

Fundamentals of Civil Litigation in Federal Court

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Commencing an Action

- Know the facts the Law, interview the client - no matter whether plaintiff or defendant
 - Interview your client to assess their veracity to ensure you're not out on a limb later down the road.
 - Civil Rule 11 - pleading may not be interposed for improper purpose; claims, etc. must be warranted by existing law or non-frivolous argument for extension, modification, or reversal of existing law, or establishment of new law.
 - This is a large tunnel to "drive your litigation truck"
 - If you do your job your right - this shouldn't be an issue
 - Factual contentions must have evidentiary support
 - Be sure that your client is being candid with you and provides you copies of all relevant documents
 - Worse thing that can happen is to find out your client is holding relevant or incriminating information
 - Knowing this you're able to assess where your client stands
 - It is usually embarrassing information
- Drafting the complaint
 - Civil Rule 8 - Short and plain statement of grounds for court's jurisdiction claim(s) (including all elements), and demand for relief
 - Adequately identify and describe parties
 - Summary Statement of Material Facts
 - Keep factual recitation to what is necessary to understand claims

- Law on notice pleading has changed in recent years
 - If you doubt you should include information - include it.

- Service of Process
 - Civil Rule 4 - Summons issued to plaintiff's attorney, may be service by anyone who is at least 18 years old and not a party or by United States Marshall
 - Saves time and money and more efficient way to SOP
 - Civil Rule 4(d) - Request for waiver of service of process
 - Civil Rule 4(k) - territorial limitations of service of process
 - Proof of service by affidavit, except when service is made by United States Marshall
 - Long Arm or Foreign SOP
 - Civil Rule 4(m) - must serve within 90 days after complaint is filed
 - Be sure to perfect service or might be subject dismissal

- To answer or to move?
 - Civil Rule 12 - answer/move
 - Must Do One or the Other
 - within 21 days of service, 60 days after request for waiver of service, or 90 days after waiver if defendant is outside the United States
 - Answer or motion
 - Waiver/preservation of defenses must assert in answer or initial motion or waiver, except failure to state claim, failure to join indispensable party, legal defense to a claim, or lack of subject matter jurisdiction
 - Civil Rule 12(c) motion for judgment on the pleadings

- Typically will not apply.
- If it does apply after the pleadings are joined

- Civil Rule 12(d) - presentation of matters outside pleadings
 - Should not use for Summary Judgment

- Civil Rule 12(e) - Motion for more definite Statement
 - Occasionally see complaint that is obscure that you're unable to have a response

- Civil rule 12(f) - Motion to strike insufficient defense or redundant, immaterial, or impertinent, or scandalous matter
 - Privilege that applies to court pleas for defamation
 - Pleadings are not indented to be press releases.

- Case Management and discovery
 - The Case Management conference
 - Civil Rule 16 - initial pretrial conference
 - Different federal judges will take different views on how aggressive at this initial conference
 - Be prepared here

 - Civil Rule 26(a)(1) initial disclosures
 - FRCP are organized in groups loosely related to subject matter
 - Each party is under voluntary obligations to comply
 - Prepare these as soon as the pleadings are closed

 - Civil Rule 26(f) discovery plan
 - Road map for the case
 - What will occur and how long it will take

 - Civil Rule 16(b) - Scheduling order
 - Typically - govern course of the action
 - Different courts have different speeds

- Civil Rule 16(e) - Final Pretrial conference
 - Sums up all the discovery
 - Tells the court how the case should be resolved
 - Trial
 - Summary Judgment
- Civil Rule 16(f) - Sanctions
 - Provisions for failure to comply to the rules
- Discovery
 - Civil Rule 26(a) - Initial Disclosures
 - Disclosure of expert testimony
 - Testifying
 - Will provide expert witness report
 - Must file and exchange with the other side
 - Testify at trial
 - Usually given a deposition
 - non-testifying
 - Consultant
 - Pretrial disclosures
 - Scope and limits of discovery
 - Tailor your discovery to address what are generally the issues in the case
 - Do not use it as a bludgeon
 - Privilege protective orders
 - Protection to non-party witnesses
 - Privilege log - list of everything someone is holding on the grounds of privilege
 - Civil Rule 45 - Subpoenas
 - Who and what you may subpoena
 - How you may subpoena
- Making the record while avoiding pitfalls

- Strategic use of interrogatories, request for production, and request for admissions
- Depositions- record potential motion for summary judgment?
 - Necessary but very expensive
 - Can spend \$5,000 to \$10,000 easily
 - See if deposition is really necessary
 - May be able to work out everything from stipulations
- Full disclosure is the key
 - Civil Rule 37 sanctions
 - Outcome will improve if you fully disclose non-privileged information
- Recent Changes
 - Discovery procedures
 - Electric Discoveries - ESI
 - Commonly Emails
 - Whatever can be stored
 - Careful when asking for ESI
 - Can be expensive
 - Revised FRCP 34
- Summary Judgment
 - Need to see if Partial or Entire Summary Judgment is justified
 - Tool used for different purposes
 - Educate Judge or judges staff about the case
 - Civil Rule 56 - no genuine issues of material fact and movant is entitled to judgment as matter of law
 - Timing by rule (56(b)) or pretrial order
 - Typical is by pretrial order
 - Motion must be supported by competent evidence
 - E.g. deposition testimony, stipulation, or affidavits

- Self Serving Affidavits by be disregarded and may be subject to being stricken
- Use of summary judgment to education court or settlement leverage
 - Use to educate opponent or opponent's client
- ADR - Arbitration and Mediation
 - May be mandatory or by agreement
 - Arbitration - Federal Arbitration Act, 9 U.S.C Section 1 et seq.
 - Contractual resolution procedure
 - Parties agreed in advance to non judicial resolution to disputes
 - Must assert this right at the outset or risk waiving it.
 - Arbitration clauses may be stricken if "onesided"
 - Mediation
 - Non-binding solution
 - Useful technique without expense of trial and appeals
 - Neutral officers Agreed Upon
 - Judicial officer, attorney, or mediation service
- Trial
 - Preparing the case for trial
 - Compilation of evidence preparation of trial exhibits
 - Be sure you have copies for all parties
 - Stipulations
 - Identification of witnesses
 - Preparation of pre-trial brief
 - If Courts will permit
 - Good if you did not file summary judgment
 - Preparation of motions in *limine*
 - Historic Device - not part of FRCP

- Should Not used to delay or complicate a trial
 - Used to clarify issues at trial
 - Procedural

- Preparing witnesses - Fewer are better
 - Direct testimony
 - Cross examination
 - Dealing with potentially privileged issues

- Trial to the court verse trial to jury
 - Who is the most desirable trier of fact?
 - Choice of exhibits and presentation of witnesses will depend on who is deciding your case
 - Even in a jury case, do not forget that the judge will control the trial

- Judgment and post judgment issues
 - Civil Rule 48 - verdict and jury polling
 - Use to make sure your verdict is unanimous and tried by a jury of at least 6 members
 - Civil Rule 49 - General versus special verdict, jury interrogatories
 - Civil Rule 50 - judgment as matter of law; motion for new trial
 - 28 Days to do this under FRCP 59
 - If court denies motions - use on appeal to order a new trial
 - Civil Rule 51 - jury instruction: objection; preserving error
 - Civil Rule 52 - findings and conclusions by court, judgment on partial findings

- Civil Rule 53 - special masters
 - Used to make factual findings
 - Generally appointed in complex cases
 - Class action cases
 - Report to district judge and they will apply or not apply their findings

- Civil Rule 54 - judgment: attorney's fees and costs
 - Judgment is a written determination on the outcome of the case - this is not a judgment.

- Civil Rule 58 - entering judgment
 - Take note of this because this will be when your appeal time starts running

- Civil Rule 59 - new trial, altering or amending judgment

- Civil Rule 60 - relief from judgment
 - Altering or amending judgments
 - Relief
 - Mistake
 - Inadvertent surprise, neglect
 - Newly discovered evidence
 - Misrepresentation or misconduct
 - Judgment is void
 - Evidence judgment had been satisfied, released or discharged
 - Another reason that satisfies relief.

- Appeal
 - Notice of Appeal
 - 18 U.S.C. Section 2107.
 - Appellate Rules 3 and 4
 - Must be timely and ripe

 - Federal Rules of Appellate Procedure