

# 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