UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PRO SE CIVIL GUIDEBOOK

August 2021

This Guidebook is intended to be an informative and practical resource for understanding the basic procedures of the Court. The statements in this Guidebook do not constitute legal advice. DO NOT CITE THIS GUIDEBOOK AS AUTHORITY. This Guidebook does not take the place of the Federal Rules, this Court's Local Rules, or the individual practices of the Judges of this Court. All parties using this Guidebook remain responsible for complying with all applicable rules of procedure. If there is any conflict between this Guidebook and the applicable rules, the rules govern.

INTRODUCTION

This Guidebook is intended to help you understand the procedures that you must follow if you represent yourself in this Court. You cannot rely on this Guidebook alone, however, because it does not address every situation that might arise in your case. Moreover, this Guidebook does not offer any information about the specific issues in your lawsuit. **And this Guidebook is not legal advice**.

The Court encourages you to review this Guidebook together with the Federal Rules of Civil Procedure and the Court's Local Rules. The Federal Rules of Civil Procedure appear at the end of Title 28 of the United States Code. The most recent version of this Court's Local Rules may be obtained from the Clerk's Office by request. Each of these resources is also available online.

This Guidebook is organized in the sequence that a civil case proceeds through the Court and is written in a question-and answer format. The Table of Contents, found below, includes each question that this Guidebook addresses.

TABLE OF CONTENTS

CHAPTER ONE: GENERAL INFORMATION

What is the Clerk's Office?

The Clerk's Office maintains the Court's records. Most of your interactions with the Court will be through the Clerk's Office, where you will file the documents that will be reviewed by the judge. The Clerk's Office cannot give you legal advice or tell you when a judge might make a decision in your case, but the Clerk's Office can tell you whether a particular document has been filed and can provide copies of documents in the court record at a cost of $.50 per page (payable in advance).

What does it mean to file documents with the Clerk's Office?

The Clerk's Office receives documents on behalf of the Court and maintains a record of the documents received. By filing a document with the Clerk's Office, you ensure that the document becomes part of the official record in your case. This record allows both you and the judges to be certain of what documents have been presented in a case.

You may file any document either by mailing the document to the Clerk's Office or by personally delivering the document to the Clerk's Office during business hours. After receiving your documents, the Clerk's Office will record (or "docket") your papers and send them to the judge assigned to your case.

Do not confuse filing documents with the Clerk's Office with serving documents on the other parties to the lawsuit. The requirements for serving a summons and complaint and other pleadings are found in Rule 4 of the Federal Rules of Civil Procedure.

The requirements for serving other types of documents are found in Rule 5 of the Federal Rules of Civil Procedure. More information about serving documents is provided later in this Guidebook.

How do I contact the Clerk's Office?

You may contact the Clerk's Office at the following address and phone number:

United States District Court for the District of Minnesota
Clerk's Office
300 South Fourth Street, Suite 202
Minneapolis, MN 55415

(612) 664-5000

What is a magistrate judge?

A federal magistrate judge is a judicial officer who has some, but not all, of the powers of a district judge appointed under Article III of the United States Constitution. Magistrate judges may (among other things) set deadlines, enter orders on scheduling, and issue Reports and Recommendations regarding whether your habeas petition should be granted or denied. You may object to any portion of a Report and Recommendation entered by a magistrate judge in your case, and your objection will be reviewed by a district judge. Local Rules 72.1 and 72.2 explain more about the role of magistrate judges.

CHAPTER TWO: STARTING YOUR CIVIL LAWSUIT

What is a civil lawsuit?

A civil lawsuit is a proceeding brought by a person or legal entity (such as a corporation or government) seeking relief against another person or legal entity. The person or entity bringing the lawsuit is called the "plaintiff," while the person or entity being sued is called the "defendant." When filing a lawsuit, a plaintiff alleges that she has been harmed by the defendant's unlawful behavior. If the defendant is found by the Court to have unlawfully harmed the plaintiff, he may be ordered to alleviate that harm — for example, through the payment of monetary damages to the plaintiff, or by stopping the activity that is harming the plaintiff.

How do I start a civil lawsuit?

A civil lawsuit begins by filing of a complaint with the Clerk's Office. A complaint is a legal document in which you tell the judge and the defendant or defendants why you believe the defendant(s) have violated the law in a way that has injured you. More information about how to prepare a complaint is provided below.

How do I write a complaint?

Rule 8 of the Federal Rules of Civil Procedure requires that a complaint include three things. First, a complaint must include a short and plain statement as to why the Court has jurisdiction over the lawsuit — more information about "jurisdiction" is provided below. Second, a complaint must include a short and plain statement showing that the plaintiff is entitled to relief. Third, a complaint must include a demand for the

specific form of relief that the plaintiff is seeking. Put another way, Rule 8 requires you to state why your lawsuit belongs in federal court, why you believe you are entitled to relief, and what relief you are seeking.

Along with the requirements of Rule 8, your complaint should include the following: (1) a caption page that clearly states who the specific plaintiffs and defendants the lawsuit are; (2) a statement as to whether you would like your lawsuit to be tried before a jury, should the lawsuit go to trial; (3) a statement as to why the District of Minnesota (rather than a federal court located elsewhere) is the correct venue for the lawsuit; and (4) the signature of each plaintiff.

To assist in drafting your complaint, general complaint forms have been made available in the Clerk's Office and on the Court's website. These forms have been created to help you provide all information necessary for bringing your lawsuit. You do not have to use a complaint form — you may always write a complaint on your own — but using a complaint form may make writing a complaint easier for you.

What does "jurisdiction" mean?

If the law permits a court to hear a certain type of case, the court is said to have "jurisdiction" over that type of case. The court system in the United States consists of state courts and federal courts. This Court, the United States District Court for the District of Minnesota, is a federal court. And federal courts are authorized under the law to hear only certain types of cases. If this Court does not have jurisdiction over your lawsuit, it cannot consider the merits of your lawsuit and must dismiss the case.

The two most common types of lawsuits that federal courts are authorized to hear are those where:

- At least one of the plaintiff's claims arises under the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331). This is often referred to as "federal question jurisdiction."

- None of the plaintiffs live in the same state as any of the defendants, and the amount in controversy exceeds $75,000 (28 U.S.C. § 1332). This is often referred to as "diversity jurisdiction." "Amount in controversy" refers to what you believe you should be paid, or the dollar value of what you want the Court to do.

Your complaint must include a jurisdictional statement that explains why the Court has jurisdiction over your lawsuit. For example, you might state that the Court has federal-question jurisdiction over your lawsuit because one of your claims arises under the Americans with Disabilities Act, a federal law. Failure to include a jurisdictional statement could result in dismissal of your complaint.

What is "venue"?

"Venue" means the place where the lawsuit is filed. Most lawsuits in federal court must be filed in a specific venue. Usually, the proper venue is the court located in the district where the defendants live, or the court located in the district where the defendants undertook the actions that you believe violated the law. A venue statement in a complaint explains why you believe the particular district — in this case, the District of Minnesota — is the proper federal court for deciding your lawsuit. More information about proper venue may be found at 28 U.S.C. § 1391.

How much detail should I include in the complaint?

Rule 8(a)(2) of the Federal Rules of Civil Procedure states that a complaint only needs to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." You should include enough detail that the judge and the defendants can understand what you believe happened, how you were injured, and why you believe that you are entitled to a remedy from the defendant or defendants you have named. You do not need to state every bit of detail that you can remember, but you must provide some description of how each defendant violated the law. Think of a complaint as you would a story: the complaint should include enough detail that someone who has never read the story can understand what has happened, but not so much information that the reader does not understand what is important in the story and what is not.

You must include factual allegations to support your legal conclusions. Legal conclusions alone are not enough for your lawsuit to go forward. For example, "the defendant breached a contract with me" is a legal conclusion. "I sold the defendant my car and he never paid me what he promised" is a factual allegation. Wherever possible, present your story in terms of factual allegations rather than legal conclusions.

A few claims — fraud, for example — must be pleaded with more detail than the "short and plain statement" requirement of Rule 8(a). Under Rule 9(b) of the Federal Rules of Civil Procedure, a claim of fraud must be stated with particularity, which means you must state the "who, what, when, where, and why" of your claim. In other words, you must state the time and place of the fraud, the persons involved, the statements made, and an explanation of why or how those statements were false or misleading.

What is a "claim" (or a "count")?

A claim, also called a count, is an assertion in a complaint that a defendant or defendants violated a specific law. Your complaint may include as many claims as you believe apply to your case, but it should include at least one identifiable claim for relief. If you know the specific law that you believe the defendants violated, you should identify that law. If you believe the defendant violated the law, but are not sure specifically which law was violated, you may describe as best you can the area of law upon which your complaint is based. Federal Rule of Civil Procedure 10(b) requires you to state each count separately; usually, these statements appear near the end of the complaint, after you have explained who the parties are, why the Court has jurisdiction, and what you believe to have happened.

What is a "request for relief"?

A "request for relief" is a statement of what you want the judge to order the defendant to do if you win your lawsuit. For example, you may request that you be awarded money or that defendant stop doing something that has been found to be unlawful. You may request more than one form of relief.

Why do I have to sign the complaint (or any other documents)?

Rule 11(a) of the Federal Rules of Civil Procedure requires that every document filed in a lawsuit be signed by the parties if they are not represented by a lawyer. Your signature indicates that the statements included in the complaint are true to the best of

your knowledge. Under Rule 11, you may be fined, or your case may be dismissed, if you are found to have included allegations that you knew to be false.

What besides a complaint is needed to begin my lawsuit?

Along with your complaint, you must also submit a civil cover sheet and either a $402.00 filing fee or, if you cannot afford to pay that filing fee, an Application to Proceed in District Court Without Prepaying Fees or Costs. (This document is also known as an *in forma pauperis* application or "IFP application."). Your case may be dismissed if you do not submit the required filing fee or an IFP application.

You also may, but are not required to, also submit other documents, or exhibits, supporting your complaint. The purpose of an exhibit is to present proof of an allegation found in your complaint. For example, if you allege that the defendant is in breach of a contract, you may include a signed copy of the contract as an exhibit to the complaint. Do not attach copies of any documents that you do not discuss in your complaint.

What is a civil cover sheet?

The civil cover sheet is a form provided by the Clerk's Office that is used to gather information about the nature of your lawsuit. You must file a civil cover sheet when you begin a new lawsuit.

How can I pay the filing fee?

The Court charges a $402.00 filing fee to begin a new lawsuit. The Court will accept payment by cash, check, VISA, MasterCard, Discover, or American Express. Checks should be made payable to the "Clerk of Court."

What if I cannot afford the fee for filing a new complaint?

If you cannot afford the $402.00 filing fee, you must file an Application to Proceed in District Court Without Prepaying Fees or Costs. (This document is also known as an *in forma pauperis* application or "IFP application."). By completing an IFP application, you represent to the Court that payment of the filing fee would either be impossible or would amount to a substantial hardship. Provide the information requested on the application to the best of your ability. If the Court agrees that you are unable to pay the filing fee, you will be excused from that requirement.

How do I file the complaint and other documents?

You can file your documents by mailing them to the Clerk's Office at the address provided above or by bringing those documents during business hours to any of the District of Minnesota's four federal courthouses.

Can I change my complaint after I file it?

Yes. Changing a document that has already been filed with the Court is known as "amending" the document. Amending a complaint is necessary to add new factual allegations, claims, or defendants. The process to amend complaints is governed by Rule 15 of the Federal Rules of Civil Procedure and by Local Rule 15.1. In most situations,

a plaintiff must first ask the Court for permission to amend her complaint and must provide a copy of the proposed amended complaint. The amended complaint replaces the original complaint and therefore must include every factual allegation and claim that the plaintiff intends to litigate.

What do I do after I file my complaint?

If you have paid the filing fee for your civil lawsuit, you will next have to serve a copy of the summons and complaint on each defendant. This service is necessary to inform the defendant that a legal proceeding has been brought against him. The rules for effecting service of the summons and complaint can be found in Rule 4 of the Federal Rules of Civil Procedure.

If you are proceeding IFP, the U.S. Marshals Service will serve your summons and complaint for you. You will be asked to supply information regarding where the defendants may be located so that the complaint and summons may be served.

May I ask the defendant to waive service of the summons and complaint?

Some defendants may be asked to forego formal service of the summons and complaint and may instead elect to receive the documents via mail. Under Rule 4 of the Federal Rules of Civil Procedure, you can ask for a waiver of service from any defendant *except:*

- A minor or incompetent person in the United States;
- The United States government, its agencies, corporations, officers, or employees; or

- A foreign state, state, or local government.

Rule 4(d) of the Federal Rules of Civil Procedure explains how to seek waiver of service. Waiver forms may be requested from the Clerk's Office or found on the Court's website. In general, waiver of service is less costly and less burdensome than formal service for all parties and should be sought wherever possible.

What if I requested waiver of service and the defendant declines?

If a defendant does not return the waiver of service to you, you need to follow the rules for formal service set out in Rule 4 of the Federal Rules of Civil Procedure. But if you and the defendant who declined to accept service by mail are each located in the United States, you may ask the judge to order the defendant to reimburse you for the money you spent in serving the summons and complaint. See Rule 4(d)(2) of the Federal Rules of Civil Procedure for more information.

How do I serve the summons and complaint?

Rule 4 of the Federal Rules of Civil Procedure governs service of the summons and complaint. Rule 4 can be complicated but must be followed carefully. The defendant may insist that the summons and complaint be served correctly before the lawsuit may proceed.

The easiest way to serve a complaint is to hire a professional process server. If you do not want to or cannot afford to hire a process server, you can also ask a friend, family member, or any other person over 18 years old to personally serve the summons and complaint for you. *You may not deliver the summons and complaint yourself.*

Rule 4 sets out different service requirements for different kinds of defendants. For example, the requirements for serving a person can be found in Rule 4(e); the requirements for business entities in Rule 4(h); the requirements for federal governmental entities and employees in Rule 4(i); and the requirements for state and municipal governmental entities and employees in Rule 4(j). Each defendant must be served in the manner that Rule 4 requires for that particular type of defendant.

Is there a time limit for serving the summons and complaint?

Rule 4(m) of the Federal Rules of Civil Procedure requires you to serve each defendant or obtain a waiver of service within 90 days after the complaint is filed in the Clerk's Office. If you do not meet that deadline and you do not show the presiding judge that you had a good reason for not serving a defendant, the judge may dismiss all claims against any defendant who was not served.

CHAPTER THREE: ANSWERS, MOTIONS TO DISMISS, AND COUNTERCLAIMS

What happens after the summons and complaint are served?

After the summons and complaint have been properly served on the defendant, the defendant must respond to the complaint. That response may take any of several forms (this is not an exhaustive list):

- An *answer*, in which the defendant responds to each of the allegations and claims raised in the complaint.

- A *motion to dismiss*, in which the defendant argues that the complaint does not show that you are entitled to relief.
- A *motion for a more definite statement*, in which the defendant argues the complaint has too little information from which he can respond.
- A *counterclaim*, in which the defendant raises claims for relief against the plaintiff.

How long does the defendant have to respond to the complaint?

Defendants generally must respond to the complaint within 21 days after service of process has been effected. Defendants who have waived service of process, however, are entitled to 60 days in which to respond to the complaint. Federal governmental defendants are also entitled to 60 days in which to respond. Other response deadlines may be found in Rule 12 of the Federal Rules of Civil Procedure.

The time limits for responding to an amended complaint are different. Under Rule 15(a)(3) of the Federal Rules of Civil Procedure, a defendant must serve a response to an amended complaint within the time remaining to respond to the original complaint, or within 14 days after being served with the amended complaint, whichever period is longer.

The Court may alter these deadlines upon request of a party or wherever the Court may feel an adjustment to be appropriate. Read carefully any orders entered by the Court for amended deadlines.

What happens if the defendant does not respond to the complaint?

If the plaintiff has properly served the defendant with the complaint and the defendant does not timely respond, the defendant is considered to be in "default." The

plaintiff is then entitled to ask the Court for a default judgment against the defendant. That default judgment may order the defendant to provide relief to the plaintiff, such as monetary damages, just as if the claims in the complaint had been fully litigated and the plaintiff had succeeded at trial.

Rule 55 of the Federal Rules of Civil Procedure discusses the rules for obtaining a default judgment. First, you must file a request for entry of default with the Clerk of the Court. The request for entry of default must include proof (usually in the form of a declaration with proof of service attached) that the defendant has been served with the complaint. If the request for entry of default shows that the defendant has been served with the summons and complaint and has not filed a written response to the complaint, the Clerk will enter default against the defendant. Under Rule 55(c) of the Federal Rules of Civil Procedure, once the Clerk enters default, the defendant is not permitted to respond to the complaint without first filing a motion to set aside the default.

After the Clerk has entered default against the defendant, the plaintiff must file a motion for default judgment against the defendant. Rule 55(b) explains how to obtain a default judgment. With the motion, the plaintiff must file an affidavit proving the amount of damages suffered and requested in the complaint. Under Rule 54(c) of the Federal Rules of Civil Procedure, the Court cannot enter a default judgment that awards more money than was asked for in the complaint. The Court also cannot give any type of relief other than what was specifically asked for in the complaint.

Once default is entered, the defendant is considered to have admitted every fact stated in the complaint, except for the amount of damages. The defendant can still

oppose a motion for default judgment, however, by attacking the complaint. For example, the defendant could argue that the facts stated in the complaint do not constitute a violation of any law. The defendant may also oppose a motion for default judgment by presenting evidence that the plaintiff did not suffer the amount of damages that he asked the Court to award.

Special rules apply if the plaintiff is seeking a default judgment against any of the following parties:

- A minor or incompetent person (see Rule 55(b) of the Federal Rules of Civil Procedure);
- The United States government or its officers or agencies (see Rule 55(d) of the Federal Rules of Civil Procedure);
- A foreign country (see United States Code, 28 U.S.C. § 1608(e)); and
- Servicemen or women (see United States Code, 50 Appendix U.S.C. § 521).

The Court may set aside an entry of default for good cause under Federal Rule of Civil Procedure 55(c), or for any of the grounds for relief from a final judgment provided in Federal Rule of Civil Procedure 60(b).

What is an answer to the complaint?

An answer is a formal response to each allegation in the complaint. It is customary to write the answer in the same numbered paragraph style as the complaint. For example, paragraph one of the answer should respond only to paragraph one of the complaint, paragraph two of the answer should respond only to paragraph two of the complaint, and so forth.

Rule 8(b) of the Federal Rules of Civil Procedure requires the defendant to admit or deny every statement in the complaint. If the defendant does not have enough information to determine whether the statement is true or false, he must state that he does not have enough information to admit or deny that statement. If only part of a statement in the complaint is true, the defendant must admit that part and deny the rest. Generally, under Rule 8(b)(6), a defendant is considered to have admitted every statement that he does not specifically deny, except for the amount of damages.

Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure require the defendant to state all legal and factual defenses he may have to the plaintiff's claims. Each defense should be listed in a separate paragraph at the end of the answer. Generally, if a defendant does not state a defense in his answer, he may not rely on that defense or try to present evidence about that defense later in the lawsuit. Because failing to list a defense in an answer could have dramatic consequences, great care should be exercised in preparing an answer.

Each defendant must sign his answer, and the answer must be served upon all other parties in the lawsuit. Defendants may file one joint answer or may respond to the complaint separately.

Once the answer is filed, does the plaintiff have to file a response to it?

Usually no, the plaintiff should not file a reply to the defendant's answer, unless directed to do so by the presiding judge. Under Rule 8(b)(6) of the Federal Rules of Civil Procedure, all statements in an answer are automatically denied by the other parties to

the lawsuit. The plaintiff should, however, file an answer to a counterclaim if one is served. More information on counterclaims is provided below.

Can the defendant make claims against the plaintiff in the answer?

A defendant may not use the answer to state claims against the plaintiff; the answer should only respond to the plaintiff's claims in the complaint. To state claims against the plaintiff, a defendant must file a "counterclaim. A defendant may, however, include a counterclaim at the *end* of the answer and then file the answer and the counterclaim as a single document. The counterclaim should be clearly labeled as such to avoid confusion by the parties and the Court.

Can the defendant amend the answer after filing it?

Yes, although as with amended complaints, a defendant must usually first request permission of the Court. See Rule 15(a) of the Federal Rules of Civil Procedure and Local Rule 15.1 for more details.

What is a counterclaim?

A counterclaim is a complaint brought by the defendant against the plaintiff. Rule 13 of the Federal Rules of Civil Procedure explains some of the requirements for filing counterclaims.

What are the requirements for counterclaims?

There are two different types of counterclaims under Rule 13: compulsory counterclaims and permissive counterclaims. A compulsory counterclaim is a claim by

a defendant against a plaintiff that is based on the same events or transactions as the plaintiff's claim against the defendant. A defendant *must* file a compulsory counterclaim at the same time his answer is filed. If the defendant doesn't file a compulsory counterclaim at the same time he files the answer, he will generally lose the ability to ever sue the plaintiff for that claim. (Some exceptions to that general requirement are listed in Rule 13(a)).

A permissive counterclaim is a claim by a defendant against a plaintiff that is *not* based on the same events or transactions as the plaintiff's claim against the defendant. For example, if the plaintiff sues the defendant for breaching a contract, the defendant's claim that the plaintiff breached the same contract is a compulsory counterclaim. The defendant's claim that the plaintiff owes him money because of a car accident that occurred six months after the alleged breach of contract would be a permissive counterclaim.

If the defendant wants to file a permissive counterclaim, the defendant should file it as early as possible in the lawsuit, but there is no rule requiring that it be filed at the same time as the answer. The decision to file a permissive counterclaim is entirely up to the defendant. By not filing a permissive counterclaim, the defendant does not lose the ability to sue the plaintiff for that claim at another time.

The Court has subject matter jurisdiction over a compulsory counterclaim if there is subject matter jurisdiction over the plaintiff's claim against the defendant. The Court can only decide permissive counterclaims, however, if there is an independent basis for subject matter jurisdiction over the permissive counterclaim. This means that the

defendant can bring a permissive counterclaim only if the Court would have subject matter jurisdiction over that claim if it were brought as a separate lawsuit.

Counterclaims should be written using the same format used to write a complaint. All the rules that apply to writing a complaint also apply to writing a counterclaim.

Once a counterclaim is filed, does the plaintiff have to respond to it?

Yes. Because a counterclaim is a complaint against the plaintiff, the plaintiff must file and serve a written response to it. Rule 12(a)(1)(B) of the Federal Rules of Civil Procedure requires the plaintiff to file and serve an answer to a counterclaim within 21 days after being served with the counterclaim. Alternatively, the plaintiff may file and serve a motion challenging some aspect of the counterclaim, such as a motion to dismiss the counterclaim pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

What is a motion to dismiss the complaint?

In a motion to dismiss the complaint (or counterclaim), the moving party argues that there are legal problems with the way the complaint was written, filed, or served. Rule 12(b) of the Federal Rules of Civil Procedure lists the following defenses that can be raised in a motion to dismiss the complaint (or counterclaim):

- **Motion to dismiss the complaint for lack of subject matter jurisdiction.** In this type of motion, the moving party argues that the Court does not have the legal authority to hear the kind of lawsuit that the claimant filed.

- **Motion to dismiss the complaint for lack of personal jurisdiction over the defendant.** In this type of motion, the defendant argues that he has so little connection with the district in which this case was filed that the Court has no legal authority to hear the plaintiff's case against that defendant.

- **Motion to dismiss the complaint for improper venue.** In this type of motion, the defendant argues that the lawsuit was filed in the wrong place.

- **Motion to dismiss the complaint for insufficiency of service of process.** In this type of motion, the moving party argues either that the claimant did not prepare the summons correctly or did not properly serve the summons and complaint on the moving party.

- **Motion to dismiss the complaint for failure to state a claim.** In this type of motion, the moving party argues that even if everything stated in the complaint is true, the moving party still did not violate the law. A motion to dismiss for failure to state a claim is not appropriate if the moving party wants to argue that the facts alleged in the complaint are not true. Instead, in a motion to dismiss the complaint for failure to state a claim, the moving party argues that even if the judge assumes the facts alleged in the complaint *are* true, those facts do not constitute a violation of any law.

- **Motion to dismiss the complaint for failure to join an indispensable party under Rule 19**. In this type of motion, the defendant argues that the plaintiff failed to sue someone who must be included in the lawsuit before the Court can decide the issues raised in the complaint.

Should I respond to a motion to dismiss?

Yes. In your response, you should explain why your complaint should not be dismissed. Requirements for responses and all other memoranda filed with the Court are set out in Local Rule 7.1.

What happens after the judge decides the Rule 12 motion?

Under Rule 12(a)(4) of the Federal Rules of Civil Procedure, if the presiding judge denies a motion to dismiss, the moving party must file and serve an answer within 14 days after receiving notice that the motion was denied. If the presiding judge grants the motion to dismiss, she can grant the motion "with leave to amend" or "with prejudice." If the presiding judge grants a motion to dismiss with leave to amend, that means that

there is a legal problem with the complaint, but the claimant may be able to fix that problem. The judge will give the claimant a certain amount of time to file an amended complaint in which the claimant may try to fix the problems identified in the Court's order. Once the opposing party is served with the amended complaint, he must file and serve a written response to the amended complaint within the time ordered by the judge. The opposing party may file and serve either an answer or another motion under Rule 12 of the Federal Rules of Civil Procedure.

If the presiding judge grants the motion to dismiss with prejudice, that means there are legal problems with the complaint that cannot be fixed. Any claim that is dismissed with prejudice is eliminated permanently from the lawsuit. If the presiding judge grants a motion to dismiss the entire complaint with prejudice, the case is over. If the presiding judge grants a motion to dismiss some claims with prejudice and denies the motion to dismiss on other claims, the moving party must file and serve an answer to the claims that were not dismissed within 14 days after receiving notice of the Court's order.

What is a motion for a more definite statement?

Federal Rule of Civil Procedure 12(e) permits a defendant to file and serve a motion for a more definite statement before filing an answer to the complaint. In a motion for a more definite statement, the defendant argues that the complaint is so vague, ambiguous, or confusing that the defendant cannot respond to it. The motion must contain an explanation of how the complaint is defective and ask for the details that the defendant needs to respond to the complaint.

Under Rule 12(a)(4)(B) of the Federal Rules of Civil Procedure, if the Court grants a motion for a more definite statement, the defendant must file and serve a written response to the complaint within 14 days after the defendant receives the more definite statement from the plaintiff. The defendant's written response may be an answer or another motion under Rule 12 of the Federal Rules of Civil Procedure. If the Court denies the motion, the defendant must file and serve a written response to the complaint within 14 days after receiving notice of the Court's order.

How is motion practice conducted?

You can file motions, briefs, and supporting documents in three ways: (1) bring the appropriate documents to the Clerk's Office to file in person; (2) mail the documents to the Clerk's Office for filing; or (3) file electronically on the Court's electronic CM/ECF docketing system.

A motion is a formal request made to the presiding judge. Usually, the following occurs when a motion is filed. First, one party files a motion explaining what he wants the presiding judge to do and why the judge should do it. The motion must be filed with a memorandum of law that explains why the judge should grant the motion. The party who files a motion is referred to as the "moving party."

Next, the party who opposes the motion — referred to as the "responding party" or "opposing party" — must file a response memorandum explaining why he believes the judge should not grant the motion. The responding party does not need to file a motion of his own.

Then, *for dispositive motions only* — that is, motions that ask for a claim to be dismissed — the moving party may file, but is not required to file, a reply memorandum in which he replies to the arguments made in the responding party's memorandum of law. At that point, neither party can file any more documents about the motion without first getting permission from the presiding judge. For *nondispositive motions*, the moving party may not file a reply memorandum without first getting permission from the presiding judge. A motion to dismiss is a dispositive motion.

Once all the papers relating to the motion are filed, the judge can decide the motion based solely on the arguments in the papers, or she can hold a hearing. If the judge holds a hearing, each side will have an opportunity to talk to the judge about the arguments in their papers. The judge then has the option to announce her decision in the courtroom (a ruling from the bench), or to further consider the motion after the hearing (taking the motion under advisement). If the judge takes the order under advisement, the parties will receive a written decision sometime after the hearing.

What are the requirements for motion papers?

Both the Federal Rules of Civil Procedure and the Court's Local Rules provide requirements for filing motion papers. In addition to requiring most motions to be in writing, Rule 7(b)(2) of the Federal Rules of Civil Procedure states that all of the Court's rules about captions and the format of documents apply to motions. Rule 11 of the Federal Rules of Civil Procedure requires parties to sign their motions. Rule 11 requires parties not to file any motions that are based on facts that they know to be false or which

they did not fairly investigate, or motions that have no reasonable legal basis. You should read Rule 11 before signing and filing any motion.

Local Rule 7.1 gives a detailed set of requirements for serving, filing and responding to motions. Under Local Rule 7.1, motions are broken into two types: "nondispositive" motions and "dispositive" motions.

A dispositive motion seeks to end the case or dismiss a claim, and is usually heard by the district judge, although a district judge may refer the motion to a magistrate judge for a Report and Recommendation. Typical dispositive motions include motions to dismiss or motions for summary judgment. Motions for injunctive relief are also considered dispositive motions. In addition, post-trial and post-judgment motions are treated as dispositive motions for purposes of Local Rule 7.1.

A nondispositive motion does not end the case or dismiss any claim. Typical nondispositive motions include motions to amend and motions to compel discovery. If you are not sure whether a motion is dispositive or nondispositive, you may call the district judge's courtroom deputy to ask.

What do I have to do before filing a motion?

Under Local Rule 7.1, the procedures for filing a nondispositive motion and a dispositive motion are somewhat different, but the first steps to file each type of motion are the same.

First, under Local Rule 7.1(a), before filing any motion except a motion for summary judgment or a motion for a temporary restraining order, you must contact the

opposing party and make a "good faith effort to resolve the issues raised by the motion." You do not need to meet with the opposing party if the opposing party is not available to meet before you file your motion, but you must then meet with the opposing party as soon as you can after filing the motion. Keep notes about any attempts you make to meet with the opposing party and keep notes about any agreement that you made when you met with the opposing party. You must prepare a meet-and-confer statement with your motion, and these notes will help you prepare that statement.

After you have met and conferred or attempted to meet and confer with the opposing party, you must contact the applicable judge's courtroom deputy. If you are filing a nondispositive motion, you must contact the magistrate judge's courtroom deputy and ask for a hearing date. If you are filing a dispositive motion, you must contact the district judge's courtroom deputy. The district judge's courtroom deputy will either give you a hearing date or will instruct you when to file your motion and supporting documents.

The parties may jointly request that a motion be decided without a hearing. A judge may also cancel a hearing on his or her own and decide the motion on the written papers alone. If the motion will be decided without a hearing, the motion must be filed and served as if the hearing date were still in effect. This means you should calculate the filing deadlines under Local Rule 7.1 based on the hearing date you originally received, even if the hearing is canceled before your motion is filed.

Under Local Rule 7.3, you may request that the hearing be held remotely by (a) filing and serving a letter requesting a remote hearing, and (b) contacting the judge's

courtroom deputy after the letter is filed to coordinate the request. Generally, the party who requested the remote hearing must make the arrangements for the conference call and notify the presiding judge and all parties of the arrangements.

What is a notice of hearing?

A notice of hearing must be filed and served with every motion, even if no hearing is scheduled when the motion is filed. The notice of hearing informs all parties in the lawsuit what kind of motion is being filed, whether a hearing date is scheduled, and if so, the hearing date and location of the hearing. A notice of hearing form is available on the Court's website.

What are affidavits and exhibits?

Affidavits and exhibits provide support for your motion. Affidavits are written statements made by a witness who swears to the truth and the statements and whose signature on the document is verified by a notary public. Exhibits are documents or other materials that are relevant to your motion or affidavits and are filed along with those documents. You should cite to any affidavits and exhibits that you file along with your memorandum in that memorandum. Under Local Rule 7.1(l), you cannot attach the affidavits and exhibits you are using to support your motion to the motion itself; instead, such affidavits and exhibits must be filed separately. Exhibits must be accompanied by an index, either with a supporting affidavit or a separate title page that identifies the exhibits.

What is a meet-and-confer statement?

When you file certain kinds of motions, you must also file and serve a meet-and-confer statement. Under Local Rule 7.1(a), the statement must (1) certify that the moving party met and conferred with the opposing party; and (2) state whether the parties agree on the resolution of all or part of the motion and, if so, whether the agreed-upon resolution should be included in a court order. A meet-and-confer statement form is available on the Court's website. Local Rule 7.1 sets forth the types of motions for which a meet-and-confer statement is required.

What if I need more time to respond to a motion?

Rule 6(b) of the Federal Rules of Civil Procedure allows the presiding judge to give a party extra time to respond to a motion if there is good reason. Under Rule 6(b), the presiding judge can grant extra time with or without a motion or notice to the other parties if a party makes the request *before* the original deadline passes. If the party waits until *after* the original deadline passes before asking for extra time, he must file a motion and show that excusable neglect caused the party to miss the deadline.

How do I serve motions, briefs, and other related documents?

You must give the other parties to your lawsuit a copy of every document that you file with the Clerk's Office. You must also serve a copy of your disclosures and discovery responses to the other parties. Disclosures and discovery responses are not filed with the Clerk's Office. The rules for serving the original summons and complaint are different

from the rules for serving other documents. The rules for serving papers other than the summons and complaint are generally much simpler.

Even if you are a plaintiff whose IFP application was granted, you need to serve documents, other than the original summons and complaint, on the defendant(s) yourself. Rule 5 of the Federal Rules of Civil Procedure establishes the rules for serving documents other than the original complaint. If the party you have served has a lawyer, then you must serve that party by serving their lawyer. If the other party does not have a lawyer, then you need to follow the rules for serving an unrepresented party that are described below.

Rule 5 allows you to serve documents on the attorney or party (if not represented) by any of the following methods:

- Handing it to the person (you cannot do this yourself, but may use any person 18 years old or older and not a party to the lawsuit);
- Leaving it at the person's office with a clerk or other person in charge, or if no one is in charge, by leaving it in a conspicuous place in the office (again, you cannot do this yourself);
- If the person has no office, or the office is closed, leaving it at the person's home with someone of suitable age and discretion who lives there (again, you cannot do this yourself);
- Mailing a copy to the person's last known address;
- Delivering a copy by any other method that the person you are serving has consented to in writing; or
- Sending it by electronic means on the Court's electronic case filing system, CM/ECF, if the person has consented to receive electronic service. All attorneys are required to file and receive service by CM/ECF, unless specifically exempted by the Court. You may check with the Clerk's Office to

determine whether other unrepresented parties have consented to electronic service.

For all the documents you file and serve on other parties, you need to file and serve a certificate of service, similar to the proof of service you filed for the complaint. Certificate of service forms are available from the Clerk's Office or on the Court's website. Please note that documents that were filed and served using the Court's electronic filing system (CM/ECF) do not require the filing of a separate certificate of service.

How can I make sure that I know about everything that happens in my lawsuit?

Although every document that is filed in a lawsuit must be served on all of the parties, sometimes mistakes are made, or documents get lost in the mail. For this reason, it is a good idea to check the docket every so often to make sure that (1) every document you filed has been entered on the docket; (2) you have received copies of every document that everyone else has filed; and (3) you are aware of every order that the Court has issued. If you have been granted permission to file electronically, you will receive e-mail notification and electronic access to each new document or entry filed on the docket. To see the docket, however, you must either visit the Clerk's Office and use the public computer terminals, or use PACER, which stands for "Public Access to Court Electronic Records." Anyone can obtain a PACER login and password, but PACER charges, in most circumstances, $.10 for every page you download. If you are not filing electronically or do not have a PACER account, you can call or visit the Clerk's Office for information about the docket in your case.

If you have a question about the schedule for a hearing, you should call the specific judge's chambers. Otherwise, calls to the judge's chambers are strongly discouraged, because neither the judge nor the judge's staff is allowed to give you legal advice or to talk with you about the merits of your case outside of the courtroom.

CHAPTER FOUR: DISCOVERY

The defendant has filed an answer — what happens next?

The magistrate judge assigned to your case will likely schedule a case management conference. A case management conference is a meeting at which the judge, with the help of the parties, sets a schedule for the case. Not all cases will have an initial case management conference, but if one is scheduled, it will be held a short time after the answer is filed. At the initial case management conference, the magistrate judge will usually set a schedule for completing discovery (that is, exchanging information that could be used as evidence), a deadline for filing motions, and a trial ready date. Additional case management conferences may be held to review the progress of the case and change the schedule, as necessary.

How should I prepare for the case management conference?

The magistrate judge will send out a notice setting the date for the initial case management conference. Pay close attention to the directions in the notice because it will state what each party must do and send to the judge before the conference. Generally,

the parties will be asked to prepare and file a report, sometimes called a Rule 26(f) report. Rule 26(f) may be found in the Federal Rules of Civil Procedure.

If the parties have a Rule 26(f) conference, Local Rule 26.1(a) directs the parties to discuss (1) the matters specified in Federal Rule of Civil Procedure 26(f); (2) the matters specified in the notice of the initial pretrial conference and any other applicable order; and (3) the matters specified in this District's Rule 26(f) Report. Each party may also be asked to submit a letter that will remain confidential between the magistrate judge and that party, describing the party's position on settlement of the case. After the initial pretrial conference, the magistrate judge will issue a scheduling order to set the various deadlines for managing your case.

Once the magistrate judge issues a scheduling order, the discovery schedule cannot be extended or modified without making a written motion and showing good cause for the extension. This procedure is described in Local Rule 16.3.

What is discovery?

"Discovery" is the process by which parties exchange information about the issues in their case before trial. The different ways to ask for and get this information are described below. These techniques include depositions, interrogatories, requests for document production, requests for admission, and physical or mental examinations.

"Depositions" are question-and-answer sessions held before trial, in which one party to a lawsuit asks questions to another person about the issues raised in the lawsuit. The answers to those questions may be used as evidence later in the case.

"Interrogatories" are written questions served on another party to a lawsuit, which must be answered in writing and under oath.

"Requests for document production" are written descriptions of documents you think another party has in their possession that would provide information about the issues in the lawsuit and requests that they provide those documents to you.

"Requests for admissions" are statements of fact you believe are true and requests that the other party admit that those statements are true or admit the application of any law to any fact. Admissions may help to clarify or narrow the aspects of the lawsuit that remain in dispute.

A mental examination is an examination of a person's mental condition by a mental health expert.

A physical examination is an examination of a person's physical condition.

Are there any limits to discovery?

Yes. Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, any party may ask for another party to disclose any non-privileged matter that is relevant to the claim or defense of any party to the lawsuit. In other words, you may get (and, if asked, you must provide) any material that is reasonably likely to lead to the discovery of admissible evidence. A judge can limit the use of any discovery method, however, if the judge finds that:

- The discovery sought unreasonably seeks information that has already been provided or that is already available from some other source which is more convenient, less burdensome, or less expensive;

- The party seeking discovery has already had enough chances to get the information sought; or

- The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount of money the parties are fighting over, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues.

Sometimes you might request information from another party and get a response that says you have asked for privileged information or information you cannot have because it is protected by a confidentiality agreement. A privileged matter is something that the law protects as confidential, and it does not need to be disclosed unless the judge orders otherwise. Typical privileges include the lawyer-client privilege, the work product privilege (generally, material an attorney prepared in anticipation of litigation), or the doctor-patient privilege.

In addition to certain categories of information that may be limited, there are some limits to how many requests for information you can make. These limits are discussed in the more detailed explanation of each method of discovery below.

When can discovery begin?

Rule 26(d) of the Federal Rules of Civil Procedure states that discovery cannot begin until the parties have had their initial pretrial conference, *unless*:

- Earlier discovery is allowed by another part of the Federal Rules of Civil Procedure;

- A judge issues an order that lets you take earlier discovery; or

- All parties agree that discovery can be taken earlier.

Each party conducts discovery according to the same deadlines — that is, neither the plaintiff nor the defendant must wait for the other to complete the discovery process before he or she begins requesting information.

Is there anything I must give to the opposing party even if they do not ask for it?

Rule 26(a) of the Federal Rules of Civil Procedure lists three types of "disclosures" that you must provide to the other parties at different times during the course of the lawsuit, even if the other parties does not request the information. Those disclosures are (1) initial disclosures; (2) expert disclosures; and (3) pretrial disclosures. More information about each type of disclosure is provided below.

What are initial disclosures?

Initial disclosures must be served on the other parties by the deadline established in the scheduling order. Initial disclosures are not filed with the Clerk's Office. Initial disclosures are required in all cases, unless exempted by Federal Rule of Civil Procedure 26(a)(1)(B) or otherwise ordered by the Court.

Content: Unless your case is one of the categories listed in Rule 26(a)(1)(B), you must serve the following information on the other parties in your lawsuit:

- The name and, if known, the address and telephone number of each individual likely to have information that you may use to support your claims and defenses, unless that information will be used solely for impeachment. You also must identify the type of information that each individual has. "Information used solely for impeachment" is information that is used only to attack the believability or credibility of a witness, rather than information used to prove your position directly.

- A copy, or a description by category and location, of all documents or other things that you have in your possession or control that you may use to support your claims or defenses, unless they will be used solely for impeachment.

- A calculation of any category of damages you claim to have suffered. You also must make available to the other parties, for inspection and copying, all documents and other things that support your calculation, including documents and other things showing the nature and extent of your injuries. You do not, however, have to disclose documents and other things that are privileged or otherwise protected from disclosure.

- You must also make available to the other parties, for inspection and copying, any insurance agreement which may apply to any award of damages in the lawsuit.

Form: Under Rule 26(a)(4) and (g) of the Federal Rules of Civil Procedure, the initial disclosures must be made in writing and be served on all the other parties to the lawsuit. They must be signed by you and must include your address. By signing the disclosure, you are certifying to the Court that the disclosure is complete and correct as of the time it is made, to the best of your knowledge.

Additional requirements: Your initial disclosures must be based on the information that is reasonably available to you. You must serve your initial disclosures even if:

- You have not fully completed your investigation of the case;

- You think another party's initial disclosures are inadequate; or

- Another party has not made any initial disclosures.

Rule 26(e)(1) of the Federal Rules of Civil Procedure imposes on you a duty to supplement your initial disclosures if you learn that the information you disclosed is

incomplete or incorrect, if the additional information has not otherwise been made known to the other parties during the discovery process or in writing.

What are expert disclosures?

In an "expert disclosure," you reveal to the other parties the identity of any expert witness you may use at trial. Expert disclosures are required by Rule 26(a)(2) of the Federal Rules of Civil Procedure. An "expert witness" is a person who has scientific, technical, or other specialized knowledge that can help the judge or the jury understand the evidence.

If you hired or specially employed the expert witness to give testimony in your case, or if the expert witness is your employee and regularly gives expert testimony as part of his or her job, the disclosure also must be accompanied by a written report prepared by and signed by the expert witness, unless the presiding judge orders otherwise, or the parties stipulate otherwise. This written report is usually referred to as an "expert report." You do not file your expert disclosures or expert report with the Clerk's Office; instead, you must provide it to the opposing party or parties.

Timing: Expert disclosures must be made by the date identified in the Scheduling Order or other applicable order. If the judge does not set a date for expert disclosures and the parties do not agree to a date for expert disclosures, the disclosures must be made at least 90 days before the trial date. If your expert disclosures are intended solely to contradict or rebut another party's previously disclosed expert disclosures, your

disclosures must be made no later than 30 days after the disclosure made by the other party.

Content: Under Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, the expert report must contain:

- A complete statement of all opinions the expert witness intends to give at trial and the basis and reasons for those opinions;
- The facts or data considered by the expert witness in forming those opinions;
- Any exhibits to be used as a summary of, or in support of, the opinions;
- The qualifications of the expert witness, including a list of all publications authored by the witness within the preceding 10 years;
- A list of any other cases during the previous 4 years in which the witness has testified as an expert at trial or by deposition; and
- The compensation to be paid to the expert witness.

Form: Under Rules 26(a)(4) and 26(g) of the Federal Rules of Civil Procedure, expert disclosures must be made in writing and must be served on all the other parties to the lawsuit. They must be signed by the party and the expert witness and must include the party's address. By signing the disclosure, you are certifying to the Court that the disclosure is complete and correct as of the time it is made, to the best of your knowledge.

Additional requirements: Under Rule 26(e)(1) of the Federal Rules of Civil Procedure, you have a duty to supplement your expert disclosures if you learn that the information you disclosed is incomplete or incorrect, and if the additional information has not otherwise been made known to the other parties during the discovery process or in writing. If your expert is required to prepare an expert report under Rule 26(a)(2)(B),

this duty extends to supplementing both the expert report and any information provided by the expert during a deposition. Any supplement to your expert disclosures must be served no later than the time your pretrial disclosures are due under Rule 26(a)(3).

What are pretrial disclosures?

In a "pretrial disclosure," each party files with the Clerk's Office and serves on the other parties certain kinds of information about evidence he may present at trial. Evidence that will be used solely for impeachment is not included. The requirements for pretrial disclosures are governed by Rule 26(a)(3) of the Federal Rules of Civil Procedure.

Timing: Pretrial disclosures must be made at least 30 days before trial, unless otherwise ordered by the Court.

Content: The following information about evidence you may use at trial should be included in your pretrial disclosures:

- The name and, if not previously provided, the address and telephone number of each witness. You must identify separately the witnesses you intend to present at trial and those whom you may present at trial if the need arises.
- The identity of those witnesses whose testimony you expect to present at trial by means of a deposition, rather than having the witness testify in person. You must also serve a transcript of the relevant portions of the deposition testimony.
- An appropriate identification of each document or other exhibit, including summaries of other evidence that you may use at trial. You must identify separately the exhibits you intend to use at trial and those you may use if the need arises.

Form: Under Rule 26(a)(4) and 26(g) of the Federal Rules of Civil Procedure, pretrial disclosures must be made in writing and must be served on all the other parties to the lawsuit. They must be signed by the party and include the party's address. By

signing the disclosure, you are certifying to the Court that the disclosure is complete and correct as of the time it is made, to the best of your knowledge.

How do I get documents from an opposing party to look at or use as evidence?

Under Rule 34(a) of the Federal Rules of Civil Procedure, any party can serve on another party:

- A request for production of documents or electronically stored information, which can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form, seeking to inspect and copy, test, or sample anything which is in that party's possession, custody or control;

- A request for production of tangible things (for example, physical items that are not documents), seeking to inspect and copy, test, or sample anything which is in that party's possession, custody, or control; or

- A request for inspection of property, seeking entry onto property controlled or possessed by that party for the purposes of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object on that property.

The request must list the items that you want to inspect and describe each item in enough detail that it is reasonably easy for the party to figure out what you want. The request also must specify a reasonable time, place, and manner for making the inspection and performing any related acts such as photocopying the materials. Frequently, the parties will agree to send each other copies of the requested documents, rather than providing a time for inspection and copying.

You should number each single document request, or request for particular categories of documents, separately. Under Rule 26(g)(1) of the Federal Rules of Civil Procedure, you must sign the requests for document production and provide your

address, e-mail address, and telephone number. By signing the requests for document production, you are certifying to the Court that you have a good reason to seek the documents and that you are not making your request in order to harass the opposing party. A request for document production from a party to the lawsuit may be served by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including service by mail.

How do I answer a request for document production served on me?

Under Federal Rule of Civil Procedure 34(b)(2), the party who has been served with the request for document production must provide a written response within 30 days after the request is served, unless the Court has set a shorter or longer time for responding.

The response must state, with respect to each item requested, that you will allow inspection of the requested documents or will send copies of those documents, unless you make an objection to the request. If there is an objection, you must state the reasons for the objection. If you object to only part of the request, you must state your objection to that part and permit inspection or send copies of the rest. A response may state an objection to a form of producing electronically stored information, and the party must state the form he intends to use.

A party who produces documents for inspection or produces electronically stored information must either:

- Produce the documents as they are kept in the usual course of business;

- Organize and label the documents to correspond with the categories in the request;
- If the request did not contain a specific form for producing electronically stored information, produce the information in the form in which it is ordinarily maintained or in a reasonably usable form (although a party need not produce the same electronically stored information in more than one form).

If, after you have responded to a document request, you discover more documents (or create more documents) that respond to the request, you need to provide those documents as well. Rule 26(e)(1) of the Federal Rules of Civil Procedure requires parties to supplement their responses to a request for document production if they learn that the response is incomplete or incorrect.

How do I get documents from persons who are not parties to the lawsuit?

If the person or business that you want documents from is *not* a party to the lawsuit, you need to follow Rule 34(c) and Rule 45 of the Federal Rules of Civil Procedure. Under Rule 34(c), a nonparty may be compelled to produce documents and tangible things by following the procedures set forth in Rule 45 of the Federal Rules of Civil Procedure. Rule 45 sets out the rules for issuing, serving, protesting, and responding to subpoenas, including subpoenas duces tecum. A subpoena duces tecum is a document issued by the Clerk's Office that requires a person to produce documents or submit to an inspection at a specific time and place.

The same form is used for regular subpoenas and for deposition subpoenas. If you want a non-party to produce documents, electronically stored information, or tangible things at their deposition, or to permit inspection of premises, you only need to fill out one subpoena form directing that person to appear at the deposition and to bring certain

items with them. You may also serve a deposition subpoena and a subpoena duces tecum separately, so that the person will appear for a deposition at a certain time and produce documents at a different time. You may also choose to serve only a deposition subpoena, or only a subpoena duces tecum, depending on what information you need for your lawsuit.

You can obtain a subpoena from the Clerk's Office for any production of documents or inspection for a case that is pending in this Court. If the subpoena will be issued by a non-attorney, the Clerk must sign it.

Federal Rule of Civil Procedure 45(c) explains where the subpoena may command a person to either appear or produce other discovery. A subpoena may command a person to attend a trial, hearing, or deposition when:

- the trial, hearing, or deposition will take place within 100 miles of where the person resides, is employed, or regularly transacts business in person;
- the trial, hearing, or deposition will take place within the state where the person resides, is employed or regularly transacts business in person *and* the person is a party or a party's officer; or
- the trial, hearing, or deposition will take place within the state where the person resides, is employed, or regularly transacts business in person *and* the person is commanded to attend a trial and would not incur substantial expense.

A subpoena may command the production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person. A subpoena may also command the inspection of premises at the premises to be inspected.

How do I serve a subpoena?

Under Rule 45(b)(1) of the Federal Rules of Civil Procedure, a subpoena may be served by any person who is at least 18 years old and not a party to the lawsuit. Service requires delivering a copy to the named person, and if that person's attendance is required, paying the fees for one day's attendance and the mileage allowed by the law. If the subpoena commands the production of documents, electronically stored information, tangible things, or inspection of premises before trial, a notice must be served on each party before the subpoena is served.

What is a deposition and how does it work?

A deposition is a question-and-answer session done during the discovery process. One party to a lawsuit asks another person, who is under oath, questions about issues raised in the lawsuit. Rule 30 of the Federal Rules of Civil Procedure explains the procedures for taking a deposition.

When you ask someone questions in a deposition about his or her knowledge of the case, that process is called "deposing the person" or "taking a deposition." The person who answers the questions in a deposition is the "deponent." The deponent answers all questions under oath, which means that he swears that all the answers are true. The deponent can be any person who may have information about the lawsuit, including eyewitnesses, expert witnesses, or another party to the lawsuit.

The questions and answers in a deposition must be recorded. The party taking the deposition (the one asking the questions and seeking information) may choose the

method for recording the deposition. The deposition can be recorded in a written record or videotaped. The written record of a deposition is called the "transcript" of the deposition. The person who records what everyone says is usually referred to as a "court reporter." Rule 30(b) of the Federal Rules of Civil Procedure explains the ways the deposition can be recorded, the role of a court reporter in recording the deposition, and other important details. The person taking the deposition must pay the cost of recording the deposition.

Do I need the judge's permission to take a deposition?

You usually do not need the judge's permission to take a deposition. However, under Rule 30(a) of the Federal Rules of Civil Procedure, you do need the judge's permission to take a deposition under any of the four following situations:

- The deponent is in prison.
- The plaintiff or defendant — or the plaintiffs and defendants as a group, if there is more than one plaintiff or defendant — seeks to conduct more than ten depositions.
- The deponent has already been deposed in the same case, and the other parties have not agreed in writing that the deponent may be deposed again.
- You want to take a deposition before the judge issues a Pretrial Scheduling Order, and the other parties will not agree in writing to let you take the early deposition. However, this exception has its own exception; you may not need to get the judge's permission for an early deposition if your notice of deposition contains a certification with supporting facts that the deponent is expected to leave the United States and therefore will be unavailable for deposition in this country after the Pretrial Scheduling Order is issued.

How do I arrange for a deposition?

First, you should consult with the attorneys representing the other parties to choose a convenient time and location for the deposition. Once you have determined the time and location for the deposition, you must give written notice of the deposition to the deponent and to all of the other parties in your lawsuit in a reasonable amount of time before the deposition. This document is referred to as the "notice of deposition." You must serve the notice of deposition on all the parties and the deponent, even if you have already discussed the deposition with all involved. The notice of deposition may be served by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including service by mail. You should not file the notice of deposition with the Clerk's Office.

What do I say in a notice of deposition?

Under Rules 30(b) and 26(g) of the Federal Rules of Civil Procedure, the notice of deposition must include:

- The time and place where the deposition will be held.
- The name and address of the deponent, if known. If you do not know the name of the deponent, you must describe the person well enough so that the other side can identify the person you wish to depose (for example, you may not know a witness's name, but know that he was "the store manager who was on duty after 6:00 p.m. on June 16, 2014.") If you do not know which person at a business or government agency has the information you need, Rule 30(b)(6) of the Federal Rules of Civil Procedure allows you to name the business or government agency as the deponent and describe the subjects you want to discuss at the deposition. The business or government agency then must tell you the persons who will testify on its behalf and the subjects on which each person will testify.
- The method by which the deposition will be recorded (for example, whether by video deposition or by a court reporter).

- Your address and signature.

When do I need to get a subpoena for a deposition?

You do not need a subpoena to depose a party; you can just go through the procedure to file a notice of deposition described above. If the deponent is not a party to the lawsuit (known as a "non-party deponent" or a "non-party witness"), you must serve the deponent with a subpoena. A subpoena is a document issued by the Clerk's Office that requires a person to appear for a court proceeding at a specific time and place. Rule 45 of the Federal Rules of Civil Procedure discusses the requirements for subpoenas.

You can get a blank subpoena form from the Clerk's Office or on the Court's website for any deposition relating to a case pending in this Court. Unrepresented parties must have the subpoena signed by a deputy clerk in the Clerk's Office. A subpoena must be hand-delivered to the deponent, along with the fees and mileage allowance required by law. Under 28 U.S.C. § 1821, a non-party deponent must be paid $40 per day for deposition testimony. A subpoena may be served on the deponent by any person who is at least 18 years old and not a party to the lawsuit.

If the non-party deponent travels to the deposition by mass transit, such as by bus or by train, you also must pay the deponent's actual travel expenses, as long as he takes the shortest practical route and travels at the most economical rate reasonably available. You do not have to pay the travel expenses until the deponent provides you with a receipt or other evidence of the actual travel cost.

If the non-party deponent does not travel to the deposition by bus, train, or other common carrier, then you must pay a mileage fee. The mileage fee is set in 28 U.S.C.

§ 1821 and 41 C.F.R. § 301-10.303 and is available at www.gsa.gov. You must also pay any necessary toll charges and parking fees that were incurred when attending the deposition.

What does it mean if the deponent files a motion to quash the subpoena?

After being served with a subpoena, a person can ask that the judge "quash" the subpoena. If the judge quashes the subpoena, the deponent does not have to appear for the deposition at the time and place identified on the subpoena.

Under Rule 45(d)(1) of the Federal Rules of Civil Procedure, you are required to take reasonable steps to avoid imposing an undue burden or expense on any person that you subpoena for a deposition. If the deponent thinks there is something improper in your subpoena, he can try to get the judge to quash it for that reason. In addition, under Rule 45(d)(3)(A)(ii), if your deposition subpoena requires a non-party deponent to travel beyond the geographical limits outlined in Rule 45(c) (that is, within 100 miles of the non-party deponent's home or business address) and the deponent objects, the judge *must* quash the subpoena.

Can I ask a deponent to bring documents to a deposition?

If the deponent is a party to the lawsuit, you may ask the deponent to bring documents to a deposition. Rule 30(b)(2) of the Federal Rules of Civil Procedure allows you to serve a request for document production along with the notice of deposition. The rules for requests for document production are found in Rule 34 of the Federal Rules of Civil Procedure. Requests for document production are discussed above.

How long can a deposition last?

Under Rule 30(d)(1) of the Federal Rules of Civil Procedure, a deposition may last no longer than one day for seven hours. If a party thinks the deposition should go more than seven hours, he must get authorization from the judge. This is done by filing a motion, or, if all parties agree to a longer deposition, by filing a stipulation (agreement) for the judge's approval.

Does the deponent have to answer all questions?

In general, a deponent must answer all questions, even if there is an objection to the question. Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, you may ask questions about any non-privileged matter that is relevant to the claim or defense of any party. A question is relevant if it appears reasonably calculated to lead to the discovery of admissible evidence.

Under Federal Rule of Civil Procedure 30(c)(2), the deponent (usually through his or her attorney, if the deponent is represented) is entitled to state any legal objections he has to any question. You may, for example, object to the form of a question (such as, the question is vague, or the question is really several questions strung together, or the question is argumentative), or you may object that the question asks for information that you are not obliged by law to give. In most cases, the deponent still must answer the question. Under Rule 30(c)(2), the deponent may refuse to answer a question *only* in the following three situations:

- When answering would violate a confidentiality privilege, such as the attorney-client or doctor-patient privilege;

- When the judge has already ordered that the question does not have to be answered; or
- To allow the objecting party to file a motion under Rule 30(d)(3).

Federal Rule of Civil Procedure 30(d)(3) allows a deponent or a party to file a motion arguing that the deposition should be stopped, that certain questions should not be answered, or that some other limitation should be placed on the way in which the deposition is being taken. The deponent or the party making the motion must show that the deposition is being conducted in bad faith or in an unreasonable manner to annoy, embarrass, or oppress the deponent or party.

Who can ask the deponent questions?

Under Rule 30(c) of the Federal Rules of Civil Procedure, any party may ask questions of the deponent at the deposition in the order that they would at trial. In general, this means that the party who noticed the deposition asks all their questions first. Then, any other party may ask questions, including the attorney for the person being deposed.

Can the deponent change his or her deposition testimony after the deposition?

Under Rule 30(e) of the Federal Rules of Civil Procedure, once the court reporter notifies the deponent that the deposition transcript is complete, the deponent then has 30 days to review the deposition transcript and to make changes. To make changes to the deposition, the deponent must sign a statement listing the changes and the reasons for

making them. The original transcript is not actually changed, but the court reporter must attach the list of changes to the official deposition transcript.

What is an interrogatory?

An interrogatory is another way to gather information about the facts in your case. Interrogatories are written questions sent by one party to any other party to the lawsuit, and these questions must be answered under oath. Unlike depositions, which can be taken of any person with knowledge about a case, interrogatories can only be served on parties to the lawsuit. Rule 33 of the Federal Rules of Civil Procedure provides the rules for serving interrogatories. Interrogatories may be served by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including service by mail.

Do I need the Court's permission to serve interrogatories?

Under Rule 33(a)(1) of the Federal Rules of Civil Procedure, you do not need the judge's permission to serve interrogatories unless you have already served 25 or more interrogatories on the same party. If you want to serve more than 25 interrogatories on a party, you must file a motion asking for the judge's permission. Note that you can serve different interrogatories on different parties. In addition, parties cannot get around the 25 interrogatories limit by putting several questions all together. Each question is one interrogatory. If your questions have separate subparts, then each subpart is counted as a separate interrogatory.

What kind of questions can I ask in interrogatories?

Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, you may ask questions about any non-privileged matter that is relevant to the claim or defense of any party. A question is relevant if it appears reasonably calculated to lead to the discovery of admissible evidence.

Are there any requirements for the form of interrogatories?

There are requirements for the form of interrogatories. You should write out each interrogatory in a separately numbered paragraph. Under Rule 26(g)(1) of the Federal Rules of Civil Procedure, you must sign the interrogatories and state your address, e-mail address, and telephone number.

How do I answer interrogatories served on me?

A responding party can answer the question or object to the question (or both). The party answering interrogatories must respond to interrogatories within 30 days. If a party needs more than 30 days to respond, she can ask the other party to agree to give her more than the 30 days provided for under Rule 33(b)(2) of the Federal Rules of Civil Procedure. Often, parties will agree to a reasonable extension of time. If the party that served the interrogatories will not agree to give the answering party more time, then the party that received the interrogatories must file a motion requesting additional time. Each interrogatory must be answered separately and fully in writing under oath unless it is objected to. Any objections also must be stated in writing and must include the reasons for the objection. If you object to only part of a question, you must answer the rest of the question.

Under Federal Rule of Civil Procedure 33(d), if the answer to an interrogatory can be found in your personal or business records or some other place that is available to you, then you must look for the answer. If the burden of finding the answer in those records would be about the same for you or for the party who served the interrogatories, you may simply answer the interrogatory by telling the other party about the records in which the answer can be found and then allow that party to look through those records. You must identify the records in sufficient detail to permit the party who served the interrogatories to locate and identify the records in which the answer can be found. You must also give the party who served the interrogatories a reasonable opportunity to review and copy those records. If a party responds to interrogatories with any objections, the party making the objections must sign the response with the objections. If the responding party does not have a lawyer, the party should sign. If a party responds to interrogatories with the substantive answer, the party must sign the answers even if the party has a lawyer.

Do I have to supplement my answers to interrogatories if I remember or learn something new?

If you have already answered an interrogatory, but later you learn something that changes your answer, you must let the other parties know by supplementing (adding to) your original answer. You can do this by sending a letter to the other parties that states which interrogatory you are supplementing and what new or different information you have. Rule 26(e)(1) of the Federal Rules of Civil Procedure imposes a duty on all parties

to supplement their answers to interrogatories if they learn that the response is incomplete or incorrect.

What is a request for admission?

A request for admission is a request to another party to agree to a fact that you believe to be true. To write a request for admission, write out a statement of fact you believe to be true, and ask the other party to admit that the statement is true. Or, write out the application of any law to any fact and ask the other party to admit that the law applies to the fact as you stated. Requests for admission can only be used with other parties to the lawsuit. If the other party admits to anything you requested under this procedure, the judge will treat that fact as having been proved.

Rule 36 of the Federal Rules of Civil Procedure establishes the requirements for requests for admission. Requests for admission may be served by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including service by mail. Each request for admission must be stated separately and should be numbered. Under Rule 26(g)(1) of the Federal Rules of Civil Procedure, you must sign the requests for admission and state your address, e-mail address, and telephone number.

How many requests for admission can I serve?

There is no limit to the number of requests for admission that you may serve, if the requests are not unreasonable, unduly burdensome, or expensive.

What happens if I do not respond to a request for admission in time?

The party who receives a request for admission has 30 days to respond under Rule 36(a)(3) of the Federal Rules of Civil Procedure. That time can be increased or decreased by agreement of the parties or if the presiding judge orders a different time for responding. If no response is served within 30 days (or the time otherwise set by the judge or by agreement), all the requests for admission are automatically considered to be admitted.

How do I respond to a request for admission served on me?

In general, when you answer a request for admission, you should write out each request for admission followed by your answer. An answer to a request for admission must either admit or deny the request or explain in detail the reasons why the answering party cannot truthfully admit or deny it. If you are unable to simply admit or deny a particular request, then you must admit the part that is true and deny (or explain why you cannot admit) the rest. In some cases, you may not know the answer. In those cases, you may answer that you do not have enough information or knowledge to admit or deny the request, and that, after a reasonable search for the information, you still do not have enough information to admit or deny the request.

Any matter that is admitted is treated as if it has been proved for the purpose of the rest of the lawsuit, unless the judge allows the answering party to withdraw or change the admission. An admission is only for the purposes of the present lawsuit and is not an admission for any other purpose. In other words, an admission in one lawsuit cannot be used against that party in any other lawsuit.

What if I do not want to admit to the truth of a request for admission?

Under Rule 37(c)(2) of the Federal Rules of Civil Procedure, if a party fails to admit a fact in a request for admission and the other party later proves that the fact is true, the requesting party may file a motion requesting the judge to order the answering party to pay the reasonable expenses incurred in making that proof, including attorney's fees. The judge will grant the motion unless she finds that:

- The request was objectionable under Rule 36(a);
- The admissions were not important;
- The party who did not admit the matter had reasonable ground to believe that he might prevail on that matter; or
- There was other good reason for the failure to admit.

After a party has responded to a request for admission, that party is under an ongoing duty to correct any omission or mistake in that response. If a party later obtains information that changes their response, Rule 26(e)(1) of the Federal Rules of Civil Procedure requires them to supplement that earlier response if it is incomplete or incorrect.

Can I be required to submit to a physical or mental examination?

When the mental or physical condition of a party (or a person under the custody or legal control of a party) is at issue in a lawsuit, Rule 35 of the Federal Rules of Civil Procedure allows the judge to order that person to submit to a physical or mental examination. The examination must be done by a suitably licensed or certified examiner,

such as a physician or psychiatrist. The party who requested the examination must pay for it.

Is a Court order required for a mental or physical examination?

A Court order is required for a mental or physical examination unless the other party agrees to the examination without an order. Unlike other discovery procedures, mental or physical examinations can be obtained only by filing a motion with the Court, or by agreement of the parties. If a motion is filed, all the ordinary rules for filing motions apply. The motion must contain:

- An explanation why there is a need for the examination;
- The time, place, manner, conditions, and scope of the proposed examination; and
- Identity of the person or persons who will conduct the examination.

What happens to the results of the examination?

If the Court orders a mental or physical examination, the party or other person who is to be examined has the right to request a detailed written report from the examiner explaining the examiner's findings, including the results of all tests made, diagnoses, and conclusions, together with similar reports of all earlier examinations of the same condition.

Because a medical or physical examination may raise new issues that the parties did not think of earlier, a party who has obtained an examination may also ask for related information. After the party who asked for the examination delivers reports to the party that opposed the examination, he may ask for any similar report of any examination that

party has about the same condition. If the person who was examined is not the party, the party need not produce any report that the party shows he is unable to obtain. If an examiner does not produce a report, the judge can exclude the examiner's testimony at trial. These requirements for examiner's reports also apply to mental or physical examinations that are agreed to by the parties, unless their agreement specifically states otherwise.

What can I do if there are problems with disclosures or discovery?

It is not uncommon for the parties to have disagreements about disclosures or discovery. There are several ways to get help from the presiding judge (usually the magistrate judge) when these disputes arise, and some of those ways are discussed below. First, however, you must try to resolve the dispute on your own, without the involvement of the Court. Under Local Rule 7.1(a), before filing a motion, you must meet and confer with the opposing party "in a good-faith effort to resolve" the discovery dispute.

What should I do if I believe a discovery request is inappropriate?

If you receive a discovery request and believe the discovery sought is inappropriate or you need more time to respond, you may file a motion for a protective order. Likewise, if you make a discovery request that the other party believes is too broad or asks for trade secrets or other confidential information, your opponent may file a motion for a protective order. A protective order is a Court order that protects a person or party from having to produce evidence that he should not have to turn over. For

example, a protective order may say that you do not have to respond to a discovery request that is overbroad or burdensome. The Federal Rules of Civil Procedure provide for protective orders under Rule 26(c). A motion for a protective order must be filed in either the court where the lawsuit is being heard or, if the motion involves a deposition, in the federal district court in the district where the deposition is to be taken.

A motion for a protective order must include:

- A certification that you have tried to confer in good faith with the other parties to resolve the dispute without help from the judge, or that you met together but were still unable to resolve it;
- An explanation of the dispute and what you want the judge to do; and
- An explanation of the facts and/or law that make it appropriate for the judge to grant your motion.

What do I do if the other party does not respond to my discovery request, or the response is inadequate?

When a dispute arises over disclosures, or over a response or a failure to respond to a discovery request, there are two types of motions that may be appropriate: a motion to compel, or a motion for sanctions. Before filing either type of motion, you must confer with the party (through the party's attorney) if you think he is refusing to cooperate and try to resolve the dispute on your own.

What is a motion to compel?

A motion to compel is a motion asking the judge to order a person to make disclosures, respond to a discovery request, or provide more detailed disclosures or a

more detailed response to a discovery request. Rule 37 of the Federal Rules of Civil Procedure explains the requirements for motions to compel.

How do I file a motion to compel?

Under Federal Rule of Civil Procedure 37(a)(2), a motion to compel a party to make disclosures or to respond to discovery must be filed in the court where the lawsuit is pending. A motion to compel a non-party to respond to discovery must be filed in the court in the district where the discovery is being taken. A party may move for discovery sanctions when the opposing party fails to respond to or supplement discovery requests. In addition to the filing requirements listed in LR 7.1(a)-(b), a motion to compel must include:

- An explanation of the dispute and what you want the judge to do;
- If the dispute involves discovery requests, the complete text of each disputed discovery request immediately followed by the complete text of the objections or disputed responses to that request; and
- An explanation of the facts and/or law that make it appropriate for the judge to grant your motion.

What kinds of things might a judge impose as a discovery sanction?

If the judge grants a motion for sanctions, she may issue an order that is appropriate to address the problem. Federal Rule of Civil Procedure 37(b)(2)(A) lists some of the types of orders that may be appropriate:

- An order resolving certain issues or facts in favor of the party who made the motion;

- An order refusing to allow the disobedient person to support certain claims or defenses or prohibiting that party from introducing certain evidence;

- An order striking certain documents or parts of documents from the case, staying the lawsuit until the order is obeyed, dismissing the lawsuit or any part of the lawsuit, or rendering a default judgment against the disobedient party; or

- An order holding the disobedient party in contempt of court for failing to obey an order, except an order to submit to a physical or mental examination.

In addition, if a party fails to make required disclosures under Federal Rule of Civil Procedure 26(a) or fails to supplement a prior response under Rule 26(e), that party cannot use such as evidence at the trial, hearing, or on any motion unless the failure to disclose was harmless. The judge may also order payment of reasonable expenses caused by the failure, inform the jury of the party's failure, or impose other sanctions.

CHAPTER FIVE: HEARINGS AND MOTIONS FOR SUMMARY JUDGMENT

What is a hearing?

A hearing is a formal court proceeding where the parties discuss issues with the judge and have their arguments on the important issues heard by the judge. Sometimes witnesses may testify or evidence may be presented, but that depends on the legal issues the judge is covering at the particular hearing.

What do I do before a hearing?

Before the hearing, take time to review all the papers that have been filed for the hearing. The judge will expect you to be able to answer questions about the issues that are being addressed at the hearing and about anything else that has been happening in

the lawsuit. Bring with you to court any papers that you might need to answer the judge's questions.

What does a courtroom look like?

Although each courtroom is slightly different, the courtroom is generally arranged as follows.

- In the front of the courtroom is a large desk area where the judge sits. This area is called "the bench."
- In front of the judge and over to one side is a chair where witnesses sit when they testify. This area is called the "witness box."
- In front of the judge, there will usually be a person seated in front of a small machine. This person is the court reporter. The court reporter uses the machine to create a record of everything that is said at the hearing. The judge may also use a digital recorder instead of a court reporter to record the hearing.
- There will often be another person seated in front of the judge. This person is the courtroom deputy, who assists the judge. If you need to show a document to the judge during a hearing, you should hand the document to the courtroom deputy, who will then hand it to the judge.
- There may be other court staff members seated off to the side.
- In the center of the courtroom in front of the bench is a stand with a microphone. This area is where lawyers, and parties who do not have lawyers, must stand when they speak to the judge.
- At one side of the courtroom, against the wall, there are two rows of chairs. This area is called the "jury box," where jurors sit during a trial. During a hearing, court staff members may be sitting in the jury box.
- In the center of the courtroom, there will be several long tables with several chairs around them. This area is where lawyers and the parties sit during a hearing and during trial. The plaintiffs sit at the table that is closest to the jury box. The defendants sit at the table next to the plaintiffs.

- In the back of the courtroom are several rows of benches where anyone can sit and watch the hearing or trial.

How should I behave at a hearing?

- When attending a hearing, it is customary to show respect for the court by dressing nicely and conservatively, as if you were going to a job interview.

- The judge will expect you to be on time. It is much better to arrive at the hearing a few minutes early than to arrive a few minutes late. Allow yourself plenty of extra time to get through security and find the correct courtroom.

- Often the judge has several short hearings scheduled around the same time. When you enter the courtroom, you should sit in the benches in the back of the courtroom until your case is announced. If your hearing is the only one, you may sit at the plaintiffs' or defendants' table in the center of the courtroom, instead of sitting in the benches at the back of the courtroom.

- When the judge enters the courtroom, you must stand and remain standing until the judge gives you permission to sit down, which usually happens when the judge sits down.

- When you hear your case announced, the judge will likely invite you to present your argument. Go to the stand with the microphone in front of the bench. You can bring with you any papers that you may need to refer to during the hearing. When you get to the stand, state your name, and indicate whether you are the plaintiff or the defendant. For example, "Good [morning or afternoon] Your Honor, my name is [your name] and I am the plaintiff in this case."

- When you speak to the judge, it is customary to refer to the judge as "Your Honor" instead of using the judge's name.

- When the judge asks questions, answer the questions completely and never interrupt the judge when she is speaking.

How does a motion hearing work?

If the judge is hearing a motion, the hearing usually goes through the following sequence of events. First, the party who filed the motion will argue why the motion

should be granted. Then, the opposing party will argue why the motion should be denied. Finally, the party who filed the motion has an opportunity to explain why he believes the opposing party's argument is wrong.

You should try not to repeat all the arguments that you made in your motion or opposition papers but instead simply highlight the most important parts.

It is not appropriate to make new arguments that are not in the papers you filed with the Court, unless you have a very good reason why you could not have included the argument in your papers.

You can refer to notes during your argument if you need to, but it is usually more effective to speak to the judge rather than read an argument that you have written ahead of time.

When one party is speaking, the other party should sit at the table. Never interrupt the other party. Instead, always wait your turn to speak. While waiting for your turn to speak, you may take notes to help you respond to what the other party says.

The judge may ask questions before you begin your argument and may also ask questions throughout your argument. If the judge asks a question, always stop your argument and answer the judge's question completely. When you are finished answering the question, you can go back and finish the other points you wanted to make.

How do I get a copy of the court reporter's transcript of a hearing?

If a court reporter was present at the hearing, then you may obtain a copy of the transcript by contacting the court reporter directly. You may contact the Clerk's Office

or look at the minute entry of the hearing (the Court's summary of the hearing) on the case docket to determine which court reporter attended the hearing and his or her contact information. If there was not a court reporter at the hearing, which is typical for hearings before magistrate judges, you may contact the magistrate judge's chambers and request that the recording of the hearing be transcribed. The Court will arrange for the transcription of the hearing, but you are responsible to pay for that service. The rates for purchasing transcripts are established by the Judicial Conference.

Once a transcript is prepared by a court reporter, the court reporter must file it with Clerk's Office. Most transcripts are filed on the Court's electronic case filing system, but access to that transcript from PACER is restricted for a period of 90 days under Local Rule 80.1 unless you purchase a copy of the transcript from the court reporter.

What is a Mediated Settlement Conference?

Under Local Rule 16.5, the Court may set a Mediated Settlement Conference before a magistrate judge. A Mediated Settlement Conference is a meeting between the parties and a magistrate judge, where the magistrate judge assists the parties in attempting to settle the case before trial. If you are notified of a settlement conference, you *must* attend. Anything you say to the magistrate judge during the settlement conference that you request to remain confidential will not be communicated to any other party at the settlement conference. Additionally, no communications that occur during the settlement conference can be disclosed to anyone outside the settlement conference without the consent of the party who made the statement or other communication. The

magistrate judge who holds the settlement conference will not be the same judge who tries the case if it goes to trial.

What is a motion for summary judgment?

A motion for summary judgment asks the Court to decide a lawsuit without having a trial because, based on all the evidence, there is no real dispute about the key facts. The Court does not need to have a trial if the parties agree about the facts, or if one side does not have any evidence to support his version of what happened. In that case, the judge can decide the issue based on the papers that are filed by the parties.

Summary judgment will be granted only if the evidence is so one-sided that a jury could not reasonably find in favor of the opposing party. In deciding a motion for summary judgment, the judge must consider all of the admissible evidence from both parties. Because summary judgment means that there is no chance to hear live witnesses and decide who is credible, the judge must consider evidence in the light most favorable to the party that does not want summary judgment. That means that if evidence could be interpreted in many ways, the judge must interpret it in the way that favors the party who opposes summary judgment.

If a judge grants a motion for summary judgment, the lawsuit is over as to the issue on which summary judgment was granted. If the judge denies a motion for summary judgment, the case will go to trial, unless the parties decide to settle the case. By denying summary judgment, a judge does not decide that she believes one side over

the other. Rather, denying summary judgment means that there is a real dispute about the facts that will have to be decided in a trial.

Rule 56 of the Federal Rules of Civil Procedure explains the requirements for filing motions for summary judgment. A motion for summary judgment may be directed at ending the whole lawsuit, or only at dismissing one or more individual claims. A motion for summary judgment may also be brought to decide if the defendant is liable (that is, violated the law), even if there is still a dispute over the amount of money or other kinds of damages that the plaintiff should get.

When can a motion for summary judgment be filed?

Under Federal Rule of Civil Procedure 56(b), unless the judge sets a different deadline in a scheduling order or other order, any party may file a motion for summary judgment at any time until 30 days after the close of all discovery. The rules for filing dispositive motions in Local Rule 7.1(c) apply to motions for summary judgment. As a practical matter, parties rarely file a motion for summary judgment until they have taken all discovery, unless they have a very good reason to seek summary judgment earlier. Most motions for summary judgment rely heavily on evidence obtained in discovery.

What if my opponent files a motion for summary judgment before I complete my discovery?

If the opposing party files a motion for summary judgment before you have finished discovery, and you need more discovery in order to show why summary judgment should not be granted, under Rule 56(d) of the Federal Rules of Civil

Procedure, you may respond to the summary judgment motion by filing an affidavit or declaration that you are unable to present facts essential to justify your opposition to the summary judgment motion. After filing your affidavit or declaration under Rule 56(d), the court may: (1) defer considering your motion or deny it; (2) allow you time to conduct discovery or obtain affidavits or declarations; or (3) issue any other appropriate order. In order for the court to allow you to conduct additional discovery, you must show what specific facts you need, why those facts will defeat summary judgment, and why you need discovery to get those facts.

Under what circumstances is a motion for summary judgment granted?

Under Federal Rule of Civil Procedure 56(a), the judge will grant a motion for summary judgment if the evidence presented by the parties in their papers shows that there is no real dispute about any material fact (in other words, the evidence that actually matters all leads to the same conclusion).

What evidence does the judge consider for summary judgment?

The presiding judge must consider the admissible evidence cited by the parties for or against the motion for summary judgment but may also consider other materials in the record. The judge does not have to search for other evidence that may have been provided by you at some other point in the case. The judge also does not have to look at any evidence that is not mentioned in your briefs (also called memoranda of law). Therefore, you should file copies of all evidence that you want the judge to consider and refer to that evidence in your papers. Even if you have already filed the same evidence

with the judge in another matter, you must file it with your summary judgment motion (or opposition to summary judgment) as well. In addition, when you cite to a document, you should point out the exact page and line of the document where the judge will find the information that you think is important. You should remember that by making it easier for the judge to find this material, you are ensuring that this material receives the fullest consideration possible.

Every fact that you rely upon must be supported by evidence. It is not enough to repeat your opinion that a fact is true or to point to arguments you have written about in other papers you filed earlier; you need to show the judge the admissible evidence that supports what you have said.

Affidavits or declarations as evidence on summary judgment.

Affidavits are written statements of fact. They are written by an actual witness to those facts and are signed under oath. An affidavit must be signed before a notary public. A declaration is also a written statement of fact and is signed under penalty of perjury. Penalty of perjury means that a person could be prosecuted for lying under oath. (See 18 U.S.C. § 1623 for more information on perjury.) Either affidavits or declarations may be used as evidence in supporting or opposing a motion for summary judgment. In a general sense, they are written versions of what a person would testify to if they were in court on the witness stand. Rule 56(c) of the Federal Rules of Civil Procedure explains how affidavits and declarations are used for summary judgment. According to Rule 56(c)(4), any affidavits or declarations submitted by the parties on summary judgment must:

- be made by someone who has personal knowledge of the facts contained in the written statement;
- state facts that are admissible in evidence; and
- show that the person making the statement is competent to testify to the facts contained in the statement.

All documents referred to in an affidavit or declaration must be attached to it as exhibits.

Hearsay

Generally, portions of a declaration or affidavit that are based on hearsay may not be used for summary judgment and will be disregarded by the judge. Hearsay is the report of another person's words or certain actions by a witness to those words or actions, offered to prove the truth of the words or actions. For example, a person swearing that they were told by someone else that the plaintiff hit the defendant first would be hearsay. Similarly, a person stating in an e-mail that they heard from someone else that the plaintiff hit the defendant first would also be hearsay.

However, there are many exceptions to this prohibition on hearsay. The rules on the use of hearsay statements can be found in Rules 801 through 807 of the Federal Rules of Evidence. Remember, if the hearsay would not be admissible in a trial, then you cannot use the hearsay evidence for summary judgment.

Authentication

Some of your evidence may be in the form of documents such as letters, records, emails, and contracts. Those documents are "exhibits" to your motion for summary judgment. Attaching a document to your papers does not make it admissible. Again,

documents can be hearsay too, so the hearsay rules in Rules 801-807 of the Federal Rules of Evidence apply. In addition, even if a document is admissible under the hearsay rules, a document may not be admissible for other reasons. For example, any exhibits that are submitted as evidence must be authenticated before they can be considered by the jury.

Rules 901 and 902 of the Federal Rules of Evidence discuss the requirements for authentication. Generally, a document is authenticated either by:

- Submitting a statement under oath from someone who can testify from personal knowledge that the document is authentic (that is, it is a real, genuine document); or
- Demonstrating that the document is self-authenticating, as described in Rule 902 of the Federal Rules of Evidence.

What is a final pretrial conference?

At a final pretrial conference, the parties and the judge (usually the district judge) will discuss which facts in the case are undisputed, the issues to be tried, and anything else the judge believes may expedite the trial. The parties will also be expected to discuss (1) disclosure of all witnesses; (2) the listing and exchange all exhibits; (3) motions in limine and objections to evidence; (4) all outstanding motions; (5) an itemized statement of damages; (6) their estimates of the length of the trial; and (7) jury selection. The judge will then issue a final pretrial order setting any deadlines for proceedings necessary before trial. Under Local Rule 16.6, a final pretrial conference will be held no earlier than 45 days before trial.

CHAPTER SIX: TRIAL

What is the difference between a jury trial and a bench trial?

There are two types of trials: jury trials and bench trials.

At a jury trial, a jury reviews the evidence presented by the parties, figures out which evidence to believe, and decides what it thinks happened. The judge will instruct the jury about the law, and the jury will then apply the law to the facts that they have found to be true and determine who wins the lawsuit.

For a jury trial to occur:

- The lawsuit must be a type of case that the law allows to be decided by a jury; and
- At least one of the parties must request a jury trial within the right timeframe. This timeframe is set forth in Federal Rule of Civil Procedure 38. A party that does not make a jury trial demand on time forfeits that right.

At a bench trial, there is no jury. The judge will determine the law, the facts, and the winner of the lawsuit. A bench trial is held when:

- None of the parties requested a jury trial (or did not ask at the right time);
- The lawsuit is a type of case that the law does not allow a jury to decide; or
- The parties have agreed that they do not want a jury trial.

When will my trial start?

Under Local Rule 39.1, the judge who will conduct your trial will notify you of your trial date at least 21 days before trial. Under Local Rule 6.1, you can file a motion to continue the case, but it will only be granted if you show good cause for the continuance.

A motion to continue the trial date must be in writing and filed with the Clerk's Office. The judge who will conduct the trial will decide whether to grant the motion to continue.

What do I have to do to prepare for trial?

There is a lot of work to do when preparing for trial and a lot of documents to be filed. This Guidebook is not intended to guide you through all the details and complicated issues that come up as you go to trial. If you find yourself preparing for a trial, you should look for additional resources at a law library.

Preparing for trial is very time consuming, so be sure to read the Court's case-management order or any other order that sets a schedule for pretrial events carefully. When the judge sets a trial date, she usually sends out an order setting pretrial deadlines for filing or submitting various documents associated with the trial. For example, the judge will probably set dates for submitting copies of exhibits, objections to exhibits, and proposed jury instructions, among other things. Usually, the judge also will set a date for a pretrial conference shortly before trial. During the pretrial conference, the judge will discuss his or her requirements for conducting trials and resolve any final issues that have arisen before trial. Give yourself enough time to file all the necessary documents on or before the deadlines.

Under Local Rule 39.1, unless otherwise ordered by the judge, you must file and serve the following documents at least 14 days before the trial date:

- Trial brief;
- Exhibit list on a form provided by the Clerk of Court;

- Witness list;
- List of deposition testimony;
- Motions in limine; and
- For jury trials: (1) proposed voir dire questions; (2) proposed jury instructions; and (3) proposed verdict form; and
- For non-jury trials: proposed findings of fact and conclusions of law.

In both jury and nonjury trials, all exhibits must be marked as described under Local Rule 39.1 and made available for examination and copying at least 14 days before trial.

Besides submitting documents, you also need to arrange for all your witnesses to be in court at the trial. If a witness does not want to come to trial, you can make them attend by serving them with a subpoena. A subpoena to appear and testify at a hearing or trial in a civil action is a document issued by the Clerk's Office that requires a person to show up at trial on a particular date. Generally, the same rules that apply to subpoenaing a witness to show up at a deposition also apply to trial subpoenas.

What is a motion in limine?

A motion in limine asks the judge to decide whether specific evidence can be used at trial. You could find yourself opposing the other side's motions in limine or wanting to file your own. Either way, Rule 103 and other Federal Rules of Evidence help explain, in part, how to present admissible evidence questions to the Court. The judge's ruling on evidence may have a big impact on how a party's case looks at trial, so researching, filing, and opposing motions in limine can be an important part of preparing for trial. A

court order may set a last date (or "cut-off date") for filing motions in limine. The judge may also limit the number of motions in limine you may file.

What happens during trial?

On the first day of trial, the judge will usually meet with the parties briefly to resolve any last-minute problems. Local Rule 39.2 describes some of the procedures you must follow during trial. First, you must stand when you speak to the judge, either from counsel's table or from the stand with the microphone in front of the bench. Speak clearly and loudly enough to be heard. Second, stay at the stand with the microphone when you examine witnesses, unless you need to show a witness an exhibit.

What is jury selection?

The purpose of jury selection is to pick a jury that can be completely fair to both parties. This is accomplished by a process called voir dire, during which each potential juror is asked a series of questions. Under Local Rule 39.2(b), the judge will ask the jurors questions, unless she states otherwise. The questions are designed to show any biases that a juror may have that would prevent him or her from being fair and impartial. Some of the questions are taken from lists of questions that the parties give the judge before trial.

Once the questioning is complete, the judge will excuse (that is, send home) any jurors who the judge thinks are too biased to be fair. The judge will also excuse any other jurors whom she believes will not be able to perform their duties as jurors for other reasons. The parties also will have an opportunity to convince the judge that other

additional jurors should be excused because they are too biased to be fair and impartial or cannot perform their duties as jurors for other reasons. This is called challenging for cause.

After all the jurors that have been challenged for cause have been excused, the parties have an opportunity to use peremptory challenges to request that additional jurors be excused. A peremptory challenge is used to excuse a juror without having to give any reason. The judge will give each party a certain number of peremptory challenges to eliminate jurors who may not be clearly biased but who the party still does not want to have on the jury.

After the jury is chosen, the judge will read some instructions to the jury. These initial instructions tell the jurors about their duties as jurors, explain to them how to deal with evidence, and give some explanation of the law that applies to the lawsuit that they are about to hear.

What are opening statements?

After the jury is chosen, each party may present an opening statement. The opening statement is a speech made by each party. The purpose of the opening statement is for each party to describe the issues in the case and state what they expect to prove during the trial. An opening statement is neither evidence nor a legal argument. It is simply a roadmap of the evidence the party believes will come out at trial. The purpose of the opening statement is to help the jury understand what to expect and what the party considers important.

In the trial, which party presents witnesses first?

After the opening statements, the plaintiff presents his or her side of the case. The plaintiff begins by asking a witness all his or her questions. This is called direct examination. Then, the opposing party may cross-examine the witness by asking additional questions about the topics covered during the direct examination. Then, the plaintiff can ask questions about the topics covered in cross-examination. This is called redirect examination. Usually, a judge will allow this process to continue until both sides state that they have no further questions for the witness. The plaintiff will present all his or her evidence before the defendant has a turn to present his or her own case. The defendant is still involved, however, by making objections and cross-examining the plaintiff's witnesses.

What if the other party wants to put on improper evidence?

All the evidence that is presented by any party during trial must be admissible. The Federal Rules of Evidence are a very detailed set of rules for the admissibility of evidence.

If one party tries to present evidence that is not allowed under the Federal Rules of Evidence or tries to ask improper questions of a witness, the opposing party may object. It is the opposing party's duty to object to evidence that he thinks should not be admitted. If the opposing party does not object, the judge may allow the improper evidence to be presented. At that point, the other party will not be able to protest that decision on appeal. It is important to remember that it is the parties' job to bring errors

to the trial judge's attention and give the judge an opportunity to fix the problem through objections.

The way to object is to stand and briefly state your objection to the judge. Objections should be brief but must contain the basis for the objection. For example, a proper objection might be: "Objection, your honor, inadmissible hearsay." It is not appropriate to give long arguments unless the judge specifically asks you to explain your objection. If the judge wants to discuss the objection with you, she may ask you to come up to the bench where the judge sits, away from the jury's view, to talk to you quietly. This is called a discussion at side bar. The judge will either sustain or overrule the objection. If the judge sustains the objection, the evidence will not be admitted or the question may not be asked. If the judge overrules the objection, the evidence will be admitted or the question may be asked, unless the judge later sustains a different objection.

What is a motion for judgment as a matter of law?

In a jury trial, after the plaintiff has presented all his or her evidence, the defendant has an opportunity to make a motion for judgment as a matter of law. Rule 50(a) of the Federal Rules of Civil Procedure explains the procedures for making a motion for judgment as a matter of law.

A motion for judgment as a matter of law is a request to the judge to decide the outcome of the case. A motion for judgment as a matter of law brought by the defendant after the close of the plaintiff's evidence is granted if the plaintiff failed to provide enough

evidence so that any reasonable jury could decide the matter in the plaintiff's favor. If the motion for judgment as a matter of law is granted, the case is over.

When does the defendant get to present his or her case?

Sometimes, parties do not file motions for judgment as a matter of law. Or if they do file motions for judgment as a matter of law, sometimes they lose, or the judge puts off ruling until later. If any of these things happen, the case moves forward. In that case, after the plaintiff has completed examining each of his or her witnesses, the defendant then presents all the witnesses that support his or her defenses to the plaintiff's case. The same procedure of direct examination, cross-examination, and re-direct examination that was used during presentation of the plaintiff's evidence also applies here.

What is rebuttal?

Rebuttal is the final stage of presenting evidence in a trial. It begins only after both sides have had a chance to present their case. In the rebuttal stage, the party who has the burden of proof (usually the plaintiff) tries to undermine or explain the opposing party's evidence. This evidence is called rebuttal evidence. Rebuttal is limited to countering only what the other party argued as evidence; the plaintiff cannot just present his or her case over again. For example, a rebuttal witness might testify that the other party's witness could not have seen the events he testified to. So, after the defendant has finished examining each of his or her witnesses, the plaintiff may call a new witness solely to show that one of the defendant's witnesses was not telling the truth. Not all cases have a

rebuttal; it depends on what the party with the burden of proof wants to do and what the judge allows.

What happens after all parties have finished presenting their evidence?

After all witnesses have finished testifying, the judge will instruct the jury about the law that applies to the case. Sometimes, the judge will wait until after closing arguments to instruct the jury about the law.

Each party may present a closing argument. The purpose of the closing argument is to summarize the evidence and argue how the jury (or, in a bench trial, the judge) should decide the case based on that evidence. Under Local Rule 39.2, closing argument is limited to one hour, unless the judge orders otherwise.

CHAPTER SEVEN: POST-TRIAL MOTIONS AND APPEALS

What is a motion for reconsideration?

Under Local Rule 7.1(j), you must present compelling circumstances before you are permitted to file a motion for reconsideration of an order entered by the judge. A request to make such a motion must be in a letter, no more than two pages long, directed to the judge. You must send a copy of the letter to the other parties.

A motion for reconsideration may be requested following the entry of any order. That said, requests for reconsideration are disfavored and are not routinely granted.

What is a post-trial or post-judgment motion?

A post-trial or post-judgment motion is filed at the conclusion of your lawsuit. Whereas an appeal is a request for a new court to review the decisions made in your lawsuit, a post-trial or post-judgment motion is a request for relief from the court that just heard your case. Motions for a new trial are governed by Rule 59 of the Federal Rules of Civil Procedure. Motions for relief from judgment are governed by Rule 60 of the Federal Rules of Civil Procedure.

What is an appeal?

An appeal is a request for another court to review the decisions made by the judge or jury in your case. Generally (though not always), parties may not file a notice of appeal until after finally judgment is entered in their lawsuit. Almost all appeals from the judgments of this Court must go to the United States Court of Appeals for the Eighth Circuit.

How do I file an appeal?

To start the appeal process, you file a notice of appeal in this Court's Clerk's Office. Notice of Appeal forms are available from the Clerk's Office or on this Court's website. Federal Rule of Appellate Procedure 3 governs how to file a notice of appeal.

A filing fee of $505.00 is owed and payable to this Court upon filing a notice of appeal. If you have been granted IFP status in this Court, however, you do not have to pay the appellate filing fee, unless otherwise ordered by the presiding judge in your case. If you were not granted IFP status when you filed your case in this Court, but you cannot

afford the appellate filing fee, you may file a motion to proceed IFP on appeal. Information about filing a motion to proceed IFP can be found above.

Under Federal Rule of Appellate Procedure 24(a)(5), if the district court denies your motion to proceed IFP on appeal, you may file a motion to proceed IFP in the Eighth Circuit within 30 days after service of this Court's notice that it denied your application to proceed IFP on appeal.

If you intend to file a motion for appointment of counsel on appeal, the motion should be filed in the Eighth Circuit, not in this Court.

When do I have to begin my appeal?

Unless the United States or its officer or agency is a party, you must file your notice of appeal in this Court within 30 days after the judgment or order appealed from is entered. If the United States, its officer or agency is a party, the notice of appeal must be filed within 60 days after the judgment or order appealed from is entered. For additional issues regarding the time for filing a notice of appeal, see Federal Rule of Appellate Procedure 4(a). There are many other steps to beginning and proceeding with your appeal, but they are governed by the Eighth Circuit Local Rules and the Federal Rules of Appellate Procedure, which are beyond the subject of this Guidebook. For more information, visit the Eighth Circuit website at http://www.ca8.uscourts.gov/.