v. Chesny, 473 U.S. 1, 9, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* . In a diversity case, when state law authorizes an award of attorney's fees as part of the costs, the same result applies. *Champion Produce, Inc. v. Ruby Robinson Co., 342 F.3d 1016, 1027 (9th Cir. 2003)* .

[b] Plaintiff May Recover Post-Offer Attorney's Fees When Statute Distinguishes Fees From Costs

When a federal statute awards a prevailing party attorney's fees, and the underlying statute defines costs in a way that excludes fees, post-offer fees are not automatically shifted and may be recoverable by the claimant despite the plaintiff's rejection of a *Fed. R. Civ. P. 68* offer. *Marek v. Chesny, 473 U.S. 1, 9, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* ; *Haworth v. State of Nev., 56 F.3d 1048, 1051 (9th Cir. 1995)* . However, even in such a case, district courts have wide discretion in refusing to award post-offer attorney fees to the plaintiff when the rejected offer of judgment exceeded the plaintiff's ultimate recovery. The court must consider the results the plaintiff obtained compared to the rejected offer looking at:

1. The amount of the Rule 68 offer;

2. The stage of litigation at which the offer was made;

3. What services were rendered by plaintiff's counsel after the offer;

4. The amount obtained by the judgment; and

5. Whether it was reasonable to proceed with the litigation after the offer was made.

Dalal v. Alliant Techsystems, 182 F.3d 757, 761 (10th Cir. 1999) ; *Haworth v. State of Nev., 56 F.3d 1048, 1052-1053 (9th Cir. 1995)* .

[4] Attorney's Fees As Part of Costs May Be Available to Offeror

An defendant whose Rule 68 offer was rejected may recover costs incurred subsequent to the offer if the plaintiff's ultimate judgment is less favorable than the offer or the same. *Fed. R. Civ. P. 68(d)*. When a statute defines attorney's fees to be part of the costs, post-offer fees should be recoverable by the defendant as part of the costs that are shifted pursuant to Rule 68. However, when fees are not considered costs, recovery will be governed by the terms of the

underlying statute, and a defendant whose offer was rejected may not qualify for an award of fees if the defendant is not the prevailing party. *Marek v. Chesny, 473 U.S. 1, 9, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* .

[5] Specificity In Offer Can Affect Amount of Fees and Costs Available

Although there are many reasons why it may be prudent to do so, a Rule 68 offer need not be broken down into specifics. There is no requirement that a Rule 68 offer specify how much is being offered on the substantive claim, how much for costs, and how much, if any, for attorney's fees. A Rule 68 offer may make these sorts of specifications, or it may simply state a lump sum.

The only thing that the language of Rule 68(a) seems to preclude is an offer that implicitly or explicitly precludes recovery of costs then accrued. *Marek v Chesny, 473 U.S. 1, 5-6, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* . If an accepted offer specifies the amount of costs, that figure will be incorporated into the court's final judgment in the matter. If, on the other hand, the accepted offer is silent as to the amount of costs, the court will set costs in the normal manner and add them to the amount of the offer as part of the court's judgment. *Marek v. Chesny, 473 U.S. 1, 6, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* .

When attorney's fees may be awarded to the prevailing party as part of the costs, the same rules apply. If an offer states only a lump sum, without reference to costs or attorney's fees, the court calculates costs and attorney's fees in the usual manner and add these sums to the amount of the offer as part of the court's judgment. If the offer states a specific amount for attorney's fees, or states that the lump sum includes all amounts that may be awarded as attorney's fees, the plaintiff's acceptance of the offer limits the amount of the award of fees. However, when it comes to attorney's fees, courts will interpret an offer as limiting a plaintiff's attorney's fees only when it does so in a clear and unambiguous manner. *See § 10.14[1] below*.

For example, an offer stating that costs are included in the lump sum offered, but that does not specifically refer to "attorney's fees," allows the plaintiff offeree to recover attorney's fees in addition to the lump sum offered when the underlying statute does not define costs to include attorney's fees. *Nusom v. Comh Woodburn, Inc., 122 F.3d 830, 834-835 (9th Cir. 1997)* .

[6] Rule 68 Inapplicable if Defendant Wins

The cost-shifting provisions of Rule 68 apply only if the plaintiff obtains a judgment, but that judgment is less favorable or the same as the offer of judgment made by the defendant. *Fed. R. Civ. P. 68(d)*.

Warning:

Any settlement involving a stipulated dismissal could trigger Rule 68 shifting of costs (and potentially attorney's fees) to an offeror. When preparing a settlement that involves a stipulated dismissal, consider adding language to the agreement to avoid potential cost-shifting consequences.

If, on the other hand, the judgment is in favor of the defendant, Rule 68 does not apply. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 354, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* . General rules allowing costs to the prevailing party will govern the cost award.

[7] Court Determines Whether Judgment Is More Favorable

The cost-shifting provisions of Rule 68 apply only when the judgment recovered by the plaintiff is not more favorable than the defendant's offer of judgment. *Fed. R. Civ. P. 68(d)*. In determining whether a judgment was less favorable than the offer, courts consider all relief awarded, including monetary recovery and pre-offer costs and attorney's fees that are includable as costs. *Corder v. Gates, 947 F.2d 374, 380-381 (9th Cir. 1991)* ; *see also § 10.12[3]*.

A court may not consider a Rule 68 offer in denying pre-offer fees and costs. *Champion Produce, Inc. v. Ruby Robinson Co., 342 F.3d 1016, 1023 (9th Cir. 2003)* ; *Payne v. Milwaukee Co., 288 F.3d 1021, 1024 (7th Cir. 2002)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 68.02[4], 68.03[4], 68.04[6], 68.06[2], 68.08[3], [4].*
- *Federal Litigation Guide P 49.22.*
- *28 U.S.C. § 1920* (generally available costs).
- *Fed. R. Civ. P. 68* (offer of judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in JudgmentsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.13

§ 10.13 Making Rule 68 Offers

[1] Only Defending Parties May Make Rule 68 Offers

Only defending parties may make offers under Rule 68. Rule 68 does not authorize similar offers or judgment or any form of cost-shifting settlement demands by plaintiffs or other claimants. *Delta Air Lines, Inc. v. August, 450 U.S.346, 350, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* . Plaintiffs may make Rule 68 offers to the extent that they are defending a claim. *See Fed. R. Civ. P. 68(a)* (rule applicable to "a party defending against a claim").

For example, a plaintiff may make an offer of judgment to an intervenor that has filed claims against the plaintiff. In these circumstances, however, whether the intervenor's judgment exceeds the plaintiff's offer will be assessed based on the nature of the offer and the intervenor's ultimate recovery against the plaintiff, rather than on the judgment between the plaintiff and the defendant. *See Simon v. Intercontinental Transport B.V., 882 F.2d 1435, 1439-1440 (9th Cir. 1989)* .

[2] Defending Party Serves Offer of Judgment in Writing on Opposing Party

Offers of judgment must be served on every party. *Fed. R. Civ. P. 5(a)(1)(E)*. Service is made by delivering a copy of the offer of judgment to each party's attorney. *Fed. R. Civ. P. 5(b)(1)*.

Strategic Point:

In a multiple-defendant case, one defendant may want to make an offer of judgment to the plaintiff, but may not want other defendants to know the amount being offered to the plaintiff, or even that an offer is being made. This may be particularly true if the intent of the Rule 68 offer is to initiate or provoke further settlement discussions. There is an argument that Rule 68 itself may permit this, because it requires service of an offer of judgment only on "an opposing party". *Fed. R. Civ. P. 68(a)*. Rule 68 may, therefore, vary the terms of Rule 5(a). *Stewart v. County of Sonoma, 634 F. Supp. 773, 775 (N.D. Cal. 1986)* .

[3] Offer May Be Conditional on Acceptance by All Parties

A defending party may make its offer of judgment conditional on acceptance by all plaintiffs. *Lang v. Gates, 36 F.3d 73, 77 (9th Cir. 1994)* ; *Amati v. City of Woodstock, 176 F.3d 952, 958 (7th Cir. 1990)* .

[4] Making Timely Offer

[a] General Rule: Offer of Judgment Must Be Made at Least 14 Days Before Trial

A Rule 68 offer must be made at least 14 days before the date set for trial. *Fed. R. Civ. P. 68(a)*. In computing the 14-day period, every day is counted, including intermediate Saturdays, Sundays, and legal holidays. *Fed. R. Civ. P. 6(a)(1)(B)*.

[b] When Party Found Liable, It May Make Offer of Judgment As If 14 Days Before Trial

In a bifurcated proceeding, when the liability of one party has been determined by verdict or order of judgment, the party found liable may make an offer of judgment that will have the same effect as an offer made before trial if it is served at least 14 days before the date set for a hearing to determine the extent of liability. *Fed. R. Civ. P. 68(c)*.

[5] Multiple Offers of Judgment Are Possible

The fact that a defending party makes a Rule 68 offer of judgment that the plaintiff does not accept does not preclude a subsequent offer of judgment, provided the subsequent offer meets the requirements of Rule 68. *Fed. R. Civ. P. 68(b)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 68.03, 68.04*.
- *Bender's Federal Practice Forms* Form Nos. 68:1-68:4.
- *Federal Litigation Guide P 49.20 et seq*.
- *Fed. R. Civ. P. 68* (offers of judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsOffers of JudgmentTime LimitationsCivil ProcedurePretrial MattersSeparate Trials



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.14

§ 10.14 Applying Ordinary Contract Principles to Offer of Judgment

[1] Effect of Ambiguity in Offer of Judgment

A common ambiguity in offers of judgment is created by a defendant offeror tracking the language of *Fed. R. Civ. P. 68(a)* in the offer by using the term "with the costs then accrued." Use of this terminology may result in an ambiguity as to whether the offer is in addition to or includes attorney's fees as part of the costs. *See, e.g., Henderson v. Sterling, Inc., 1998 U.S. App. LEXIS 7437, at *11 (4th Cir. 1998)* ; *Erdman v. Cochise County, 926 F.2d 877, 878-881 (9th Cir. 1991)* .

The usual rules of contract construction apply to a Rule 68 offer of judgment. *Guerrero v. Cummings, 70 F.3d 1111, 1113 (9th Cir. 1995)* . Ambiguities in an offer may invalidate the offer or be construed against the offeror. *See Henderson v. Sterling, Inc., 1998 U.S. App. LEXIS 7437, at *11 (4th Cir. 1998)* (unpublished case); *Erdman v. Cochise County, 926 F.2d 877, 880-881 (9th Cir. 1991)* ; *see also Lish v. Harper's Magazine Found., 148 F.R.D. 516, 519 (S.D.N.Y. 1993)* .

For example, when an ambiguity involves the availability of attorney's fees as a part of the costs in an offer of a lump sum "with costs now accrued," those fees will be recoverable in addition to the sum provided for in the offer, and the ambiguity will not invalidate the offer. *Erdman v. Cochise County, 926 F.2d 877, 879 (9th Cir. 1991)* .

When an offer of judgment provides in addition to costs for "reasonable attorney fees as determined by the Court," the offeree may be able to seek post-offer attorney's fees to the extent allowable under applicable law. If an offeror wishes to limit fees to those incurred as of the time of the offer, the offer should restrict itself to "costs now accrued". *Holland v. Roeser, 37 F.3d 501, 502, 504 (9th Cir. 1994)* . Alternatively, a statement in an offer that judgment be taken including "fees and costs incurred by this plaintiff prior to the date of this offer in an amount to be set by the court" is sufficient to bar a plaintiff's motion for post-offer fees. *Guerrero v. Cummings, 70 F.3d 1111, 1113 (9th Cir. 1995)* .

[2] Seeking Modification or Clarification of Offer of Judgment

Following entry of judgment on an accepted Rule 68 offer, or following entry of a cost order based on entry of a judgment not more favorable than the offer of judgment, a motion to modify or clarify a judgment on costs may be sought under *Fed. R. Civ. P. 59(e)* (amendment of judgment) or *Fed. R. Civ. P. 60* (relief from judgment). *See*

Stubblefield v. Windsor Cap. Group, 74 F.3d 990, 997 (10th Cir. 1996) ; *Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438, 441 (9th Cir. 1982)* .



Strategic Point:

When an ambiguity in an offer may work to the benefit of the offeree, after conferring with the client, offeree's counsel must decide whether to seek clarification of the offer from opposing counsel or to accept the offer and seek the apparent benefit of the offer. For example, if the offer is silent as to attorney's fees that are not included as part of the costs, the offeree's counsel may decide to seek fees rather than clarification. Counsel and the client should be clear that, if they do not seek clarification, they bear the risk that the court will not construe the ambiguity in their favor. The offeree must, therefore, be prepared to live with the offer as construed unfavorably.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 59.30 -59.37, 60.02 et seq., 68.04[6], 68.09.*
- *Federal Litigation Guide P 49.30.*
- *Fed. R. Civ. P. 68* (offers of judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral Overview



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.15

§ 10.15 Striking Offer of Judgment

[1] Motion to Strike Is Appropriate for Procedural or Substantive Defects

Because an offer of judgment has a binding effect when refused as well as when accepted, defective offers may be stricken to protect the ability of parties to make reasonable decisions regarding the conduct of litigation. *Boorstein v. New York, 107 F.R.D. 31, 34 (S.D.N.Y. 1985)* . A plaintiff may move to strike a Rule 68 offer for procedural defects or substantive defects. *See Boorstein v. New York, 107 F.R.D. 31, 35 (S.D.N.Y. 1985)* (substantive defects); *Klawes v. Firestone Tire & Rubber Co., 572 F. Supp. 116, 118 (E.D. Wis. 1983)* (procedural defects).

[2] Deadline for Filing Motion to Strike

The better practice for filing a motion to strike is to do so within the 14-day period for acceptance of the offer. *Fed. R. Civ. P. 68(a)*. However, a motion to strike filed after the expiration of the period can be considered, because the validity and effect of a Rule 68 offer is not usually determined until the close of the lawsuit and the filing of attorney's fee applications. *Christian v. Wood Motors, 1995 U.S. Dist. LEXIS 5560, at *8 (N.D.N.Y. 1995)* ; *Boorstein v. New York, 107 F.R.D. 31, 34 (S.D.N.Y. 1985)* .

[3] Procedure for Filing Motion to Strike Offer of Judgment

A party seeking an order to strike an offer of judgment must make a formal motion to the court, and an opposing party may file opposing papers.

PRACTICE RESOURCES:

- *Federal Litigation Guide P 49.31.*
- *Fed. R. Civ. P. 68* (offers of judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsOffers of JudgmentTime Limitations



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.16

§ 10.16 Rejecting Rule 68 Offer

Under Rule 68, "an unaccepted offer is considered withdrawn". *Fed. R. Civ. P. 68(b)*. An offer of judgment rejected by the offeree is not admissible at trial, except in a proceeding to determine costs. *Fed. R. Civ. P. 68(b)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 68.06[1].*
- *Federal Litigation Guide P 49.31.*
- *Fed. R. Civ. P. 68(b)* (unaccepted offer of judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentRejectionsCivil ProcedureSettlementsOffers of JudgmentWithdrawals



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.17

§ 10.17 Accepting Rule 68 Offer

A notice of acceptance of a Rule 68 offer of judgment must be served on the offering party within 14 days of service of the offer itself. If the offer of judgment is not accepted within that time period, the offer is deemed withdrawn. *Fed. R. Civ. P. 68(a), (b).*

If the offer of judgment is served by mail, or by electronic or alternate means of delivery under Rule 5(b)(2)(D), the deadline for accepting the offer is extended by three additional days. *See Fed. R. Civ. P. 6(d)*; *see also Fed. R. Civ. P. 5(b)(2)(E)* and *(F).*

A Rule 68 offer is irrevocable during the 14-day period given to the plaintiff in which to respond. *Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1240 (4th Cir. 1989)* ; *United States. v. Hendricks, 1993 U.S. Dist. LEXIS 8580, at *6 (N.D. Ill. 1993)* .

A notice of acceptance must be in writing and unconditional. *Fed. R. Civ. P. 68(a).* The partial acceptance of an offer of judgment is invalid. *See Whitcher v. Town of Matthews, 136 F.R.D. 582, 584 (W.D.N.C. 1991)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 68.05.*
- *Federal Litigation Guide P 49.34.*
- *Bender's Federal Practice Forms* Form Nos. 68:10, 68:11.
- *Fed. R. Civ. P. 6(d)* (extension of time).
- *Fed. R. Civ. P. 68* (offers of judgment).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentTime Limitations



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.18

§ 10.18 Filing Offer and Acceptance

Either party may file the offer of judgment and timely notice of acceptance with the court, along with proof of service of both. Failure to file precludes the clerk from entering judgment according to the terms of the offer. *See Fed. R. Civ. P. 68(a).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 68.04[2].*
- *Federal Litigation Guide P 49.35.*
- *Bender's Federal Practice Forms* Form Nos. 68:10, 68:11.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesGovernmentsCourtsClerks of CourtGovernmentsCourtsCourt Records



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.19

§ 10.19 Checklist for Drafting Settlement Agreement

☐ Consider terms and types of settlement available.

- ○ Lump sum settlement. *See § 10.21[1] below*.
- ○ Structured settlement. *See § 10.21[2] below*.
- ○ Partial settlement, as to only some defendants or claims. *See § 10.21[3] below*.
- ○ Sliding scale settlements. *See § 10.21[4] below*.

☐ Evaluate items to include in written agreement. *See § 10.21 below*.

☐ Comply with post-settlement notification requirements under local rules *below*.

☐ Consider putting settlement on record in court. *See § 10.23 below*.

☐ Assure action is terminated by filing stipulation of dismissal or securing signed judgment conforming to terms of settlement agreement. *See § 10.22 below*.

☐ Review necessity of--and arrange for--judicial approval for certain types of settlements. *See § 10.25 below*.

☐ **Search by Topic:** Civil Procedure > Settlements > Settlement Agreements

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewTortsProcedureSettlementsStructured SettlementsGeneral Overview



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.20

§ 10.20 Preliminary Considerations

The terms and structure of any settlement are crucial to the parties, and substantial care must be devoted to negotiating and memorializing the agreement.

Cousnel should consider whether they want to the settlement limited to the dispute at hand or sufficiently broad to cover any future disputes between the parties. The parties may wish to consider confidentiality clauses and other provisions common to settlement agreements.

PRACTICE RESOURCES:

- *Federal Litigation Guide P 49.40 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral Overview



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.21

§ 10.21 Considering Types of Settlements Available

[1] Settling With Single Lump Sum Payment

A very common type of settlement is a lump sum settlement. In lump sum settlements, the defendant agrees to pay the plaintiff with a single check or cash payment, in consideration of which the plaintiff executes a release of claims.

The major advantage of lump sum settlements is their ease of execution, in that:

1. The agreement may be quickly performed by the parties with an exchange of documents;

2. The court need not monitor performance of the agreement;

3. Payments for any future damages are reduced to present value; and

4. Once completed, the parties need not have further contact.

The disadvantages of lump sum settlement agreements include the following:

1. The defendant must have immediate access to the necessary funds;

2. The plaintiff may be required to manage large sums of money with little or no expertise. *See Georges v. Secretary of HHS, 1992 U.S. Cl. Ct. LEXIS 204, at *16 (Cl. Ct. 1992)* (discussing advantages and disadvantages of lump sum and structured settlements); and

3. The plaintiff may incur tax liability on the lump sum settlement amount. *See Georges v. Secretary of HHS, 1992 U.S. Cl. Ct. LEXIS 204, at *13 (Cl. Ct. 1992)* ; *see also 26 U.S.C. § 61(a)* (gross income means all income from whatever source derived); *26 U.S.C. § 104(a)(2)* (damages received in suit or settlement for personal injuries or sickness excludable from taxable income).

[2] Structured Settlements Involving Payments Over Time

In a structured settlement, the claimant typically receives periodic payments for a set length of time, rather than a lump sum. In return, the plaintiff provides a release of its claims. To provide a source of funds from which to satisfy the defendant's obligation to the plaintiff, the defendant or its liability carrier often may purchase an annuity contract from a life insurance company with the plaintiff as a beneficiary. *See Legal Economic Evaluations, Inc. v. Metropolitan Life Ins. Co., 39 F.3d 951, 953 (9th Cir. 1994)* .

Advantages of a structured settlement include:

1. Allowing the plaintiff a larger total settlement than might be available in a lump sum, while requiring less immediate outlay from the defendant than is typically required for a lump sum payment;

2. Providing the plaintiff with a guaranteed source of income over a period of time, facilitating plaintiff's financial planning or protecting a minor or incompetent plaintiff from mismanagement; and

3. If properly implemented, structured settlement may reduce or eliminate tax liability.

Disadvantages of structured settlements include:

1. The plaintiff cannot access the total settlement amount immediately;

2. Usually fixed periodic payments, which would preclude adjustments for inflation;

3. Dependence on the financial stability of the entity is providing payments, including a life insurance carrier providing an annuity; and

4. Problems with valuation of structured settlements for purposes of computing attorney's fees.

[3] Considering Partial Settlements

A partial settlement is an agreement settling some but not all claims, or an agreement settling claims against some but not all defendants. Once a judgment is entered as to the settled claims or defendants, the plaintiff continues the suit as to the remaining claims or defendants.

Partial settlements present important issues for both settling and non-settling parties. For example, the plaintiff's counsel must ensure that the agreement releases only those claims or defendants to be discharged. Defense counsel must ensure that the settlement discharges their clients' entire responsibility for the plaintiff's claims, particularly where, if plaintiffs prevail in the action, non-settling defendants may be entitled to a setoff from settling defendants. Such an issue can be addressed by seeking a "bar order." *See § 10.04[2] above*.

[4] Structuring Sliding Scale Settlements

[a] Sliding Scale Settlements Defined

In a sliding-scale settlement, a defendant settles with a plaintiff, but the amount of the defendant's settlement is dependent on the outcome of the case. The settling defendant frequently, but not always, remains in the case. Even though there is no longer an adversary relationship between the plaintiff and the settling defendant, defendants agreeing to sliding scale agreements frequently remain in the case to convince the trier of fact of their comparative lack of fault and the greater percentage of comparative fault of the non-settling defendants.

[b] Pierringer Releases

In a "Pierringer release," a plaintiff who settles with one of multiple defendants agrees to indemnify that defendant for any eventual contribution action brought by the non-settling defendants after the entry of judgment. *See, e.g., In re Exxon Valdez Icicle Seafoods Inc., 229 F.3d 790, 797 (9th Cir. 2000)* ; *Bruner Corp. v. R. A. Bruner Co., 133 F.3d 491, 494 (7th Cir. 1997)* ; *Thompson v. Brule, 37 F.3d 1297, 1300 (8th Cir. 1994)* .

By their nature, "Pierringer releases" are useful only when a defendant may be compelled to pay more than his or her proportionate share of fault and then seek contribution from co-defendants. In a wide variety of cases governed by federal law, such releases will not be needed, as courts have adopted a "proportionate share" approach to the allocation of fault among multiple defendants, in which each defendant may be compelled to pay only his or her proportionate share and in which contribution claims will never be required. *See McDermott, Inc. v. Amclyde, 511 U.S. 202, 215-217, 114 S. Ct. 1461, 128 L. Ed. 2d 148 (1994)* (endorsing use of proportionate allocation of damages); *In re Exxon Valdez Icicle Seafoods Inc., 229 F.3d 790, 796-797 (9th Cir. 2000)* (noting that "proportionate share" approach has been recommended for tort cases).

[5] Obtaining Injunctive Relief with Consent Decrees

Consent decrees expressing a voluntary agreement between settling parties typically contain an injunction. Unlike typical settlements, the court issuing a consent decree exercises continuing authority and supervision to ensure that the parties fulfill their express obligations under the decree. *See International Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 523 n.13, 106 S. Ct. 3063, 92 L. Ed. 2d 405 (1986)* .

A consent decree is subject to independent district court review before it is entered. The court may approve or reject the consent decree. For court approval, the decree must be fundamentally substantively and procedurally fair, adequate and reasonable. However, when the decree has been negotiated by the Department of Justice on behalf of a federal agency that is an expert in its field, the court must accord substantial deference to the settlement. *U.S. v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1426 (6th Cir. 1991)* ; *United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990)* .

A federal court may refuse to exercise continuing jurisdiction even when the parties have agreed to it. *California v. LaRue, 409 U.S. 109, 112-113 n.3, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972)* ; *Arata v. Nu-Skin Int'l, Inc., 96 F.3d 1265, 1269 (9th Cir. 1996)* . Thus the court may vacate a consent decree once its terms have been met. *Collins v. Thompson, 8 F.3d 657, 659 (9th Cir. 1993)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 41.32.*
- *Federal Litigation Guide P 49.40.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityPierringer ReleasesCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsConsent DecreesTortsProcedureSettlementsStructured SettlementsGeneral Overview



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.22

§ 10.22 Including Common Settlement Agreement Provisions

[1] Identification of Parties

All settlement agreements should contain provisions identifying the parties to the agreement and naming their counsel. In addition, it is wise to include a clause binding the parties' corporate parents, subsidiaries, divisions, successors, assigns, employees and representatives. If any party acts in a representative capacity, the clause describing that party should delineate the capacity in which the representative serves. Similarly, when a corporate party's representative is signing the agreement on the corporation's behalf, the agreement should describe the corporate representative's authority to bind the corporation.

[2] Recitation of Disputed Matters

The settlement agreement should generally recite the disputed matters of the case, together with enough facts to specify the nature of those claims. The agreement should also include the case name, court, and docket number for any litigation settled by the agreement.

[3] Recitation of the Parties' Obligations

Settlement agreements should detail the obligations assumed by each party in settlement of disputed claims. Attempt to anticipate all possible issues regarding settlement terms, and avoid ambiguity, because post-settlement litigation is common.

For example, in a lump sum settlement, the agreement should recite that the defendant agrees to give the plaintiff a check or cash in whatever form is agreed on, such as a wire transfer or a cashier's check, in a specified amount, payable as described, in return for which the plaintiff agrees to execute a release of the plaintiff's claims.

Warning:

Plaintiff's counsel should ensure that the settlement agreement specifies a deadline for the defendant's settlement payments. If a settlement agreement does not provide any specific time for payment, the law implies a reasonable period of time in which to make the payment. *Janneh v. GAF Corp., 887 F.2d 432,*

436 (2d Cir. 1989) .

[4] Release Provisions

The settlement agreement should list the rights, claims, interests, or obligations released in return for settlement. In addition, if the settlement is partial, the agreement should specify those claims or obligations not included in the settlement.

While counsel for the defendant may wish to include a release using broad, general language, counsel for the plaintiff should exercise caution in agreeing to such general language.

[5] Confidentiality Provisions

The parties may negotiate a confidentiality provision as part of a settlement. Such agreements are subject to court approval, and the parties seeking such a provision should be prepared to demonstrate good cause for it. *See Phillips v. GMC, 307 F.3d 1206, 1212 (9th Cir. 2002)* , *Hasbrouck v. BankAmerica Hous. Servs., 187 F.R.D. 453, 456-457 (N.D.N.Y. 1999)* ; *Kalinauskas v. Wong, 151 F.R.D. 363, 366 (D. Nev. 1993)* . If the parties intend to include a confidentiality provision in their settlement agreement, and if, as is common, the settlement agreement is placed on the record by the settlement judge at the conclusion of the settlement conference, the parties should request the court to seal the transcript.

Warning:

Negotiation of a confidentiality clause on behalf of a large, corporate client can be a tricky business. It is very dangerous for a corporation to promise confidentiality on the part of every employee. Therefore, when representing a large corporation, counsel should specify exactly who is bound by the confidentiality obligation.

Warning:

If a confidentiality provision is included in a settlement agreement, it may be difficult to enforce. Actual damages for breach of a confidentiality obligation may be hard to measure and hard to prove. It may be better for parties to also negotiate a liquidated damages provision as a means of enforcing a confidentiality provision, the damages being triggered in the event of an unauthorized disclosure.

[6] Other Settlement Provisions

Other provisions typically contained in the settlement agreement include:

1. Disclaimer by the defendant providing that the settlement is not an admission of liability;

2. Choice of law clause indicating the law governing construction of the settlement agreement;

3. Choice of forum clause regarding where any dispute regarding settlement may be litigated or the exclusive forum where any dispute must be litigated;

4. Integration clause providing that the settlement agreement represents the final agreement between the parties, precluding the introduction of extrinsic evidence;

5. Agreement that the court retains jurisdiction of the case for purposes of enforcing the settlement;

6. Mutual promises to return discovery materials to the producing party; and

7. Attorney's fee clause for construction or enforcement actions.

Warning:

An agreement between the parties alone cannot maintain jurisdiction of a district court. The court itself must retain such jurisdiction either by incorporating the terms of the settlement agreement into its order or expressly retaining jurisdiction to enforce it. *See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381-382, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* .

[7] Signatures

It is important to have the parties as well as the attorneys execute the settlement agreement. Securing parties' signatures may forestall later argument that the settlement was negotiated without a particular party's authority.

PRACTICE RESOURCES:

- *Federal Litigation Guide P 49.41.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsSettlement Agreements



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.23

§ 10.23 Putting Oral Settlement on Record

To avoid disputes concerning the existence or terms of an oral settlement agreement, counsel may request or the judge may require that the agreement be "put on the record" by stating the terms of the settlement in open court where they are transcribed by a court reporter, or entered into the minutes of the court. Ordinarily, the parties will follow up the recorded settlement with a detailed written settlement agreement.



Warning:

Absent extenuating circumstances, the court will enforce the parties' apparent assent to the terms of an agreement entered into in open court. *See Doi v. Halekulani Corp., 276 F.3d 1131, 1136-1137 (9th Cir. 2002)* ; *Sargent v. HHS, 229 F.3d 1088, 1090 (Fed. Cir. 2000)* .

PRACTICE RESOURCES:

- *Federal Litigation Guide P 49.42.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in JudgmentsContracts LawTypes of ContractsOral AgreementsGovernmentsCourtsCourt Records



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.24

§ 10.24 Terminating Action to Implement Settlement

Settlements are usually implemented by the plaintiff filing a voluntary dismissal or the entry of a stipulated judgment that conforms to the terms of the settlement agreement. If a party executes a settlement agreement providing for the filing of a stipulation of dismissal and fails to file such a stipulation, the opponent may move to enforce the settlement agreement and the district court will retain jurisdiction. *See also § 10.29 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 41.33, 41.34*.
- *Fed. R. Civ. P. 41(a)* (voluntary dismissal).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsStipulationsCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in Judgments



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.25

§ 10.25 Obtaining Judicial Approval of Settlement

Typically, a decision to settle or not rests solely in the parties' discretion. However, settlements may not be effective in "representative" actions without judicial approval. Thus, court approval for a settlement is required in the following types of actions:

1. Class actions. *Fed. R. Civ. P. 23(e)*;

2. Shareholder derivative suits. *Fed. R. Civ. P. 23.1*; and.

3. Consent decrees. *County of Suffolk v. Stone & Webster Eng'g Corp., 106 F.3d 1112, 1117 (2d Cir. 1997)* .

In a class action, the court must "direct" the form of notice to all class members who would be bound by a settlement. *Fed. R. Civ. P. 23(e)(1)*. In practice, the parties generally inform the court of the settlement, draft the notices, and request the hearing. For approval of the settlement, the parties must disclose all relevant matters, including all terms of the proposed settlement and any side agreements that contributed to the settlement. *See Fed. R. Civ. P. 23(e)(2), (3)*. There must be a formal hearing at which class members may appear and object. *See Fed. R. Civ. P. 23(e)(2), (5)*. The court will not approve a settlement unless it finds that the settlement is fair, reasonable, and adequate with respect to all class members. *See Fed. R. Civ. P. 23(e)(2)*.

Courts may engage in a limited review of settlement agreements even when formal judicial approval is not required. Courts will review, and court approval is required to implement, any term of a settlement agreement that requires the court to take some action, for example, when the settlement agreement requires that the court retain jurisdiction over the settlement for purposes of enforcement, or when the parties ask for court files to be sealed. In a diversity action, counsel should consult state law for other types of actions in which settlement requires the court's approval.

Court hearings may be required even after an enforceable settlement has been reached. It is not uncommon, for example, to have the merits of the case completely resolved by an enforceable settlement agreement that requires no court approval or that has been approved by the court, but which still requires a court hearing to set the amount of disputed court costs or the amount of attorney's fees recoverable under the settlement.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.160 -23.171, 41.40.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsDerivative ActionsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsConsent Decrees



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.26

§ 10.26 Checklist for Settlement Agreement Enforcement

☐ Enforcing settlement agreement. *See §§ 10.27 -10.30 below*.

- ○ Confirm breach and attempt informal resolution.
- ○ If informal resolution not possible, choose strategy for enforcement. *See § 10.27 below*.
- ○ Confirm that agreement is valid under state law governing contracts. *See § 10.28[1] below*.
- ○ Ensure that under applicable laws no public policy reasons invalidate the agreement. *See § 10.28[1][c] below*.
- ○ Confirm that a complete agreement existed between the parties. *See § 10.28[2] below*.
- ○ Determine whether District Court has jurisdiction to enforce settlement agreement. *See § 10.29 below*.
- ○ Enforce settlement in state court if jurisdiction not retained in federal court. *See § 10.30 below*.
- ○ Seek an injunction against any inconsistent proceedings brought by opponent. *See § 10.30[3] below*.

○ Prepare and file motion to enforce or motion for contempt as appropriate. *See § 10.29[4] below*.

☐ Opposing enforcement of settlement.

○ Ascertain whether enforcement may be challenged based on invalidity, incompleteness, or lack of jurisdiction. *See § 10.31 below*.

○ Invalidity is judged under state law that governs interpretation and validity of contracts. *See § 10.28[1][b] below*.

○ Ascertain whether agreement between the parties was incomplete. *See § 10.28[2] below*.

○ Ascertain whether district court lacks jurisdiction to enforce the settlement agreement. *See § 10.29[3] below*.

○ If agreement provided for arbitration, ask for enforcement of arbitration as sole remedy under Federal Arbitration Act. *See § 10.30[2] below*.

○ Ask for an evidentiary hearing by establishing question of material fact surrounding contract formation. *See § 10.28[3] below*.

○ If court takes jurisdiction, argue against any contempt proceeding. *See § 10.29[4] below*.

☐ **Search by Topic:** Civil Procedure > Settlements > Settlement Agreements > Enforcement

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementBreach of Contract ActionsCivil ProcedureSettlementsSettlement AgreementsEnforcementContempt



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.27

§ 10.27 Considering Options and Strategy When Settlement Agreement Must Be Enforced

Ideally, a party will not have to seek enforcement of a settlement agreement. However, if enforcement is required, the enforcing party must establish at a minimum that the agreement is an enforceable contract, that it is complete, and that none of its terms are void as against public policy. Additionally, if the party seeks enforcement in federal court, the party must establish jurisdiction for the enforcement of the agreement in that court.

A party opposing enforcement will have the opportunity to raise all of the above issues--namely, asserting that the agreement is not enforceable, is incomplete, or is void either partially or entirely as against public policy. Finally, the party can challenge the basis for federal jurisdiction if enforcement is sought in federal court.

If a settlement agreement is breached, the opposing party has the option of attempting to seek enforcement of the settlement agreement in the original action, bringing a new, separate action for breach of the settlement agreement, or rescinding the agreement and suing on the original claims. *See, e.g., Arnold v. United States, 816 F.2d 1306, 1309 (9th Cir. 1987)* . In considering whether to rescind and sue on the original claims, counsel must determine whether there are actual grounds for rescission of the settlement agreement as opposed to merely suing for its breach, whether there are any limitations defenses that might bar this strategy, and whether, with the passage of time, it will be practical and economical to attempt to reassert the original claims or defenses. No repudiation of the agreement will be allowed if the contract is substantially performed and obviously consented to and understood. *Jackson v. Con-Way Transp. Servs., 2007 U.S. App. LEXIS 6216, at *10 (11th Cir. 2007)* (unpublished case). On the other hand, if the settlement represents a substantial discount to the value of the claims, and the plaintiff believes that the claims are easily proved, the rescission option makes sense. In all other cases, unless the court has retained jurisdiction of the matter for purposes of enforcement, the most practical solution may be a separate action for breach of a settlement agreement. However, counsel may have to bring this action in state court unless there are independent grounds for federal subject matter jurisdiction over what would be a breach of contract action.

PRACTICE RESOURCES:

- *Federal Litigation Guide P 49.60 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementBreach of Contract ActionsCivil ProcedureSettlementsSettlement AgreementsEnforcementContemptContracts LawRemediesRescission & RedhibitionGeneral Overview



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.28

§ 10.28 Showing Settlement Agreement Is Legally Valid

[1] Construction of Settlement Agreement

[a] Settlement Agreement Is Enforceable Contract

A settlement agreement is an enforceable contract. The general requirements for contract enforcement must be satisfied. *Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987)* . When material facts concerning the existence or terms of the agreement exist, parties are entitled to an evidentiary hearing. *Murchison v. Grand Cypress Hotel Corp., 13 F.3d 1483, 1486 (11th Cir. 1994)* .

[b] Settlement Agreement Interpreted According to State Contract Law

The construction and enforcement of settlement agreements are governed by principles of local law that apply to interpretation of contracts generally--even if the underlying claim is federal. *Carr v. Runyan, 89 F.3d 327, 331 (7th Cir. 1996)* ; *United Commercial Ins. Serv. v. Paymaster Corp, 962 F.2d 853, 856 (9th Cir. 1992)* . When the settled claim is based on federal law, however, federal public policy may require that the validity of the settlement agreement be measured by federal law. *Newton v. Rumery, 480 U.S. 386, 392, 107 S. Ct. 1187, 94 L. Ed. 2d 405 (1987)* .

The choice of which state law will govern interpretation of the settlement contract will be determined by the choice of law rules of the state in which the district court sits or from which the case was transferred. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 243 n.8, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* . If, as is normally the case, the governing law permits it, the parties may include a provision in a settlement agreement that specifies which law will govern interpretation of the settlement agreement. *DCS Sanitation Mgmt. v. Castillo, 435 F.3d 892, 895-896 (8th Cir. 2006)* ; *Consul, Ltd. v. Solide Enters., Inc., 802 F.2d 1143, 1146-1147 (9th Cir. 1986)* .

[c] Void Terms Will Not Be Enforced

As with other contracts, a term of a settlement agreement that is void as against public policy may not be enforced. *See DCS Sanitation Mgmt. v. Castillo, 435 F.3d 892, 895-896 (8th Cir. 2006)* ; *Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1396 (9th Cir. 1991)* .

[2] Complete Agreement Must Have Existed Between Parties

[a] Both Parties Must Have Agreed to Terms of Settlement or Authorized Counsel to Settle Dispute

To be enforceable, a settlement agreement (1) must represent a complete agreement, and (2) both parties must have either agreed to the terms of the settlement or authorized their respective counsel to settle the dispute. *Chaganti & Assocs., P.C. v. Nowotny, 470 F.3d 1215, 1222 (8th Cir. 2006)* ; *Ozyagcilar v. Davis, 701 F.2d 306, 308 (4th Cir. 1983)* .

[b] Client May Grant Authority to Make Binding Settlement on Its Behalf

A client may grant an attorney valid authority to make a binding settlement on its behalf. Enforceability of a settlement agreement, including the issue of apparent authority, is governed by state contract and agency law. *Chaganti & Assocs., P.C. v. Nowotny, 470 F.3d 1215, 1222 (8th Cir. 2006)* ; *Carr v. Runyan, 89 F.3d 327, 331 (7th Cir. 1996)* .

[c] Client's Signature on Agreement Not Required

Absent duress or contrary public policy considerations, a settlement agreement put on the record in open court will be binding on a party regardless of whether the client has been asked to sign anything. *Baptist v. City of Kankakee, 481 F.3d 485, 490 (7th Cir. 2007)* ; *Doi v. Halekulani Corp., 276 F.3d 1131, 1136 (9th Cir. 2002)* .

Warning:

Advise the client to carefully consider any settlement agreements before agreeing to them on the record, because the statement will be irrevocable.

[3] Court May Require Evidentiary Hearing on Question of Formation of Contract

While the court has authority to enforce settlement agreements through summary proceedings, when there is a question as to the existence or validity of an agreement, the court may be required to hold a hearing as to the formation of the agreement or its consummation. *See Murchison v. Grand Cypress Hotel Corp., 13 F.3d 1483, 1486 (11th Cir. 1994)* ; *Callie v. Near, 829 F.2d 888, 890-891 (9th Cir. 1987)* .

PRACTICE RESOURCES:

- *Federal Litigation Guide P 49.62 et seq.*
- Restatement 2d Conflict of Laws § 187(2).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in JudgmentsContracts LawTypes of ContractsSettlement AgreementsGovernmentsCourtsCourt Records

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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.29

§ 10.29 Enforcing Settlement Agreement In District Court

[1] Independent Basis of Jurisdiction Must Exist

A settlement agreement reached in a federal court case might not be enforceable in federal court. The simple fact that the settlement was reached in a federal district court proceeding does not automatically give that court subject matter jurisdiction over subsequent proceedings to enforce the settlement agreement. "Enforcement of the settlement agreement ... is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction", *Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378, 380-381, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* .

[2] Enforcement While Case Still Pending Before Court

The Court retains jurisdiction of the original action prior to dismissal. Thus a settlement agreement entered into prior to the dismissal of the action may be enforced in that action. *See, e.g., Doi v. Halekulani Corp., 276 F.3d 1131, 1140 (9th Cir. 2002)* .

Strategic Point:

The settlement agreement need not call for immediate dismissal of the action or the immediate entry of a judgment conforming to the terms of the settlement agreement. Courts frequently will allow the parties to have a reasonable period of time to implement the terms of a settlement. Thus, the settlement agreement may provide for dismissal at a future time, such as in 90 days, unless either party gives notice that the settlement has not been completed within that time. The court may be more willing to consent to this procedure than it would be to actually dismiss the case or to enter a final judgment based on the terms of the settlement agreement, yet "retain" jurisdiction for an indefinite period for the purpose of enforcing the settlement agreement.

[3] Post-Dismissal Enforcement Possible Only If Court Explicitly Retains Jurisdiction

One form of settlement agreement over which the court invariably retains jurisdiction is a consent decree. *California v.*

Randtron, 284 F.3d 969, 974 (9th Cir. 2001) . In all other types of cases, once the court dismisses the action or enters a final judgment based on the terms of the settlement agreement, the court loses jurisdiction over the matter. The court does not have subject matter jurisdiction over proceedings to enforce the settlement agreement unless there is some independent basis for jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* . A motion to enforce a settlement agreement is a separate contract dispute requiring its own independent basis for jurisdiction. *O'Connor v. Colvin, 70 F.3d 530, 532 (9th Cir. 1995)* .

The district court may, however, retain jurisdiction over the matter for the express purpose of enforcing the settlement agreement, either by so stating in an order or by incorporating the settlement agreement into the terms of its order. *See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 382, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* . Courts often retain jurisdiction over class action and multiparty settlements. *See, e.g., Sandpiper Vill. Condo Ass'n v. Louisiana-Pacific Corp., 428 F.3d 831, 841 (9th Cir. 2005)* . The cases have required that, if the court agrees to retain ancillary jurisdiction, it do so explicitly, formally, and without any ambiguity. *Arata v. Nu-Skin Int'l, Inc., 96 F.3d 1265, 1269 (9th Cir. 1996)* . The parties' stipulation or agreement among themselves is not enough to confer jurisdiction. *California v. LaRue, 409 U.S. 109, 112-113 n.3, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972)* .

Strategic Point:

If the court is willing to retain jurisdiction over the proceeding to handle possible disputes concerning enforcement of the settlement agreement, the best procedure is to make a formal request for an order under which the court would retain jurisdiction for settlement enforcement purposes, either by a court's order from the bench or by means of a written motion under *Fed. R. Civ. P. 7(b)*. In any event, the parties should be sure that the court's order retaining jurisdiction is either reflected in the court minutes or formalized in an explicit written order signed by the court.

[4] If Jurisdiction Retained, Party May Be Able to Bring Contempt Proceedings

When jurisdiction has been retained, a party may seek enforcement of a settlement agreement through contempt proceedings when the opponent has violated a court order approving the settlement or commanding or enjoining particular conduct. *Alexander v. Chicago Park Dist., 927 F.2d 1014, 1022 (7th Cir. 1991)* ; *TNT Mktg. Inc. v. Agresti, 796 F.2d 276, 278 (9th Cir. 1986)* ; *see also §§ 11.11 -11.15 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 106.03[4], 106.24[4], 106.40.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementContemptCivil ProcedureSettlementsSettlement AgreementsIncorporation in Judgments



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.30

§ 10.30 Enforcing Settlement Agreement Elsewhere

[1] Party Seeking Enforcement May Bring Separate Action

A party seeking enforcement of a settlement agreement may bring a separate action to enforce the settlement. For the new action to be filed in federal court, it is essential that the court has retained jurisdiction with regard to the particular matter sought to be enforced or that it has a separate basis for exercising federal jurisdiction.

[2] Federal Arbitration Act May Govern If Agreement Provides for Arbitration

If the settlement agreement provides for arbitration, the court's enforcement of the arbitration provision will be governed by the Federal Arbitration Act. *United Steelworkers of America v. Warrior & Gulf, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)* ; *9 U.S.C. § 4*; *see also § 1.101 above*.

[3] Injunctions to Enjoin Inconsistent Actions May Be Available

Assuming the court has retained jurisdiction to enforce a settlement agreement in federal court, an injunction may be available to bar an inconsistent state court action when such an action would pose a significant risk of frustrating the District Court's jurisdiction over the consent judgment--such as when the court exercises its power over a res. *United States v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1013 (9th Cir. 1998)* . However, there can be concurrent state and federal jurisdiction to enforce a settlement agreement, and when the state exercise of jurisdiction is not inconsistent with the federal court order it may not be enjoined. *Hinduja v. Arco Prods. Co., 102 F.3d 987, 989-990 (9th Cir. 1996)* ; *Lubrizol Corp. v. Exxon Corp., 871 F.2d 1279, 1283 (5th Cir. 1989)* .

[4] Party May Raise Settlement Agreement Bar to Further Litigation

Some settlement agreements prescribe procedures for or limitations on further litigation. The motion-to-dismiss procedure under *Fed. R. Civ. P. 12(b)(6)* may be used to enforce such terms, and courts have interpreted such agreements to establish bars to the maintenance of a civil action. *Augustine Medical Inc. v. Progressive Dynamics, Inc., 194 F.3d 1367, 1373-1374 (Fed. Cir. 1999)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 81.08.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in JudgmentsCivil ProcedureRemediesInjunctionsGeneral Overview



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.31

§ 10.31 Opposing Enforcement of Settlement Agreement

Arguments against the enforcement of a purported settlement agreement include:

1. Performance under the agreement is complete or impossible;

2. Counsel lacked authority to enter into the agreement. *See Farris v. JC Penney, 176 F.3d 706, 712 (3d Cir. 1999)* (interpreting Pennsylvania law);

3. There was no meeting of the minds sufficient to create an enforceable agreement. *See Callie v. Near, 829 F.2d 888, 891 (9th Cir. 1987)* ; *Ozyagcilar v. Davis, 701 F.2d 306, 308 (4th Cir. 1983)* ;

4. The agreement is void in whole or in part for public policy reasons. *Newton v. Rumery, 480 U.S. 386, 392, 107 S. Ct. 1187, 94 L. Ed. 2d 405 (1987)* ; and

5. The district court lacks jurisdiction to enforce the settlement agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380-381, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* .

PRACTICE RESOURCES:

- *Federal Litigation Guide P 49.62 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewContracts LawDefensesPublic Policy ViolationsContracts LawFormationMeeting of Minds



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1-10 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 10.32

§ 10.32 Appeal of Enforcement of Settlement Agreement

An appellate court reviews a district court decision to enforce a settlement agreement for abuse of discretion. *Rose v. Kroger Co., 1999 U.S. App. LEXIS 32757, at *4 (6th Cir. 1999)* ; *Maynard v. City of San Jose, 37 F.3d 1396, 1401 (9th Cir. 1994)* ; *United States v. Hardage, 982 F.2d 1491, 1496 (10th Cir. 1993)* . The district court abuses its discretion when its decision is based on an error of law or a clearly erroneous factual finding. *Shoels v. Klebold, 375 F.3d 1054, 1060 (10th Cir. 2004)* ; *Rabkin v. Oregon Health Scis. Univ., 350 F.3d 967, 977 (9th Cir. 2003)* . The court reviews *de novo* a legal challenge to the interpretation of a settlement agreement. *Augustine Medical Inc. v. Progressive Dynamics, Inc., 194 F.3d 1367, 1370 (Fed. Cir. 1999)* ; *Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir. 1989)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 206.05[1].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewDe Novo Review



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Chapter 11 SANCTIONS AND CONTEMPT

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§ 11.syn Synopsis to Chapter 11: SANCTIONS AND CONTEMPT

§ 11.01 Procedural Context--Sanctions

§ 11.02 Checklist for Moving for and Opposing Rule 11 Sanctions

§ 11.03 Understanding Rule 11

[1] Rule 11 Is Designed to Deter Baseless Filings

[2] Rule 11 Is Not Substitute for Motion for Summary Judgment

[3] Rule 11 Permits Sanctions

[4] Rule 11 Is Not Aimed at General Misconduct

[5] Rule 11 Is Inapplicable When More Specific Rules Apply

§ 11.04 Seeking Rule 11 Sanctions: Pleadings, Written Motions, and Other Papers

[1] Informal Notice to Counsel Is Usually Advisable

[2] Motion for Rule 11 Sanctions Must Be Separate From Other Motions

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Chapter 11 SANCTIONS AND CONTEMPT
PART A: PROCEDURAL CONTEXT

1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.01

§ 11.01 Procedural Context--Sanctions

Generally, sanctions are available when an adversary party or lawyer engages in specified improper conduct. Rule 11 sanctions are available when certain improprieties occur in connection with a pleading, written motion, or other paper. *Fed. R. Civ. P. 11*. Sanctions are also available when an attorney unreasonably and vexatiously multiples legal proceedings. *28 U.S.C. § 1927*.

In addition, a district court has the inherent power to fashion appropriate sanctions for conduct that abuses the judicial process. *Kovilic Constr. Co. v. Missbrenner, 106 F.3d 768, 772 (7th Cir. 1997)* .

Civil and criminal contempt adjudications, defined by the penalty imposed, are also available when a party violates a court order or engages in other improper conduct. *18 U.S.C. § 401*; *Hicks v. Feiock, 485 U.S. 624, 635 n.7, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988)* .

Requests for sanctions or a contempt adjudication are made by motion, although a court has inherent powers to sanction or find in contempt one who engages in improper conduct, such as acting in bad faith or disobeying a court order. *Young v. United States, 481 U.S. 787, 795-796, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987)* (inherent power of court to punish for contempt).

When moving for sanctions or a finding of contempt, a party must follow substantive and procedural requirements. A criminal contempt proceeding is a separate proceeding that is not part of the original action. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* , *superseded* on other grounds by amendment of *Fed. R. Civ. P. 11*; *Fed. R. Crim. P. 42(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsFrivolous LawsuitsCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptGovernmentsCourtsAuthority to Adjudicate



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Chapter 11 SANCTIONS AND CONTEMPT
PART B: RULE 11 SANCTIONS

1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.02

§ 11.02 Checklist for Moving for and Opposing Rule 11 Sanctions

☐ Seeking Rule 11 sanctions.

- ○ Determine that conduct of opponent falls under Rule 11. *See § 11.03 below*.
- ○ Inform opponent in writing that you plan to move for Rule 11 sanctions. *See § 11.04[1] below*.
- ○ Check local court rules for general motion procedure, motion procedures applicable to motions for sanctions generally, and procedures applicable to the particular type of sanctions sought.
- ○ Prepare motion papers. *See § 11.04 below*.
- ○ Serve the filing-ready motion for sanctions and supporting documents on opposing parties. *See § 11.04[3] below*.
- ○ File the motion for sanctions at least 21 days after service. *See § 11.04[3] below*.

☐ Opposing Rule 11 sanctions.

- ○ Cure any Rule 11 violation, if possible, during the 21-day safe-harbor period. *See § 11.05[1] below*.
- ○ If the motion has been determined or filed prior to the 21-day safe-harbor period,

raise that point in opposition to the premature imposition of sanctions. *See § 11.05[1] below*.

○ If applicable, assert that the contention in question was made in good faith. *See § 11.05[2] below*.

○ Substantiate any legal authority in support for the contention in question, particularly if the point is unsettled in the relevant circuit. *See § 11.05[2] below*.

○ If applicable, assert that the conduct in question is not covered under Rule 11. *See § 11.05[3] below*.

○ Dispute the reasonableness or amount of attorney's fees sought. *See § 11.05[4] below*.

☐ **Search by Topic:** Civil Procedure > Sanctions > Baseless Filings

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureSanctionsBaseless FilingsFrivolous LawsuitsGovernmentsCourtsRule Application & Interpretation



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Chapter 11 SANCTIONS AND CONTEMPT
PART B: RULE 11 SANCTIONS

1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.03

§ 11.03 Understanding Rule 11

[1] Rule 11 Is Designed to Deter Baseless Filings

The central purpose of Rule 11 is to deter baseless filings in district court and to streamline the administration and procedure of the federal courts. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* , *superseded* on other grounds by amendment of *Fed. R. Civ. P. 11.*

Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. *Fed. R. Civ. P. 11(a).* The paper must state the signer's address, e-mail address, and telephone number. *Fed. R. Civ. P. 11(a).*

A typed name is not sufficient to meet the signature requirements; the name must be handwritten. *Becker v. Montgomery, 532 U.S. 757, 764-768, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001)* .

Exception:
A typed signature may be acceptable in courts that accept documents by electronic filing.

The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention. *Fed. R. Civ. P. 11(a).*

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

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

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

3. The factual contentions have evidentiary support or, if specifically so identified, will likely have

evidentiary support after a reasonable opportunity for further investigation or discovery; and

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

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

Fed. R. Civ. P. 11 requires counsel to make a reasonable investigation, under the circumstances, of the facts and the law before submitting pleadings. *Fed. R. Civ. P. 11(b).*

[2] Rule 11 Is Not Substitute for Motion for Summary Judgment

Rule 11 motions should not be employed to test the sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. *Fed. R. Civ. P. 11*, Committee Note of 1993; *see Safe-Strap Co. v. Koala Corp., 270 F. Supp. 2d 407, 416 (S.D.N.Y. 2003)* (Rule 11 motion for sanctions is not proper substitute for summary judgment motion).

[3] Rule 11 Permits Sanctions

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

Warning:

Sanctions motions should not be used to intimidate, harass, increase litigation costs, obtain a settlement, test the sufficiency of allegations, emphasize the merits of a claim, create a conflict of interest between attorney and client, reveal privileged information or work-product, or as a discovery device. *Fed. R. Civ. P. 11*, Committee Note of 1993. Inasmuch as a motion for sanctions is subject to the certification requirements of Rule 11, an attorney or party may be sanctioned for filing a sanctions motion for an improper purpose. *Fed. R. Civ. P. 11(b)(1).*

[4] Rule 11 Is Not Aimed at General Misconduct

Rule 11 sanctions are directed at papers signed in violation of the rule, not at general misconduct. *Truesdell v. Southern Cal. Permanente Med. Group, 293 F.3d 1146, 1154 (9th Cir. 2002)* .

[5] Rule 11 Is Inapplicable When More Specific Rules Apply

Fed. R. Civ. P. 11 is not properly used to sanction the inappropriate filing of papers when other rules more directly apply. *Fed. R. Civ. P. 11(d)* explicitly states that Rule 11 does not apply to discovery matters encompassed by *Fed. R. Civ. P. 26-37*. Therefore, improper certification of discovery requests and disclosures should be addressed under *Fed. R. Civ. P. 26(g)* rather than Rule 11. *See §§ 8.89 -8.92 above*. Similarly, the filing of inappropriate affidavits or declarations in support of, or in opposition to, motions for summary judgment should be considered under *Fed. R. Civ. P. 56(h)*, rather than Rule 11. *See § 11.12[2][b] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 11.02, 11.10, 11.11, 11.20, 11.23.*

- *Federal Litigation Guide P 8A.04*.
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 2.
- *Bender's Federal Practice Forms* Form Nos. 11:1-11:3.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 7.
- *Fed. R. Civ. P. 11(a)* (signature).
- *Fed. R. Civ. P. 11(b)* (representations to court).
- *Fed. R. Civ. P. 11(c)* (sanctions).
- *Fed. R. Civ. P. 26(g)(3)* (sanctions for improper certification of disclosures and discovery requests, responses, and objections).
- *Fed. R. Civ. P. 37* (general sanctions rule for discovery and mandatory disclosures).
- *Fed. R. Civ. P. 56(h)* (sanctions for summary judgment affidavits or declarations submitted in bad faith).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureSanctionsBaseless FilingsCertification RequirementsCivil ProcedureSanctionsBaseless FilingsFrivolous LawsuitsCivil ProcedureSanctionsBaseless FilingsSigning Requirements



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Chapter 11 SANCTIONS AND CONTEMPT
PART B: RULE 11 SANCTIONS

1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.04

§ 11.04 Seeking Rule 11 Sanctions: Pleadings, Written Motions, and Other Papers

[1] Informal Notice to Counsel Is Usually Advisable

Counsel should consider notifying opposing counsel by letter of any intention to seek Rule 11 sanctions ("Rule 11 letter"). *Fed. R. Civ. P. 11*, Committee Note of 1993. The letter should outline the grounds for sanctions and ask that the offending paper be withdrawn or corrected.



Strategic Point:

Informal notice is almost always a good idea except in the most egregious cases. It sometimes obtains the necessary relief without a fight, and the judge will appreciate it.

[2] Motion for Rule 11 Sanctions Must Be Separate From Other Motions

A motion for sanctions under Rule 11 must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). *Fed. R. Civ. P. 11(c)(2).*

[3] Motion for Rule 11 Sanctions Must Be Served Under Rule 5

The Rule 11 motion must be served under Rule 5. *Fed. R. Civ. P. 11(c)(2).*



Warning:

In most cases, an electronic or paper filing with the court may not include such sensitive information as an individual's complete social security number. *See Fed. R. Civ. P. 5.2.*

[4] Motion for Rule 11 Sanctions Must Be Made Promptly

When appropriate, sanctions motions should be filed as soon as practicable after discovery of a Rule 11 violation. *Sullivan v. Hunt, 350 F.3d 664, 666 (7th Cir. 2003) .*

Warning:

Ordinarily, Rule 11 motions should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. *Fed. R. Civ. P. 11*, Committee Note of 1993.

[5] "Safe Harbor" Provision Allows Timely Withdrawal of Challenged Paper or Position

The Rule 11 motion must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion. *Fed. R. Civ. P. 11(c)(2).*

This is the "safe harbor" provision that allows opposing counsel to withdraw or correct the offending paper. A party will not be subject to sanctions unless, after receiving the motion, it refuses to withdraw that position or acknowledge candidly that it does not currently have evidence to support a specified allegation. *See Fed. R. Civ. P. 11*, Committee Note of 1993.

[6] Motion For Sanctions Must Describe Specific Conduct and State Grounds and Relief Sought

A Rule 11 motion must describe the specific conduct that allegedly violates Rule 11(b). *Fed. R. Civ. P. 11(c)(2).*

A motion for sanctions must comply with *Fed. R. Civ. P. 7*, which requires that, among other things:

1. The motion must state with particularity the grounds for seeking the order (*Fed. R. Civ. P. 7(b)(1)(B)*); and

2. The motion must state the relief sought (*Fed. R. Civ. P. 7(b)(1)(C)*).

Fed. R. Civ. P. 7(b)(1).

At a minimum, the notice requirement mandates that the subject of a Rule 11 sanctions motion be informed of the specific conduct or omission for which the sanctions are being considered, so that the subject of the sanctions motion can prepare a defense. *Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 389 (2d Cir. 2003)* .

The relief sought may include:

1. Nonmonetary directives;

2. An order to pay a penalty into court; and

3. If imposed on motion and warranted for effective deterrence, an order directing payment to the movant for part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

Fed. R. Civ. P. 11(c)(4).

A sanction imposed under Rule 11 must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. *Fed. R. Civ. P. 11(c)(4).*

The court must not impose a monetary sanction:

1. Against a represented party for violating Rule 11(b)(2); or

2. On its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

Fed. R. Civ. P. 11(c)(5).

An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction. *Fed. R. Civ. P. 11(c)(6).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 11.22, 11.25, 11.26.*
- *Federal Litigation Guide P 8A.04.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 2.
- *Bender's Federal Practice Forms* Form Nos. 11:100-11:104.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 7.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 11(c)* (sanctions).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsFrivolous Lawsuits



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Chapter 11 SANCTIONS AND CONTEMPT
PART B: RULE 11 SANCTIONS

1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.05

§ 11.05 Opposing Motion for Rule 11 Sanctions

[1] Safe Harbor Provision Allows Correction or Withdrawal of Challenged Paper Without Incurring Sanctions

If a motion for sanctions alleges that a paper presented to the court violated the certification requirements of Rule 11, the challenged paper may be corrected or withdrawn within 21 days after service without incurring sanctions. *See Fed. R. Civ. P. 11(c)(2).*

[2] Good-Faith Reliance on Authority May Defeat Sanctions

A request for sanctions on the basis that a contention is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law, may be opposed on the ground that the person subject to sanctions made a good-faith argument in support of that contention. *See Fed. R. Civ. P. 11(b)(2).*

[3] Conduct Described in Motion Must Be Sanctionable

Rule 11 sanctions are limited to specified representations to the court in violation of that rule. *See Fed. R. Civ. P. 11.* A motion for sanctions may therefore be opposed on the ground that any conduct described in the motion is outside the scope of Rule 11.



Strategic Point:

Sanctions under *Fed. R. Civ. P. 11* may not be imposed for conduct in depositions, discovery meetings of counsel, oral representations at hearings, and behavior in prior proceedings. *Christian v. Mattel, Inc., 286 F.3d 1118, 1131 (9th Cir. 2002)* .



Warning:

Sanctions may nevertheless be available under other authority, for example, *Fed. R. Civ. P. 37*, *28 U.S.C. § 1927*, or the court's inherent authority to impose sanctions.

[4] Attorney Fees Sought in Motion Must Relate to Challenged Paper and Must Seek To Deter Conduct

The amount of attorney's fees awarded under *Fed. R. Civ. P. 11* must be reasonably and appropriately spent in relation to the offensive pleading or other paper. *See, e.g., Christian v. Mattel, Inc., 286 F.3d 1118, 1131, n.12 (9th Cir. 2002)* .

The amount of attorney's fees awarded must also be sufficient to effectively deter the same conduct in the future. *Vollmer v. Publishers Clearing House, 248 F.3d 698, 711 (7th Cir. 2001)* .

Counsel should therefore oppose an award of fees if the moving party has not provided a sufficient showing that fees are based on a reasonable rate for a reasonable number of hours spent addressing the specific Rule 11 violation described in the motion. Furthermore, counsel should oppose a fee award if the amount is inappropriate with respect to the purpose of deterrence.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 11.11, 11.22, 11.24.*
- *Federal Litigation Guide P 8A.04.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 2.
- *Bender's Federal Practice Forms* Form No. 11:104.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 7.
- *Fed. R. Civ. P. 11.*
- *Gary v. Braddock Cemetery, 517 F.3d 195, 201-202 (3d Cir. 2008)* (district court must rule on Rule 11 motion before or contemporaneously with final judgment, to eliminate piecemeal appeals and serve interests of judicial economy).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsFrivolous Lawsuits



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Chapter 11 SANCTIONS AND CONTEMPT
PART C: SANCTIONS UNDER 28 U.S.C. § 1927 FOR MULTIPLYING LITIGATION UNREASONABLY AND VEXATIOUSLY

1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.06

§ 11.06 Checklist for Seeking and Opposing Sanctions Under 28 U.S.C. § 1927

☐ If litigant has multiplied proceedings unreasonably and vexatiously, move for sanctions under *28 U.S.C. § 1927*.

- ○ Determine particular actions of opposing counsel that have multiplied proceedings unreasonably and vexatiously. *See § 11.07[1] below*.
- ○ Consider how you will prove bad faith or conduct tantamount to bad faith. *See § 11.07[5] below*.
- ○ Determine the amount of time reasonably spent in response to this conduct.
- ○ Draft motion for sanctions under *28 U.S.C. § 1927*. *See § 11.07[6] below*.
- ○ Follow procedure applicable to motions generally.
- ○ File motion papers with clerk.

☐ Oppose sanctions under *28 U.S.C. § 1927*, based on applicable grounds.

- ○ Assert that *28 U.S.C. § 1927* is inapplicable to the facts. *See § 11.08[1] below*.
- ○ Assert that the motion was filed to accomplish a purpose other than deterrence. *See § 11.08[2] below*.

○ Assert that respondent acted from mere negligence or ignorance, not bad faith. *See § 11.08[3] below*.

☐ **Search by Topic:** Civil Procedure > Sanctions > Vexatious Litigants

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview



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1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.07

§ 11.07 Seeking Sanctions Under 28 U.S.C. § 1927

[1] Sanctions Under § 1927 Are Intended To Deter Improper Multiplicity of Proceedings

A court may impose sanctions on any attorney who unreasonably and vexatiously multiplies legal proceedings. *28 U.S.C. § 1927.*

Section 1927 permits the imposition of excess costs, expenses and attorney fees that are incurred because of the prohibited conduct. *28 U.S.C. § 1927.* It authorizes an award against one who multiplies the proceedings unreasonably and vexatiously in the amount reasonably incurred because of that conduct. *Wilson v. Morgan, 477 F.3d 326, 347 (6th Cir. 2007)* .

[2] Section 1927 Applies to Conduct After Commencement of Case, Including During Trial

28 U.S.C. § 1927 provides a mechanism for sanctioning conduct that occurs after commencing a case, including during trial. *MGIC Indem. Corp. v. Moore, 952 F.2d 1120, 1121 (9th Cir. 1991)* .

[3] Sanctions Under § 1927 Apply to Later Proceedings

Although *Fed. R. Civ. P. 11* sanctions attach only on the basis of 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. *West Coast Theater Corp. v. City of Portland, 897 F.2d 1519, 1528 (9th Cir. 1990)* .

[4] Sanctions Under § 1927 Are Imposed Only on Attorney

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. *Smith Int'l, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1197 (5th Cir. 1988)* ; *1507 Corp. v. Henderson, 447 F.2d 540, 542 (7th Cir. 1971)* .

The amount of sanctions imposed is not affected by the sanctioned attorney's ability to pay, but by the amount of the victim's loss, and the amount is intended to compensate the victim for that loss. *See Shales v. General Chauffeurs,*

Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746, 749 (7th Cir. 2009) (violation of § 1927 is a form of intentional tort, and damages in tort law depend on the victim's loss, not the wrongdoer's resources).

[5] Sanctions Under § 1927 Require Finding of Bad Faith or Equivalent Conduct

28 U.S.C. § 1927 authorizes the imposition of sanctions only when there is a finding of conduct constituting or akin to bad faith. *State St. Bank & Trust Co v. Inversiones Errazuriz Limitada, 374 F.3d 158, 180 (2d Cir. 2004)* .

Circuit Split:

Circuits apply different standards for finding bad faith. Some courts apply an objective test for determining whether the requisite state of mind is present, whereas others follow a subjective test. *See, e.g., Hamilton v. Boise Cascade Express, 519 F.3d 1197, 1203 (10th Cir. 2008)* (attorney "without any impure motive" may be held responsible for "objectively unreasonable" multiplication of proceedings); *Amlong & Amlong, P.A. v. Denny's, Inc., 457 F.3d 1180, 1190-1193 (11th Cir. 2006)* (applying objective test); *Estate of Blas ex rel. Chargualaf v. Winkler, 792 F.2d 858, 860 (9th Cir. 1989)* (applying subjective test). The trend appears to be a movement away from the subjective bad-faith standard.

[6] Motion for Sanctions Under § 1927 Must State Specific Grounds and Specific Relief, and Must Be Served Pursuant to Rule 5

A motion for sanctions must comply with *Fed. R. Civ. P. 7*, which requires that, among other things:

1. The motion must state with particularity the grounds for seeking the order; and

2. The motion must state the relief sought.

Fed. R. Civ. P. 7(b)(1).

A motion must be served pursuant to *Fed. R. Civ. P. 5*. Therefore, counsel should serve every party. *Fed. R. Civ. P. 5(a)(1)(D).*

Warning:

The order should specify the authority considered, the grounds for the sanctions including a description of the offensive conduct, and the reasoning behind the monetary award calculation. Otherwise, the appellate court has an insufficient record on which to decide an appeal. *See Insurance Benefit Admin., Inc. v. Martin, 871 F.2d 1354, 1361-1363 (7th Cir. 1989)* .

[7] Additional Requirements for Motion Under § 1927 Must Be Met in Some Jurisdictions

Counsel should consult local court rules for additional requirements for serving sanction motions in general and for serving motions under *28 U.S.C. § 1927* in particular.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 11.40.*
- *Federal Litigation Guide P 8A.11.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 3.

- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 7.
- *28 U.S.C. § 1927.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview



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1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.08

§ 11.08 Opposing Sanctions Under 28 U.S.C. § 1927

[1] Asserting That § 1927 Does Not Apply

A person subject to sanctions under *28 U.S.C. § 1927* may assert, when appropriate, that the statute is inapplicable to the instant case. *See 28 U.S.C. § 1927.*

[2] Asserting That Motion Under § 1927 Was Not Filed for Proper Purpose

If appropriate under the circumstances, the responding party to 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 was not intended to seek sanctions for the purpose of deterring attorney misconduct. *See Truesdell v. Southern Cal. Permanente Med. Group, 209 F.R.D. 169, 173-174 (C.D. Cal 2002)* .

[3] Asserting Absence of Bad Faith

If the respondent did engage in the conduct described in the motion under *28 U.S.C. § 1927*, but the conduct involved mere ignorance or negligence rather than bad faith or recklessness, the responding party should raise that issue, because sanctions are not properly imposed on those grounds. *See Fink v. Gomez, 239 F.3d 989, 993 (9th Cir. 2001)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 11.40.*
- *Federal Litigation Guide P 8A.11.*
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 3.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 7.

- *28 U.S.C. § 1927.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview



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Chapter 11 SANCTIONS AND CONTEMPT
PART D: SANCTIONS FOR BAD-FAITH LITIGATION ABUSE UNDER INHERENT POWER OF COURT

1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.09

§ 11.09 Checklist for Seeking and Opposing Sanctions Under Inherent Power of Court

☐ Seek sanctions under inherent power of court.

○ Determine whether a party has engaged in some type of objectionable conduct, such as disobedience of a judicial order, fraud, abuse of judicial process, or vexatious actions. *See § 11.10[4] below*.

○ Determine whether the person acted in bad faith or in a manner tantamount to bad faith. *See § 11.10[3] below*.

○ Consider whether a particular federal or local rule applies to the objectionable conduct.

○ Determine which sanctions are appropriate, such as attorney's fees, dismissal, default judgment, vacation of judgment, a contempt citation, disqualification or suspension of counsel, an injunction against further litigation, exclusion of evidence, or monetary sanctions. *See § 11.10[5] below*.

○ Draft motion for sanctions under court's inherent power. *See § 11.10[6] below*.

☐ Oppose motion for sanctions under inherent power of court.

○ Dispute the facts asserted in the motion. *See § 11.10[7] below*.

○ Assert that the respondent acted in good faith and support that assertion by showing that the respondent did not act in bad faith, nor in a manner tantamount to bad faith. *See §*

11.10[7] below.

○ Assert that the sanctions requested or imposed are so severe that a normal motion procedure is inadequate and that the respondent is entitled to the due process protections available for criminal contempt. *See § 11.10[7] below*.

☐ **Search by Topic:** Civil Procedure > Sanctions > General Overview

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselDisqualificationsCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewGovernmentsCourtsAuthority to Adjudicate



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1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.10

§ 11.10 Seeking and Opposing Sanctions Under Inherent Power of Court

[1] Federal Courts Have Inherent Powers to Sanction Bad-Faith Conduct

A district court has the inherent power to fashion appropriate sanctions for conduct that abuses the judicial process. *Kovilic Constr. Co. v. Missbrenner, 106 F.3d 768, 772 (7th Cir. 1997)* ; *see also Fink v. Gomez, 239 F.3d 989, 991-992 (9th Cir. 2001)* (federal courts have inherent power to levy sanctions, including attorney's fees for willful disobedience of order and other grounds).



Strategic Point:

Courts are reluctant to impose sanctions, and the bad-faith standard is difficult to establish. As with *Fed. R. Civ. P. 11* and *28 U.S.C. § 1927* motions for sanctions, moving for sanctions under the court's inherent power should be reserved for egregious cases or for times when the inappropriate conduct is repeated.

[2] Court May Rely Both on Specific Rule or Statute and on Inherent Authority

Counsel should not seek sanctions based on a court's inherent powers if appropriate sanctions can be imposed under another provision, such as *Fed. R. Civ. P. 11*. *See Fed. R. Civ. P. 11*, Committee Note of 1993.

The procedures specified in *Fed. R. Civ. P. 11* (i.e., notice, opportunity to respond, and findings) should ordinarily be employed when seeking a sanction under the court's inherent powers. *See Fed. R. Civ. P. 11*, Committee Note of 1993.



Strategic Point:

Sanctions under the court's inherent powers are not precluded by the sanction provisions in *28 U.S.C. § 1927* or *Fed. R. Civ. P. 11*. *Chambers v. NASCO, Inc., 501 U.S. 32, 46-51, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* . However, the better practice usually is to proceed under a rule or statute if one fits. The court may add inherent authority as an additional ground for granting sanctions just as a precaution.

[3] In Some Circuits Court Must Specifically Find Bad Faith or Conduct Tantamount to Bad Faith

The Fifth Circuit requires a finding of bad faith before a court may impose sanctions based on its inherent powers. *Elliott v. Tilton, 64 F.3d 213, 217, n.3 (5th Cir. 1995)* .

In the Ninth Circuit, sanctions under the court's inherent powers are available if the court specifically finds bad faith or conduct tantamount to bad faith. *Fink v. Gomez, 239 F.3d 989, 992-994 (9th Cir 2001)* , *citing* *Chambers v. NASCO, Inc., 501 U.S. 32, 46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) and* *Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* , *superseded* on other grounds by amendment of *28 U.S.C. § 1927*; *see also* *B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1108 (9th Cir. 2002)* (conduct tantamount to bad faith is sanctionable).

Circuit Split:

There is a split among circuits and even within some circuits evidencing confusion about a district court's power to impose sanctions under the inherent powers doctrine. *See* *United States v. Seltzer, 227 F.3d 36, 41 (2d Cir. 2000)* . The Second Circuit holds that when the district court invokes its inherent power to sanction misconduct by an attorney that involves that attorney's violation of a court order or other misconduct that is not undertaken for the client's benefit, the district court need not find bad faith before imposing a sanction under its inherent power. *United States v. Seltzer, 227 F.3d 36, 42 (2d Cir. 2000)* . Circuits in which cases have held that sanctions may be imposed based on a lesser standard include the Seventh Circuit and Eleventh Circuit. *See* *United States v. Mottweiler, 82 F.3d 769, 772 (7th Cir. 1996)* ; *Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1207-1208 (11th Cir. 1985)* . The Third Circuit has authority for both views. *See* *Martin v. Brown, 63 F.3d 1252, 1265 (3d Cir. 1995)* (inherent power to sanction attorneys usually requires finding of bad faith); *Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 75 n.11 (3d Cir. 1995)* (showing of bad faith not always required).

[4] Sanctions Are Available for Variety of Willful Actions

Federal courts' inherent power to levy sanctions has been based on the following conduct:

1. Disobeying judicial orders. *Young v. United States, 481 U.S. 787, 798, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987)* ; *Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* , *superseded* on other grounds by amendment of *28 U.S.C. § 1927*;

2. Fraud. *See* *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)* ;

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)* , *superseded* on other grounds by amendment of *28 U.S.C. § 1927*; and

4. Acting vexatiously, wantonly, or for oppressive purpose. *See* *Alyeska Pipeline Svc. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-259, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)* , *superseded* on ground of awarding attorney's fees by *42 U.S.C. § 1988*.

[5] Court May Dismiss Case or Impose Other Sanctions

The district court's wide discretion to impose sanctions under its inherent power includes dismissal of a lawsuit. *See Chambers v. NASCO, Inc., 501 U.S. 32, 43-44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

Sanctions that may be imposed pursuant to the court's inherent power also include:

1. Attorney's fees. *Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-765, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* , *superseded* on other grounds by amendment of *28 U.S.C. § 1927* (in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel);

2. Default judgment against the offending party. *See Shepherd v. ABC, 62 F.3d 1469, 1475 (D.C. Cir. 1995)* ;

3. Vacation of judgment. *See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* ;

4. Contempt citation. *See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 51, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* ;

5. Disqualifying or suspending counsel. *See, e.g., Shepherd v. ABC, 62 F.3d 1469, 1475 (D.C. Cir. 1995)* ;

6. Injunction against further litigation. *See, e.g., Shafii v. British Airways, 83 F.3d 566, 571 (2d Cir. 1996)* ; and

7. Exclusion of evidence. *See, e.g., Shepherd v. ABC, 62 F.3d 1469, 1475 (D.C. Cir. 1995)* .

Strategic Point:

Judges are reluctant to use this authority if a specific statutory basis for sanctions applies.

[6] Motion for Sanctions Under Court's Inherent Powers Must State Specific Grounds and Relief Sought, and Must Be Served Pursuant to Rule 5

A motion for sanctions must comply with *Fed. R. Civ. P. 7*, which requires that, among other things:

1. The motion must state with particularity the grounds for seeking the order; and

2. The motion must state the relief sought.

Fed. R. Civ. P. 7(b)(1).

A motion must be served pursuant to *Fed. R. Civ. P. 5*. Counsel must serve every party. *Fed. R. Civ. P. 5(a)(1)(D).*

Strategic Point:

Counsel should consult local court rules for additional requirements for serving sanction motions.

[7] Opposition to Motion for Sanctions Under Court's Inherent Powers Includes Lack of Due Process

When a court uses its inherent powers to impose sanctions that are criminal in nature, it must provide the same due process protections that would be available in a criminal contempt proceeding. If the imposition of sanctions under the court's inherent powers is tantamount to a finding of criminal contempt, the person subject to sanctions is entitled to all the procedural protections available to an alleged contemnor under criminal contempt. *See International Union,*

UMW v. Bagwell, 512 U.S. 821, 826-832, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994) .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 11.41*.
- *Federal Litigation Guide P 8A.12*.
- *Sanctions: The Federal Law of Litigation Abuse* Ch. 4.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 7.
- *Fed. R. Civ. P. 5* (service and filing of papers).
- *Fed. R. Civ. P. 7(b)* (motions and other papers).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselDisqualificationsCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewGovernmentsCourtsAuthority to Adjudicate



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Chapter 11 SANCTIONS AND CONTEMPT
PART E: SEEKING AND OPPOSING CONTEMPT ADJUDICATION

1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.11

§ 11.11 Checklist for Drafting and Opposing Motion for Contempt

☐ Seek a contempt adjudication.

- ○ State the grounds for contempt. *See § 11.12 below*.
- ○ Specify the order sought. *See § 11.13 below*.
- ○ State the claims for damages resulting from the contumacious conduct and the attorney's fees incurred as a result of the contempt proceeding. *See § 11.13 below*.
- ○ Include evidence of damages. *See § 11.13 below*.
- ○ File motion papers. *See § 11.13 below*.
- ○ Serve motion papers. *See § 11.13 below*.

☐ Oppose motion for contempt.

- ○ Move to discharge show-cause order. *See § 11.14 below*.
- ○ Determine grounds for opposition. *See § 11.14 below*.
- ○ Demand hearing or jury trial if applicable. *See § 11.14 below*.
- ○ Request attorney's fees and costs. *See § 11.14 below*.

☐ **Search by Topic:** Civil Procedure > Sanctions > Contempt.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsFrivolous LawsuitsCivil ProcedureSanctionsContemptCivil Contempt



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1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.12

§ 11.12 Understanding Contempt

[1] Court Has Inherent Power to Punish For Contempt

Federal courts have inherent power to punish persons for committing acts that tend to obstruct or interfere with the orderly administration of justice, or that impair the dignity or authority of the court: that is, courts have inherent power to punish for contempt. *Young v. United States, 481 U.S. 787, 795, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987)* .

Those powers reach conduct outside the presence of the court and are governed by the control vested in courts to achieve orderly disposition of cases. *Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

[2] Violation of Specific Federal Rules May Be Sanctioned

[a] Rule 45: Disobeying Subpoena

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of *Fed. R. Civ. P. 45(c)(3)(A)(ii)* (requiring over 100 miles of travel). *Fed. R. Civ. P. 45(e)*.

[b] Rule 56: Summary Judgment

If satisfied that an affidavit or declaration under *Fed. R. Civ. P. 56* (summary judgment) is submitted in bad faith or solely for delay, the court has discretion to order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt. The court may impose such sanctions only after notice and a reasonable opportunity to respond. *Fed. R. Civ. P. 56(h)*.

[c] Rule 70: Failure to Obey Judgment Regarding Land Conveyance and Other Actions

If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done--at the disobedient party's

expense--by another person appointed by the court. *Fed. R. Civ. P. 70(a).*

The court may also hold the disobedient party in contempt. *Fed. R. Civ. P. 70(e).*

[3] Defining Direct and Indirect Contempt

Direct contempt occurs within the court's presence. *See International Union, UMW v. Bagwell, 512 U.S. 821, 827 n.2, 832, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* .

Indirect contempt takes place outside 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)* .

If a court delays punishing a direct contempt until a later time 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)* .

[4] Distinction Between Civil and Criminal Contempt Depends on Penalty

A contempt sanction is civil if the contemnor can avoid the sentence imposed on him or her, or purge himself or herself of it, by complying with the terms of the original order. *Hicks v. Feiock, 485 U.S. 624, 635 n.7, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988)* .

A criminal contempt sentence is punitive and vindicates the authority of the court by punishing past acts of disobedience. *International Union, UMW v. Bagwell, 512 U.S. 821, 827-828, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* . A criminal contempt sanction is fixed and unconditional; it does not terminate on compliance with the court's order. *International Union, UMW v. Bagwell, 512 U.S. 821, 828-829, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* .

Criminal contempt proceedings, unlike civil proceedings, require constitutional protections. *International Union, UMW v. Bagwell, 512 U.S. 821, 846, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* .

Imprisonment and monetary fines are available in both civil and criminal contempt proceedings. A contempt fine or sentence is considered civil and remedial if it either coerces the person into compliance with the court order or compensates the complainant for the losses sustained. *See International Union, UMW v. Bagwell, 512 U.S. 821, 829, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* .

[5] Nature of Civil Contempt

With respect to civil contempt, the defendant "keeps the keys to the jail in his own pocket" and may be released whenever that person complies with the relevant legal obligations. *Friends of the Earth, Inc. v. Laidlaw, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610* . Therefore, civil contempt sanctions are appropriate only when the contemnor is able to purge the contempt by his or her own affirmative act. *International Union, UMW v. Bagwell, 512 U.S. 821, 828, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* .

Civil contempt proceedings are considered "trials" within the meaning of *Fed. R. Civ. P. 43(a)*, which requires the taking of oral testimony in open court (rather than a hearing on a motion within the meaning of *Fed. R. Civ. P. 43(e)*) unless otherwise provided by rule. Hence, the issues may generally not be tried on the basis of affidavits. *See Fed. R. Civ. P. 43(a)*; *Shillitani v. United States, 384 U.S. 364, 370-371, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966)* .

However, a person cited for civil contempt does not have a right to a jury trial. *See Fed. R. Civ. P. 43(a)*; *Shillitani v. United States, 384 U.S. 364, 370-371, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966)* .

Circuit Split:

The Ninth Circuit has held that although a civil contempt need not be willful, and there is no "good-faith" exception to the requirement of obedience to a court order, a person should not be held in contempt if his or her action appears to be based on a good-faith and reasonable interpretation of the court's order. *Go-Video v. Motion Picture Ass'n of Am., 10 F.3d 693, 695 (9th Cir. 1993)* . That position is not held by all jurisdictions, however. For example, in the Sixth Circuit, good faith is not a defense in civil contempt proceedings. Similarly, willfulness is not an element of civil contempt. However, the state of mind of the contemnor is relevant with respect to the consideration of sanctions. *Gnesys, Inc. v. Greene, 437 F.3d 482, 493 (6th Cir. 2005)* .



Strategic Point:

Counsel should learn the position of the relevant jurisdiction on this issue to discover to what extent, if any, the contemnor's state of mind and beliefs affect either the adjudication of contempt or the severity of sanctions imposed.

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.

United States v. City of Jackson, 359 F.3d 727, 731 (5th Cir. 2004) .

[6] Nature of Criminal Contempt

Willfulness is an element of criminal contempt. *Doe v. Maywood Hous. Auth., 71 F.3d 1294, 1297 (7th Cir. 1974)* .

A court of the United States has power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as the following:

1. Misbehavior of any person in its presence or so near to it as to obstruct the administration of justice;

2. Misbehavior of any of its officers in their official transactions; and

3. Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401.

Any person who commits criminal contempt may be punished for that contempt after prosecution on notice. *Fed. R. Crim. P. 42*; *see also 18 U.S.C. § 401.*

The court must give the person notice in open court, in an order to show cause, or in an arrest order; the notice must do the following:

1. State the time and place of the trial;

2. Allow the defendant a reasonable time to prepare a defense; and

3. State the essential facts constituting the charged criminal contempt and so describe it.

Fed. R. Crim. P. 42(a)(1).

Exception:

A judge (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies. The contempt order must recite the facts, be signed by the judge, and filed with the clerk. *Fed. R. Crim. P. 42(b).*

The right to jury trial exists when punishment exceeds six months. *Bloom v. Illinois, 391 U.S. 194, 206 n.8, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968)* .

A criminal contempt proceeding is a separate and independent proceeding at law that is not part of the original action. A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* , *superseded* on other grounds by amendment of *Fed. R. Civ. P. 11*; *see Fed. R. Crim. P. 42(a)* (procedural requirements for criminal contempt).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 45.62*, *56.33*, *70.02[3]*, *70.04*, 642.02 -642.04.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 7.
- *18 U.S.C. § 401.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsFrivolous LawsuitsCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt



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1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.13

§ 11.13 Moving for Civil Contempt

A motion for contempt must state specifically the court order that has not been obeyed. *See Fed. R. Civ. P. 7(b)(1).*

The motion must also set forth the relief or order sought. *Fed. R. Civ. P. 7(b)(1).*

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)* .

Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections are required than for criminal contempt. *International Union, UMW v. Bagwell, 512 U.S. 821, 831, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* . Civil contempt may be imposed in an ordinary civil proceeding on notice and an opportunity to be heard; neither a jury trial nor proof beyond a reasonable doubt is required. *International Union, UMW v. Bagwell, 512 U.S. 821, 827, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* .

A civil contempt order that fines or imprisons the contemnor is purged on performance of the act ordered by the court. *International Union, UMW v. Bagwell, 512 U.S. 821, 827, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 7.03.*
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 7.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureSanctionsContemptCivil ContemptEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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§ 11.14 Responding to and Opposing Allegations of Contempt

A party held in civil contempt can purge the contempt by obeying the court order. *International Union, UMW v. Bagwell, 512 U.S. 821, 828, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (the contemnor "carries the keys of his prison in his own pocket").

Inadvertence is a defense to contempt if the person who has violated a court order has interpreted the order in a reasonable manner and in good faith. *See Go-Video v. Motion Picture Ass'n of Am., 10 F.3d 693, 695 (9th Cir. 1993)* (judgment of contempt vacated because plaintiff substantially complied with reasonable interpretation of protective order).

A party's inability to comply with a judicial order constitutes a defense to a charge of civil contempt. *United States v. Rylander, 460 U.S. 752, 757, 103 S. Ct. 1548, 75 L. Ed. 2d 521 (1982)* .

In raising that defense, the defendant has a burden of production. *United States v. Rylander, 460 U.S. 752, 757, 103 S. Ct. 1548, 75 L. Ed. 2d 521 (1982)* .

The imposition of penalties under the procedure for civil contempt may be opposed on the ground that the nature of the penalty was so severe that it amounted to a penalty for criminal contempt; and therefore that the contemnor was deprived of due process applicable to criminal contempt procedure. *See International Union, UMW v. Bagwell, 512 U.S. 821, 834, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* .

An alleged contemnor may move to discharge an order to show cause citing for contempt. *See United States v. United Mine Workers, 330 U.S. 258, 267-268 n.14, 67 S. Ct. 677, 91 L. Ed. 884 (1947)* .

An alleged contemnor may raise the absence of willfulness in defense of allegations of criminal contempt. A party's disobedience of a court order must be willful to constitute a basis for criminal contempt sanctions. *See Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 772 (9th Cir. 1983)* ; *Doe v. Maywood Hous. Auth., 71 F.3d 1294, 1297 (7th Cir. 1974)* .

The alleged contemnor may assert that the criminal contempt proceeding violates due process required under *Fed. R.*

Crim. P. 42(a), for example, by lack of notice or denial of a jury trial when one is allowed. Criminal contempt penalties may not be imposed unless the contemnor has been afforded the constitutional protections of a criminal proceeding. *See Hicks v. Feiock, 485 U.S. 624, 632, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988)* .

Summary criminal contempt is justified only in extraordinary circumstances when the judge both witnesses the contumacious conduct and needs immediately to assert judicial authority to restore the orderly operation of the judicial system. *United States v. Glass, 361 F.3d 580, 586-588 (9th Cir. 2004)* . Summary criminal contempt may be opposed on the ground that the conduct in question did not occur in open court or that the conduct was not of the type for which summary criminal contempt is available.

Summary contempt is not appropriate in the following circumstances:

1. Any misconduct cited did not occur in court;

2. Any misconduct cited did not occur in the judge's presence; or

3. The alleged contemnor's actions did not create or threaten any disturbance, violence, or physical obstruction in open court.

See Pounders v. Watson, 521 U.S. 982, 988, 117 S. Ct. 2359, 138 L. Ed. 2d 976 (1997) .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.)* Ch. 642.
- *Moore's AnswerGuide: Federal Civil Motion Practice* Ch. 7.

Legal Topics:

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



Moore's AnswerGuide: Federal Pretrial Civil Litigation

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Chapter 11 SANCTIONS AND CONTEMPT
PART E: SEEKING AND OPPOSING CONTEMPT ADJUDICATION

1-11 Moore's AnswerGuide: Fed Pretrial Civil Litigation § 11.15

§ 11.15 Appealing Civil Contempt Order After Final Judgment

Ordinary civil contempt orders are not final, appealable orders. *Lamar Fin. Corp. v. Adams, 918 F.2d 564, 566 (5th Cir. 1990)* . Orders of civil contempt entered against a party during the course of a pending civil action are not appealable until final judgment. *Kirkland v. Legion Ins. Co., 343 F.3d 1135, 1140 (9th Cir. 2003)* .

Criminal contempt orders, on the other hand, are final and immediately appealable. *Lamar Fin. Corp. v. Adams, 918 F.2d 564, 566 (5th Cir. 1990)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) § 202.11[9].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule