

CHAPTER 6 PRETRIAL AND TRIAL PRACTICE

Without intending to be fully comprehensive, this chapter discusses a variety of procedural issues related to litigation and trial practice, roughly in the chronology of litigation. First, the chapter reviews informal and formal methods of discovery, including mandatory initial disclosures and conferences involving discovery issues. Mechanics, strategy, and practice pointers are included. Second, the chapter deals with conferences and scheduling, with particular attention to the role of magistrate judges.

Third, the chapter delves into motions practice, including motions for emergency relief and for summary judgment, which should be of particular interest to legal aid attorneys. Fourth, the rise and use of mandatory or encouraged alternative dispute resolution (ADR) procedures are covered and include practical advice on the use of ADR and crafting litigation to make subsequent use of ADR more successful. And, fifth, the chapter discusses both trial and appellate practice.

I. Discovery and Trial Preparation

Discovery is the process of uncovering relevant facts and identifying witnesses whose testimony can establish those facts. As required by Federal Rule of Civil Procedure 11, discovery begins with a reasonable investigation of the facts before the attorney drafts the complaint.

A. PRELITIGATION DISCOVERY

This prelitigation investigation may include a client interview, interviews of witnesses, review of public records, correspondence with opposing parties, and requests for information pursuant to public records or Freedom of Information Act provisions. Whenever possible, use prelitigation investigation rather than formal discovery to establish facts.¹ Even when the investigation requires the cooperation of adverse parties, that cooperation is more likely to be forthcoming before suit is filed.

Investigation which does not involve current or former employees of an adverse party does not require notice to adverse parties. Investigation which does involve such employees raises complex ethical concerns. The American Bar Association Model Rule of Professional Conduct 4.2 prohibits communications by a lawyer for one party concerning the matter in representation with two classes of employees: (1) persons having a managerial responsibility on behalf of an organization with adverse interests and (2) any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.²

¹For more guidance on prelitigation factual investigation, see Chapter 1 of this MANUAL.

²See generally Donald J. Farage, *Ex Parte Interrogation: Invasive Self-Help Discovery*, 84 DICKINSON LAW REVIEW 1 (1989); Eugene P. Gurr, *Ethics of Conducting Ex Parte Interviews*, 3 ST. JOHN'S JOURNAL OF LEGAL COMMENTARY 234 (1988).

As for the first part of the test, you may ethically interview current low-level employees of a corporation or organization—those who are not in management and therefore not in a position to bind the corporation—provided that (1) they were not personally involved in the disputed events (even if they observed it or other relevant events) and (2) their statements cannot be imputed to the corporation or organization.³ This rule is not always easy to apply, and clear boundaries do not always exist. Among the difficulties are discerning without complete knowledge who is a managerial-level employee and determining whether the employee to be interviewed is not personally involved. With respect to the second part of the test, Rule 801(d)(2) of the Federal Rules of Evidence permits statements to be imputed to the party if either (1) the person was authorized to make a statement concerning the subject or (2) the statement concerns a matter within the scope of the declarant's agency or employment, and made during the existence of the relationship.⁴ Thus the American Bar Association Model Rule of Professional Conduct 4.2 precludes contact only with persons who are in effect part of the litigation, not mere witnesses, even if they are current employees.⁵ Like all potential witnesses, such persons are of course nevertheless free to refuse to talk with you for any or no reason.

The rules are more permissive with respect to former employees.⁶ The American Bar Association position (and the majority view) is that you may ethically interview former employees even if they were in a managerial position at the time of the incidents giving rise to the litigation, unless their own conduct was involved in the disputed events, or they are covered by a protective order.⁷ Once a managerial employee leaves the organization, she no longer speaks for the corporation, her admissions no longer bind the corporation, and she may therefore be interviewed *ex parte* without notice.⁸ Other former employees may also be interviewed, unless their act or omission in connection with the particular matter may be imputed to the organization for purposes of civil or criminal liability.⁹ No effort should be made, however, to induce the former employee to violate the attorney-client privilege to the extent his communications as a former employee with his former employer's counsel are protected by it.

B. HOW THE PLEADINGS LIMIT DISCOVERY

Broadly speaking, the scope of discovery is determined by the parties to the action, the theories offered, and the facts or injuries alleged. The December 1, 2000, revisions of the Federal Rules of Civil Procedure narrowed the scope of ordinary discovery from “relevant to the subject matter involved in the pending action” to “relevant to the claim or defense of any party.”¹⁰ There is no precise dividing line between discovery relevant to claims or defenses and discovery relevant to the subject matter.¹¹ This is still a very broad standard.¹² But the rule change “signals to parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.”¹³ Moreover, for good

³ See, e.g., *Jenkins v. Wal-Mart Stores Inc.*, 956 F. Supp. 695, 697 (W.D. La. 1997); *Fayemi v. Hambrecht and Quist Inc.*, 174 F.R.D. 319, 324 (S.D.N.Y. 1997); *Smith v. Armour Pharmaceutical Co.*, 838 F. Supp. 1573, 1578 (S.D. Fla. 1993). Cf. *In re Shell Oil Refinery*, 143 F.R.D. 105, 108 (E.D. La. 1992).

⁴ See, e.g., *Staheli v. University of Mississippi*, 854 F.2d 121, 127 (5th Cir. 1988) (in case challenging the denial of tenure to a professor, statement by another professor regarding the reason that the university chancellor was upset with plaintiff was not an admission because personnel matters were not within the scope of the declarant's agency relationship); but see *Miles v. M.N.C. Corp.*, 750 F.2d 867, 874–75 (11th Cir. 1985) (racial slur by employee involved in hiring evaluations and decisions admissible against corporation as within scope of employee's duties).

⁵ See *Brown v. St. Joseph County*, 148 F.R.D. 246, 254 (N.D. Ind. 1993); *In re Shell Oil Refinery*, 143 F.R.D. at 107.

⁶ Susan J. Becker, *Conducting Informal Discovery of a Party's Former Employees: Legal and Ethical Concerns and Constraints*, 51 MARYLAND LAW REVIEW 239 (1992).

⁷ American Bar Association, Formal Opinion 91–359 (Mar. 22, 1991); *United States v. Saks*, 964 F.2d 1514, 1524 (5th Cir. 1992); *Curley v. Cumberland Farms*, 134 F.R.D. 77, 82 (D.N.J. 1991); *H.B.A. Management v. Estate of Schwartz*, 693 So. 2d 541, 545 (Fla. 1997).

⁸ See, e.g., *H.B.A. Management*, 693 So. 2d at 546; Fed. R. Evid. 801(d)(2)(D).

⁹ *Curley* 134 F.R.D. at 88; *Lang v. Superior Court*, 826 P.2d 1228, 1231 (Ariz. Ct. App. 1992) (E.g., “if an employee hired to drive a truck is involved in an accident that occurs in the course and scope of employment, the fact that the employee leaves her employment should not determine the propriety of ex parte communications. Clearly, the employee's acts or omissions in connection with any litigation that arises out of the accident can be imputed to the former employer for purposes of civil liability”); *Strawser v. Exxon Co.*, 843 P.2d 613, 618 (Wyo. 1992); *Accord Triple A Machine Shop Inc. v. California*, 213 Cal. App. 3d 131, 142 (1989).

¹⁰ Fed. R. Civ. P. 26(b)(1).

¹¹ Advisory Committee Note to the 2000 Amendments to Fed. R. Civ. P. 26.

¹² See, e.g., *Thompson v. Department of Housing and Urban Development*, 199 F.R.D. 168 (D. Md. 2000).

¹³ Advisory Committee Note to the 2000 Amendments to Fed. R. Civ. P. 26.

cause shown, a party may obtain the same scope of discovery as had been routinely available under the old Rules.¹⁴ As before, the information sought in discovery need not be admissible but must be reasonably calculated to lead to the discovery of admissible evidence relevant to a claim or defense.

This revision of Rule 26(b)(1) may encourage plaintiffs to plead as many claims as possible within the limits of Rule 11. It may also encourage plaintiffs to plead more facts, because this triggers the defendant's obligation in its answer to admit or deny the allegations and plead other defenses that help determine the scope of discovery.

C. MANDATORY INITIAL DISCLOSURES

In most cases, Federal Rule Of Civil Procedure 26(a)(1) requires each party to make significant "initial disclosures" in writing. This requirement does not apply in three situations:

- if otherwise stipulated,¹⁵
- if otherwise directed by court order (not local court rule), and
- in certain Rule 26(a)(1)(E) categories of proceedings, the most important of which is "an action for review of an administrative record."

Without waiting for formal discovery requests, parties must identify witnesses and documents "that the disclosing party may use to support its claims or defenses," a computation of damages, and information regarding insurance agreements.¹⁶ "Use" is broadly construed to include use in discovery, to support a motion, or at trial but excludes information used solely for impeachment.¹⁷

Failure to make these disclosures may result in exclusion of the material which should have been disclosed.¹⁸ The 2000 amendments, however, allow a party to argue during Rule 26(b) conferences that "initial disclosures are not appropriate in the circumstances of this action." A party and his attorney also have a duty to supplement or correct disclosures "if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."¹⁹ Incomplete investigation or failure of an opponent to make disclosures is not an excuse for failing to make these disclosures yourself.²⁰ The disclosures must be signed and served, but not filed, and "must be made at or within [fourteen] days after the Rule 26(f) conference unless a different time is set by stipulation or court order."²¹ The Rule 26(f) conference, discussed below, must be held at least twenty-one days before a scheduling conference is held or a scheduling order is due. Additional disclosures later in the case are mandated by Rules 26(a)(2) (expert testimony) and 26(a)(3) (pretrial disclosures). These disclosures are usually governed by an order of the trial court.

D. CONFERENCE OF PARTIES, THE JOINT DISCOVERY PLAN, AND DISCOVERY PLANNING

At the Rule 26(f) conference, counsel and unrepresented parties must, among other tasks, "confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan."²² The discovery plan of the parties is supposed to address "the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues," as well as any limitations on discovery and any protective orders that may be needed.²³ A joint written report of the conference must be submitted to the court within fourteen days of the conference. Some judges strictly follow this mandate, while others often waive this requirement, at least in uncomplicated cases where the parties appear to be working together without difficulty. Check to determine the judge's individual practice.

¹⁴Fed. R. Civ. P. 26(b)(1).

¹⁵The court can override this stipulation as part of case management.

¹⁶This language, included in 2000, replaced the 1993 standard: "relevant to disputed facts alleged with particularity in the pleadings." The new standard would, e.g., not require an attorney to disclose unfavorable information because such information would presumably not be used to support a claim.

¹⁷Advisory Committee Note to the 2000 Amendments to Fed. R. Civ. P. 26.

¹⁸Fed. R. Civ. P. 37(c)(1).

¹⁹*Id.* 26(e)(1).

²⁰*Id.* 26(a)(1).

²¹*Id.* 26(a)(1), (4).

²²*Id.* 26(f).

²³*Id.* 26(f)(2).

Apart from the discovery plan that must be discussed with opposing counsel, you must develop your own plan, which should be reviewed and revised as the litigation progresses. Successful discovery requires that you identify what you must prove as early as possible. The plan should identify the facts that you must prove, the discovery tools most likely to assist in proving those facts, and a sequence for using the various discovery tools. As you accumulate information, you must maintain a carefully organized file that shows both the content and the source of every document. As the case develops, continue to identify the facts that you can prove and how you will prove them. In more complex litigation, you may find it useful to create a computerized database of documents and potential testimony.

The discovery plan should set forth the sequence of discovery. If you anticipate protracted discovery, you should begin it promptly and proceed in stages. Some basic information should be given automatically under the Rule 26(a)(1) initial disclosures. You can then use carefully drafted interrogatories to identify other documents and their respective custodians, potential witnesses, and any basic facts that are not subject to being shaped by opposing counsel. Next, request production of documents and, when appropriate, request admissions. And, last, depose important witnesses and again consider requests for admission. In a class action, early discovery should also establish the existence of a class and, when feasible, the identity and addresses of class members. As you complete each stage in your discovery plan, you should review and modify it to reflect what you have learned.

The amount and type of discovery needed vary from case to case. In many instances, however, recurring issues make it possible to reuse old forms or to obtain forms from attorneys in similar cases. Frequently the Sargent Shriver National Center on Poverty Law and backup centers have forms available. In an appropriate case, form books on discovery, particularly *American Jurisprudence Proof of Facts*, may be helpful. Charles A. Wright, Arthur R. Miller, and Edward H. Cooper's *Federal Practice and Procedure* forms can be helpful, and forms are becoming increasingly accessible on the Internet. Recognize the limitations of forms: they save time, but they were not written with your specific case in mind. Use them as a beginning rather than an end.

There is danger in not using discovery tools to the fullest extent. The arsenal of discovery devices authorized by the federal rules is formidable. If you are unfamiliar with the full potential for discovery, you may overlook important opportunities. Discussing discovery with more experienced counsel is always worthwhile. The underutilization of discovery is especially common in test case litigation, where a focus on critical legal issues may obscure the need for thorough discovery. Discovery is vital to finding the facts to make a record as the foundation for successful litigation.

E. WRITTEN DISCOVERY

Interrogatories, as well as requests for production, are often the first discovery tool to be used.

1. Interrogatories

Except with leave of court or by stipulation, interrogatories may be served only after the Rule 26(f) conference discussed above.²⁴ They can be directed only to other parties, who then have thirty days to respond.²⁵ Filing discovery requests and responses with the court is prohibited by Federal Rule of Civil Procedure 5(d), except in connection with trial or certain motions, such as motions to compel, for protective orders, or for summary judgment.

Interrogatories are best used for limited, specific purposes. They establish a basis for subsequent discovery by production or deposition. Thus, interrogatories typically seek the addresses and names of persons having knowledge of relevant matters, the identity of people having certain authority or occupying certain offices, the existence, location, or accuracy of documents and reports, statistical data or summaries, and the identity and opinions of experts. Interrogatories may accompany requests for admissions and ask the basis for and facts supporting any denials. Rule 26(b)(2) now prohibits local rules limiting the number of interrogatories or depositions. Instead Rule 33(a) limits the number of interrogatories which may be served upon any other party to twenty-five, "including all discrete subparts," but the court may authorize additional interrogatories if the factors specified in Rule 26(b)(2) warrant them. Plan interrogatories with great care; do not waste the limited opportunity to use interrogatories on questions of only marginal value.

²⁴*Id.* 33(a), 34(b).

²⁵*Id.* 33(b)(3), 34(b).

Effective interrogatories are short, to the point, and unambiguous. They should be drafted to anticipate and avoid useless responses and valid objections. If possible, they should require good-faith elaboration by the opposing party. Good interrogatories commit the opposing party to clear answers or information. Remember that, although interrogatories are directed to a party, an attorney prepares the answers. These answers are to be drafted after a reasonable inquiry, which may involve asking agents, reviewing documents, and engaging in other reasonable investigations.²⁶ Before serving your interrogatories, test them by trying to frame an objection to each one and by trying to compose an answer that would be responsive but useless.

Discovery is not objectionable simply because the information sought is already known by the party propounding the interrogatories. Neither is an interrogatory objectionable simply because it seeks an opinion or application of law to fact.²⁷ The court may, however, impose limits on discovery if it becomes “unreasonably cumulative or duplicative.”²⁸

Other valid objections include that

- the meaning of interrogatories is unclear,
- the interrogatory seeks a legal conclusion,²⁹ or
- the expense of responding to them outweighs the likely benefit.³⁰

Objections must be stated with specificity.³¹

As with initial disclosures, a party and his attorney have a duty to supplement or correct answers to interrogatories “if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.”³²

2. Requests for Production of Documents

Like interrogatories, requests for production can be directed only to parties. Federal Rule of Civil Procedure 34 governs such requests whether filed separately or in conjunction with a deposition.³³

Rule 34(a) permits a party to request documents or materials or to inspect and copy “tangible things” which are in the respondent’s “possession, custody or control.” The request itself should define the term “documents” broadly and should specifically refer to electronic data. Because “possession, custody or control” reaches documents not within the actual possession of the opposing party, Rule 34 requires production of documents that can be obtained through a good-faith effort by the party or its counsel. Control is broadly defined to include “the legal right to obtain the documents requested upon demand.”³⁴ The party seeking production of documents bears the burden of establishing the opposing party’s control over those documents.³⁵

Rule 34(b) requires that requested documents be described by “individual item or by category” with “reasonable particularity.” Do not simply request “all relevant documents.” Such a request is probably objectionable; more important, it permits your opponent to determine unilaterally what is relevant. Make as many requests as reasonably specific as you can, and include requests describing documents by category or content. Ask for production of original documents together with copies which contain any handwritten notes or changes, as well as all subsequent versions of the documents which are not identical to the initial one.

²⁶*Id.* 26(g)(2).

²⁷*Id.* 33(c). As for opinions and conclusions, the rule also provides that “the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.”

²⁸*Id.* 26(b)(2).

²⁹*O'Brien v. International Brotherhood of Electrical Workers*, 443 F. Supp. 1182, 1187 (N.D. Ga. 1977).

³⁰Fed.R.Civ.P. 26(b)(2).

³¹*Id.* 33(b)(4).

³²*Id.* 26(e)(2).

³³*Id.* 30(b)(5).

³⁴*In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984); *Prokosch v. Catalina Lighting Inc.*, 193 F.R.D. 633, 636 (D. Minn. 2000); *Burton Mechanical Contractors Inc. v. Foreman*, 148 F.R.D. 230, 236 (N.D. Ind. 1992); *Henderson v. Zurn Industries*, 131 F.R.D. 560, 567 (S.D. Ind. 1990); *Bowman v. Consolidated Rail Corp.*, 110 F.R.D. 525, 526 (N.D. Ind. 1986).

³⁵*McAuslin v. Grinnell Corp.*, 1999 WL 24617, *2 (E.D. La. Jan. 19, 1999); *Sithon Maritime Co. v. Holiday Mansion*, 1998 WL 182785, *6 (D. Kan. Apr. 10, 1998). See also *Camden Iron and Metal v. Marubeni American Corp.*, 138 F.R.D. 438, 441 (D. N.J. 1991) (quoting *Henderson v. Zurn Industries Inc.*, 131 F.R.D. at 567).

Rule 34(b) requires the opposing party to object or file a written response which “shall state, with respect to each item or category, that inspection and related activities will be permitted as requested.” Many lawyers fail to file the required response; they assume that actual production is all that is required. Insist on a written response showing what is being produced and what is not produced; this should protect you against the later appearance of a document not previously produced. If your request was drafted with care, you may be able to exclude from evidence surprise documents clearly encompassed within its terms. The response may also indicate that requested documents do not exist—a fact that may be quite significant in establishing an element of your case such as arbitrary action or negligence.³⁶ Follow up on requests for admission confirming the nonexistence of the documents.

The response to a request for production may be an objection or a motion for a protective order.³⁷ If the objection includes that the requests are burdensome or unduly intrusive, the court is likely to balance the need for the information by the party seeking discovery with the harm to the party opposing it. If only the expense of copying documents is involved, you may offer to do the copying. If the expense is related to reviewing the respondent’s files, you may again offer to undertake the review.

Conversely you may receive objectionable discovery requests. Ordinarily your response to improper requests for production, requests for admission, and interrogatories should be to object, specifying your grounds with precision. You should rarely find it necessary to move for a protective order.

Occasionally parties respond to a request for production by turning over a large volume of unreviewed, unsorted materials and documents as a form of obstruction or harassment. Because Rule 34 requires the producing party to sort or label documents to correspond with the request, the production of a mass of unsorted material violates the rule.³⁸ If this happens, you should move to compel discovery under Rule 37(d). Although most trial courts prefer not to supervise the discovery process actively, production that clearly violates the obligation to particularize a response should lead to relief. Confronted with a respondent who has foisted a huge mound of unsorted materials upon the requesting party, a court should order the respondent to particularize the response and may ultimately impose sanctions on a party who fails to do so.³⁹

The ultimate goal of production is to generate admissible evidence. Although parties customarily stipulate to the authenticity of documents that they produce, authenticity or source is sometimes in doubt. In such a case, the requesting party may later submit requests for admission to establish authenticity, simplifying the admission of those documents into evidence.⁴⁰ Documents can also be authenticated at a deposition.

As with initial disclosures and interrogatories, a party and his attorney have a duty to supplement or correct responses to requests for documents “if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.”⁴¹ Production of documents from a nonparty requires the use of the subpoena procedure set forth in Rule 45(a)(1)(C).

3. Requests for Admission

Requests for admissions issued pursuant to Federal Rule of Civil Procedure 36 are a useful but often underused tool. They are not principally discovery devices but rather a means to define and limit the matters in controversy between the parties.⁴² They are intended to relieve the parties of the time and cost of proving facts that will not be disputed at trial. To be useful, requests for admissions must be precise. They must be phrased in such a way as to be admitted or denied.

³⁶E.g., a request for production of all documents that constitute the administrative record would reveal that agency action was arbitrary if the record did not contain documents that should have formed the basis of the agency decision.

³⁷See, e.g., *Badalamenti v. Dunham’s Inc.*, 896 F.2d 1359, 1362 (Fed. Cir.), cert. denied, 498 U.S. 851 (1990).

³⁸*Rothman v. Emory University*, 123 F.3d 446, 455 (7th Cir. 1997).

³⁹In *Consolidated Equipment Corp. v. Associate Commercial Corp.*, 104 F.R.D. 101, 103 (D. Mass. 1985), the court held that dismissal was an appropriate sanction when the plaintiff responded to a request for production merely by offering to permit the defendant to inspect undifferentiated records contained in forty-seven feet of files.

⁴⁰The admission overcomes objections relating to authenticity, best evidence, and hearsay.

⁴¹Fed. R. Civ. P. 26(e)(2).

⁴²See, e.g., *Russo v. Baxter Healthcare Corp.*, 51 F. Supp. 2d 70, 79 (D.R.I. 1999).

They may cover facts or mixed questions of fact and law, but not pure questions of law.⁴³ Authority is split as to whether requests for admission seeking interpretations of documents are improper.⁴⁴

Although documents produced in response to a request for production can sometimes be authenticated through use of the party's written reply, the better practice is for the discovering party to request that authenticity be admitted. A request for admission may relate to origin, authenticity, accuracy, or contents of the document. Rule 36(b) states: "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Such permission is occasionally granted.⁴⁵ A request for admissions that is not answered within thirty days after service of the request is deemed admitted.⁴⁶

The rule further provides that "an answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny."⁴⁷ The propounding party may move to compel more responsive answers if unsatisfied with the responses given. Unlike interrogatories, the number of requests for admission is not limited by the federal rules but may still be limited by local court rule. Such a limit is rarely imposed; the number may also be limited by court order, but again this is unusual.⁴⁸

F. DEPOSITIONS

Since December 2000, Federal Rule of Civil Procedure 30(a)(2)(A) has limited to ten the number of depositions which may be taken by the plaintiffs or by the defendants without leave of court.

1. In General

The rule further limits a deposition to one day of seven hours of actual deposition time (excluding breaks) unless the parties otherwise agree or the court allows additional time "if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination."⁴⁹ As a result, the deposing party is advised to send to the witness or her attorney documents to review in advance of the deposition. If the witness fails to do her homework, or if a witness stonewalls, this may be grounds for asking for an extension of the time limit or sanctions or both. Similarly you should ask the deponent to hand over subpoenaed documents in advance of the deposition and note that this may alleviate the need to exceed the time limit. According to the Advisory Committee Notes, when organizations are deposed pursuant to Rule 30(b)(6), each person designated as a witness is subject to a separate seven-hour time limit on his deposition.⁵⁰

Depositions can be enormously helpful but are expensive. Unlike other discovery tools, depositions may be taken of any witness, and, unlike answers to interrogatories and requests for production, responses in depositions come directly from witnesses or parties, without screening or filtering by opposing counsel. Testimony during a deposition is under oath and may be used on a motion for summary judgment or as evidence or for impeachment at trial. Since a deposition may be accompanied by a subpoena *duces tecum*, it is a method of document discovery from nonparty witnesses.⁵¹

⁴³ See, e.g., *United States v. Block* 44, 177 F.R.D. 695, 695 (D. Fla. 1997); *Lakehead Pipe Co. v. American Home Assurance*, 177 F.R.D. 454, 458 (D. Minn. 1997).

⁴⁴ Compare, e.g., *Bausch & Lomb Inc. v. Alcon Laboratory Inc.*, 173 F.R.D. 367, 377 (W.D.N.Y. 1995), with *Booth Oil v. Safety-Kleen Corp.*, 194 F.R.D. 76, 80 (W.D.N.Y. 2000).

⁴⁵ See, e.g., *Rolscreen Co. v. Pella Products Inc.*, 64 F.3d 1202, 1209 (8th Cir. 1995).

⁴⁶ Fed. R. Civ. P. 36(a).

⁴⁷ *Id.* See also *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996).

⁴⁸ Fed. R. Civ. P. 26(b)(2).

⁴⁹ *Id.* 30(d)(2).

⁵⁰ Advisory Committee Note to the 1993 Amendments to Fed. R. Civ. P. 30.

⁵¹ Fed. R. Civ. P. 45(a)(1)(C).

2. Taking Depositions

Depositions are arranged by preparing a notice of deposition—a standard form designating the location and time for the deposition. To avoid scheduling conflicts, consult opposing counsel to determine an agreeable time. When deposing a party, a subpoena is not required; service of the notice on opposing counsel is all that is necessary. If the party is a corporation or governmental entity and you are unsure whom to depose, you can instruct the party to designate witnesses with knowledge of the areas into which you propose to inquire.⁵²

When deposing a nonparty witness, obtain a subpoena and notify the other parties. You may issue the subpoena in the name of the court in which the action is pending if you are admitted to practice in that district. When the deposition is to be taken in another district, you may issue the subpoena in the name of the court in that district, provided that you are admitted in the district in which the action is pending.⁵³ Serve the subpoena and a copy of the notice, with a check to cover witness fees and travel costs, on the witness to be deposed (service on the witness' attorney is not sufficient).⁵⁴ According to the great weight of authority, you must pay these expenses even when the plaintiff is proceeding *in forma pauperis*.⁵⁵

Select a court reporting service for a stenographer. Although some jurisdictions permit tape recording, and counsel may stipulate to a tape recording to be transcribed by one of the attorney's secretaries to save expense, this practice rarely works well. The best recourse is to employ a reporter and then to order only necessary portions of the transcript. If you intend to order less than the complete transcript, you must organize your questions to cover all aspects of a particular subject at the same time. Depositions may also be videotaped, but this is rarely done unless the deposition is intended as trial testimony. A videotaped deposition is more effective as evidence than having a transcript read in court, but live testimony will best hold the fact finder's attention.

Depositions typically take place in the office of the deposing party's attorney. However, the deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business, subject to considerations of expense.⁵⁶ A number of reporting services and courthouses have facilities for depositions; these may be more convenient and a more authoritative setting. When you request a party to bring documents to the deposition, subpoena a witness to appear with records. If you want a witness to have ready access to records, you may prefer to take the deposition at the witness' office. A request rather than a subpoena is sufficient to require a party to bring documents to a deposition. However, the thirty-day time period of Rule 34 applies to such a request under Rule 30(b)(5). To avoid the potential delay, you can issue a subpoena *duces tecum* even to a party.⁵⁷ Sequestration of witnesses during a deposition is no longer the norm. Other witnesses may attend unless a specific showing of harm is made.⁵⁸

In preparing for a deposition, you must begin by defining your objectives. Is your primary goal to determine what the witness knows? To learn the details of the adversary's case in order to prepare better to rebut it? To commit the witness to testimony favorable to your position in order to prepare a record for summary judgment? Whatever your goal, you should prepare for the deposition by outlining a series of questions or areas of inquiry, checking off each question or area as you cover it. Do not, however, fall into the trap of asking only questions developed in advance; you must listen carefully during the deposition. Inevitably the answers you get will suggest questions that you did not think of before the deposition.

Most depositions open with two sets of preliminary rituals. The first concerns stipulations, some of which may vary with local practice. Some attorneys are in the habit of proposing stipulations which are already mandated by federal rule unless otherwise stated, such as waiver of irregularities in the notice and disqualification of the officer before whom the deposition is taken.⁵⁹ If the opposing party is requesting the "usual stipulations," be sure to ask, at the outset, precisely what is encompassed by them. Stipulations may also waive the witness' right to read and sign the transcript before it is submitted to the court. Federal Rule of Civil Procedure 30(e) requires review of the transcript by the witness only if that

⁵²*Id.* 30(b)(6).

⁵³*Potomac Electrical Power Co. v. Electric Motor Supply Inc.*, 190 F.R.D. 372, 380 (D. Md. 1999).

⁵⁴Fed. R. Civ. P. 45(b)(1); 28 U.S.C. §1821.

⁵⁵See 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2454 (2d ed. 1994).

⁵⁶See 8A *id.* § 2112 at 81–85.

⁵⁷See *id.* § 2108.

⁵⁸See, e.g., *Jones v. Circle K. Stores Inc.*, 185 F.R.D. 223, 223 (M.D.N.C. 1999); *Tuszkewicz v. Allen Bradley Co.*, 170 F.R.D. 15, 16 (E.D. Wis. 1996).

⁵⁹Fed. R. Civ. P. 32(d).

is requested by a party before completion of the deposition. Do not permit your own witness to waive review and signature because doing so may prevent him from amending, correcting, or revising by affidavit his testimony before trial.⁶⁰

The second preliminary but very important ritual is for the deposing attorney to state certain ground rules to the witness. You should introduce yourself and indicate the party whom you represent. After the reporter swears the witness, explain to the witness on the record that the testimony is under oath and must be both accurate and complete. Instruct the witness that if the witness does not understand a question, the witness should say so in response, and you will rephrase the question. Similarly the witness should be advised to explain or clarify any answer that the witness feels needs explanation or clarification. This not only helps prevent embellishment of testimony at trial but also may give you leads for additional inquiry. Explain to the witness that an answer must be given by spoken words and not simply by a gesture, nod, or “mmhmm.” Ask whether there is any reason why the deponent cannot testify fully and accurately.

Experience teaches that depositions are best conducted in an accommodating, friendly manner. The best deposition is one in which the witness cooperates. A hostile, abrasive, or overbearing manner discourages cooperation. A confused, interrupted, belligerently conducted deposition does not generate a useful transcript. Moreover, it solidifies hostilities and may impede settlement.

Do not settle for ambiguous answers; follow up and insist on an answer. Remember that a reporter cannot transcribe accurately when several people speak simultaneously. Do not allow attorneys to answer questions in the guise of an objection, thus testifying in place of the deponent. The informal setting of a deposition often leads to going “off the record” more often than in a courtroom, with the result that valuable information may not be recorded. To assure the production of a useful transcript, be cautious about going off the record.

The first objective in most depositions is to discover what the witness knows. To further that objective, begin the deposition much like an interview: start by having the witness identify herself, her position, background, and involvement and detail what she did or experienced relevant to the case. Inquire of the witness’ knowledge about other witnesses, the parties generally, and potential sources of evidence. After allowing the witness to give narrative answers to questions framed to elicit elaboration, you should go back through the testimony, pinning down dates, locations, persons present, documentation, and other ways of fixing the testimony and using it as a source for further investigation or discovery. Only then should you seek, if at all, to confront the witness with adverse examination, particularly that which develops motive or exposes hostility. Along the way, acquaint the witness with matters developed previously through discovery or produced by the witness in response to a subpoena *duces tecum*. Ask the witness to identify the matters, agree with and substantiate them, or indicate her inability to do so and explain why.

Mark in advance all documents you intend to use during a deposition. Whenever possible, have three sets of marked documents—one for the witness, which the reporter should retain, one for opposing counsel, and one for yourself. To ensure that the transcript is clear, always refer to documents by their exhibit number.

Objections to the competency, relevancy, or materiality of testimony can but need not be made during a deposition; they can be raised later at trial. The only objections waived if not made during the deposition are those relating to the form of questions, privilege, and errors that could have been corrected during the deposition itself.⁶¹ Because objections are preserved for trial, the deposing attorney should seek during the deposition to respond, if possible, to the objection by curing any defect, such as a defect regarding the form of the question. An objection not cured precludes the use of the answer at trial.

Some attorneys engage in obstructive behavior, particularly with young opposing counsel. You have to cope with harassment by opposing counsel in order to prevent interference with your ability to elicit appropriate testimony from the witness. Rule 30(d) provides: “Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).”⁶² An attorney is prohibited from attacking every question posed by opposing counsel so as to prevent elicitation of any meaningful testimony from the witness and is prohibited from coaching the witness.⁶³ However, for an attorney to raise objections that are not

⁶⁰ See, e.g., *Rios v. Bigler*, 67 F.3d 1543, 1552 (10th Cir. 1995); *Blackthorne v. Posner*, 883 F. Supp. 1443, 1451 (D. Or. 1995).

⁶¹ Fed. R. Civ. P. 32(d)(3)(B).

⁶² See *McDonough v. Keniston*, 188 F.R.D. 22, 24 (D.N.H., 1998).

⁶³ *Odone v. Croda International PLC*, 170 F.R.D. 66, 68 (D.D.C. 1997).

waived by not being made is not *per se* improper. A witness and his lawyer are not permitted to confer at their pleasure during the witness' testimony except to determine whether to assert a privilege.⁶⁴

Personal remarks and ad hominem attacks on opposing counsel are inappropriate and may be sanctioned.⁶⁵ The witness' own lawyer has no proper need to act as an intermediary, interpreting questions.⁶⁶ If necessary, a judicial ruling seeking a protective order or a motion to compel may be obtained, although only at the expense of interrupting or delaying the deposition.⁶⁷ The federal magistrate or judge assigned to the case (or in the district in which the deposition is held) often makes herself available to resolve these types of disputes, sometimes by telephone. In some jurisdictions, however, interrupting a deposition to move to compel may delay the deposition for weeks or months as you await a ruling.⁶⁸ If possible, learn the local practice from other counsel or the judge's clerk before deciding whether to interrupt a deposition.

3. Defending Depositions and Preparing Witnesses

The four key steps to follow in order to prepare a witness for deposition are: (1) Review your entire file, not just the pleadings, to anticipate questions that the witness will be asked. (2) Meet with the witness to review the deposition process, including the preliminaries and breaks, the facts, documents about which you expect her to be asked, and the questions that you expect will be asked, including the most difficult issues which are likely to be covered. (3) If the witness is shaky or would feel more comfortable, have another attorney conduct a mock cross-examination of the witness. Try to keep this practice session as formal as possible, and use a tape recorder to simulate the presence of a court reporter. (4) Advise the witness how to dress for and conduct herself during the deposition. A sample set of instructions is set forth below.⁶⁹

Instructing a witness not to answer a question should rarely be necessary. Except when the inquiry intrudes into privileged areas, or when the inquiry is both irrelevant and embarrassing, simply object and permit the witness to answer. If a witness is instructed not to answer, the deposition may proceed to other matters; deposing counsel can seek an order compelling discovery from the court later. Alternatively the deposition may come to a halt while such relief is being sought, to resume at a subsequent time if a magistrate judge is not promptly available. This is rare; interrupting the deposition is necessary only where the objection precludes all useful inquiry or where the witness will soon become unavailable.

The strategic use of legitimate objections may be highly useful even if the objection would not be waived by not being made. As noted above, this is not *per se* improper, although at some point it could become abusive. An objection may signal to the witness to be cautious before responding to the question or may give her an opportunity to think through her answer more carefully before giving it. On the other hand, advocates can also signal a weakness in their case by pointedly objecting to a line of questioning.

⁶⁴ *Hall v. Clifton Precision*, 150 F.R.D. 525, 528–30 (E.D. Pa. 1993).

⁶⁵ *Van Pilsun v. Iowa State University of Science and Technology*, 152 F.R.D. 179, 180 (S.D. Iowa 1993).

⁶⁶ *Johnson v. Wayne Manor Apartments*, 152 F.R.D. 56, 59 (E.D. Pa. 1993).

⁶⁷ See, e.g., *Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697, 700 (D. Fla. 1999).

⁶⁸ Fed. R. Civ. P. 30(d)(4).

⁶⁹ The following is a sample set of instructions: (1) Never speculate or guess. (2) Do not volunteer any information; answer only the question asked. (3) Do not get angry or emotional—you will not think as clearly. (4) Just answer the question that is asked. (5) Do not anticipate the question. (6) Wait until opposing counsel finishes his question. (7) If you do not remember, say so. (8) Ask to look at a document if you are asked questions about it. (9) If asked to look at any document, read the whole thing. (10) Even if asked for an estimate, do not guess. (11) Never answer just “yes” or “no” if you want to explain. (12) Do not try to be funny or witty—this is a formal proceeding. (13) Listen to my objections—they are made for a reason. (14) Beware of opposing counsel's friendliness—do not drop your guard. (15) Try not to give absolute, definitive answers. E.g., avoid words such as “never” or “always” if there is any doubt. Better: “That's all I can remember at this time.” (16) Treat opposing counsel with respect even if you do not like him. (17) Come to the deposition well groomed. (18) Beware of an inadequate summary of your testimony by opposing counsel. (19) Do not feel like you have to prove your case at the deposition. (20) Pause before answering to give yourself time to think.

In defending a deposition of your client or of a friendly witness, you must also decide whether to ask questions at the conclusion of direct examination. Although many lawyers, reasoning that explanations or rehabilitation may be offered at trial, forgo “redirect” of their witnesses, you should not automatically decline this opportunity. Whenever the examination of your witness produces damaging testimony that can be explained, obtain the explanation in redirect. A later explanation is not precluded, but it is more easily dismissed as the work of the lawyer than one elicited during the deposition on the very same day as the apparently damaging statement. Waiting until trial to rehabilitate your witness is particularly hazardous for two reasons. First, an explanation offered at trial, after your witness has been impeached or even in anticipation of impeachment, may look contrived. Second, before trial, the deposition of your witness may become part of an adverse motion for summary judgment. Should that happen, your witness will have no other opportunity to testify, although an explanatory affidavit may be permissible, at least if the witness noted a correction on his “errata sheet.”

An errata sheet presents the next best chance, apart from changes made at the deposition itself, for a witness to amend his testimony. An errata sheet may be created by the witness when the transcript is submitted to him for review, but, under Rule 30(e), submission to the witness occurs only if it is affirmatively requested by the deponent or a party before completion of the deposition. Rule 30(e) also permits the deponent to make “changes in form or substance” in his transcribed testimony. To be effective, however, the changes must be supported by reasons and must be made within thirty days of submission of the transcript to him.⁷⁰ The changes are appended to the deposition, although the original testimony stands as well. Again, however, this approach will be less convincing to the trier of fact than testimony amended at the time of the deposition.

In the event that the deposing attorney conducts the deposition “in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party,” you may seek a protective order under Federal Rule of Civil Procedure 30(d)(4).

4. Depositions of Organizations

The foregoing rules and principles apply fully to depositions of organizations. Pursuant to Rule 30(b)(6), such depositions are where the person being deposed is to testify “as to matters known or reasonably available to the organization.” For example, once an organization designates a witness on its behalf, the scope of the inquiry is governed only by the general scope of discovery, and is not limited to the specific areas identified in the notice of deposition.⁷¹ Indeed, in one respect, organizations producing 30(b)(6) witnesses have a greater responsibility than other parties. The party responding to a 30(b)(6) deposition notice “must prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits.”⁷² Even if the documents are voluminous and the review of those documents would be burdensome, the deponents are still required to review them in order to prepare themselves to be deposed.⁷³ Such preparation is necessary because the individuals so deposed are required to testify to the knowledge of the corporation, not merely to their own.⁷⁴

⁷⁰ Fed. R. Civ. P. 30(e). See 8A WRIGHT & MILLER, *supra* note 55, § 2118.

⁷¹ See, e.g., *Detoy v. City of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000); *Cabot Corp. v. Yamulla Enterprises*, 194 F.R.D. 499, 499 (M.D. Pa. 2000).

⁷² *Calzaturificio v. Fabiano Shoe Co.*, 201 F.R.D. 33, 37 (D. Mass. 2001) (citing *Prokosch v. Catalina Lighting Inc.*, 193 F.R.D. 633, 639 (D. Minn. 2000)). See also *Bank of New York v. Meridien Biao Bank Tanzania, Ltd.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997) (deponent must be prepared “to the extent matters are reasonably available, whether from documents, past employees, or other sources”); *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

⁷³ *Prokosch*, 193 F.R.D. at 638 (“the burden upon the responding party, to prepare a knowledgeable Rule 30 (b)(6) witness, may be an onerous one, but we are not aware of any less onerous means of assuring that the position of a corporation that is involved in litigation, can be fully and fairly explored”).

⁷⁴ *Id.* at 638 (a corporation must prepare its deponents “so that they may give complete, knowledgeable and binding answers on behalf of the corporation”); *Taylor*, 166 F.R.D. at 361 (“the designee [under Rule 30(b)(6)] must not only testify about facts within the corporation’s knowledge, but also its subjective beliefs and opinions. . . . The corporation must provide its interpretation of documents and events”).

G. ELECTRONIC DISCOVERY

Document discovery includes “data compilations from which information can be obtained, translated if necessary, by the respondent through detection devices into reasonably usable form.”⁷⁵ Without clear direction in Federal Rule of Civil Procedure 34, the courts have struggled with whether producing computer files in hard copy or producing them in an electronic form navigable by the recipient is sufficient.⁷⁶ Deleted computer files, whether they be emails or otherwise, are discoverable.⁷⁷ The procedure utilized to permit one party to attempt to resurrect data deleted from the other’s computer equipment may vary. Some courts require the party seeking discovery first to submit an affidavit from a computer expert regarding the feasibility of recovering deleted e-mails without damage to the opposing party’s computer. Subsequently a computer expert specializing in the field of electronic discovery may be appointed to create a “mirror image” of the defendant’s hard drive. Possibly privileged information must also be protected.⁷⁸

A few cases have also applied rules of reasonableness to the issues of who should bear the burden and cost of reconstructing lost data and how to protect privacy concerns.⁷⁹ The question of who is to pay the expense of electronic discovery was recently the subject of several rulings. One such ruling, *Zubulake v. UBS Warburg*, is particularly noteworthy and may be followed by other courts.⁸⁰ In *Zubulake* the court outlined seven factors (in order of importance) to determine which party would bear the cost of electronic discovery: (1) the specificity of the request, (2) the availability of information from other sources, (3) the cost of production in relation to the amount in controversy, (4) the cost of production in relation to the resources of each party, (5) the ability of each party to control costs, (6) the importance of the issues to the case, and (7) the relative benefits to the parties of obtaining the information.

H. EXPERT DISCOVERY

The federal rules “provide for extensive pretrial disclosure of expert testimony.”⁸¹ Federal Rule of Civil Procedure 26(a)(2)(B) requires parties to disclose the names of their retained trial experts before trial and to give the opposing party a written report, prepared and signed by the expert witness. The report is required to be comprehensive. It must contain “a complete statement of all opinions to be expressed by the expert and the basis and reasons therefor,” along with “the data or other information considered by the witness in forming the opinions,” exhibits, the expert’s qualifications (including publications) and compensation, and a listing of expert testimony during the preceding four years.⁸² The disclosures “shall be made at the times and in the sequence directed by the court,” but at least ninety days before trial if not otherwise directed.⁸³ However, the parties have an additional thirty days to disclose expert evidence intended solely

⁷⁵Fed. R. Civ. P. 34(a).

⁷⁶See, e.g., Richard L. Marcus, *Complex Litigation at the Millennium: Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW AND CONTEMPORARY PROBLEMS 253 (2001).

⁷⁷See, e.g., *Rowe Entertainment Inc. v. William Morris Agency*, 205 F.R.D. 421, 427 (S.D.N.Y. 2002) (stating that “[e]lectronic documents are no less subject to disclosure than paper records,” and only questioning who should bear the cost of such discovery, particularly for backup tapes and deleted e-mails); *McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001); *Kleiner v. Burns*, 2000 WL 1909470 (D. Kan. Dec. 15, 2000) (noting that Rule 26(a)(1)(B) requires description and categorization of computerized data, including deleted e-mails, and stating that “[t]he disclosing party shall take reasonable steps to ensure that it discloses any backup copies of files or archival tapes that will provide information about any ‘deleted’ electronic data”); *Simon Property Group L.P. v. mySimon Inc.*, 194 F.R.D. 639, 640 (N.D. Ill. 2000); *Playboy Enterprises v. Welles*, 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999).

⁷⁸See, e.g., *Simon Property Group*, 194 F.R.D. at 641–42; *Playboy Enterprises*, 60 F. Supp. 2d at 1055.

⁷⁹See, e.g., *Rowe Entertainment Inc.*, 205 F.R.D. at 431 (“Thus, since there has been no showing that the defendants access either their backup tapes or their deleted e-mails in the normal course of business, this factor tips in favor of shifting the costs of discovery to the plaintiffs.”); *McPeck*, 202 F.R.D. at 34 (ordering limited efforts at recovery of deleted data in order to assess the recoverability of relevant information, in light of the cost of such recovery, in order to determine the scope of further efforts); *Playboy Enterprises*, 60 F. Supp. 2d at 1053 (stating that discovery of electronic data is appropriate, and the only concern is that “the producing party be protected against undue burden and expense and/or invasion of privileged matter”).

⁸⁰*Zubulake v. UBS Warburg*, 02 Civ. 1243 (SAS) 2003 U.S. Dist. LEXIS 7940 (S.D.N.Y. May 13, 2003).

⁸¹*Thibeault v. Square D Co.*, 960 F.2d 239, 244 (1st Cir. 1992).

⁸²See, e.g., *Pacamor Bearings Inc. v. Minebea Co.*, 918 F. Supp. 491, 508 (D.N.H. 1996).

⁸³Fed. R. Civ. P. 26(a)(2)(C).

to contradict or rebut evidence on the same subject matter identified in another party's disclosures.⁸⁴ The "automatic sanction" for a violation of Rule 26(a)'s disclosure requirements is preclusion of the expert's testimony.⁸⁵

In some cases, a thorough report may eliminate the need for the deposition of an expert. However, the deposition permits far greater exploration of any weaknesses in the witness's background, knowledge, and opinions.⁸⁶ If a deposition is desired and you are able to afford the significant expense entailed, you may schedule it as soon as the expert is identified and the report given.⁸⁷ By contrast, a party may seek discovery from experts who are merely retained or specially employed in anticipation of litigation or preparation for trial and who are expected to testify only as provided in Rule 35(b) or upon a showing of exceptional circumstances.⁸⁸

Matters considered by experts, including documents given by counsel to the expert and the expert's draft reports, are generally disclosable in their reports and discoverable. Draft reports may be discoverable even if they contain comments of nontestifying, consulting experts.⁸⁹ They are discoverable as well even if they have counsel's comments.⁹⁰ District courts disagreed as to the discoverability of communications between counsel and experts in general.⁹¹ Counsel's own notes of her communications with an expert are generally viewed as nondiscoverable work product.⁹² If, however, counsel's notes are furnished to the expert, the trend seems to be to override even core opinion work product privilege and compel discovery of the attorney-expert communication.⁹³ Extreme caution should therefore be exercised before sending the expert anything in writing, whether by e-mail or otherwise. As with other discovery, timely supplementation of expert disclosures is required pursuant to Federal Rule of Civil Procedure 26(e)(1). Supplementation of an expert report on the eve of trial is not permitted unless justified by good cause.⁹⁴

I. THE USES OF DISCOVERY

Information learned in discovery frequently suggests amending your pleadings to add new claims or parties. When information gathered during discovery supports new claims, new parties, or new relief, amend or supplement your pleadings. Occasionally discovery suggests that a claim is no longer viable or that a party should be voluntarily dismissed. In that event, file an appropriate document pursuant to Federal Rule of Civil Procedure 41(a).

More typically the point of discovery is to generate usable evidence. Evidence from discovery may be particularly valuable in connection with preliminary injunctive relief and summary judgment. Although preliminary injunctions may require testimony offered in court, they are sometimes granted or denied because of documentary evidence including depositions or responses to requests for production.⁹⁵

⁸⁴ *Id.* 26(a)(2)(C). See, e.g., *Dixon v. Certainteed Corp.*, 168 F.R.D. 51, 54 (D. Kan. 1996).

⁸⁵ Advisory Committee Notes to the 1993 Amendments to the Fed. R. Civ. P. See also Fed. R. Civ. P. 37(c)(1); *Nutra Sweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 785 (7th Cir. 2000); *LaMarca v. United States*, 31 F. Supp. 2d 110, 122–23 (E.D.N.Y. 1998); *Fund Commission Service II Inc. v. Westpac Banking Co.*, 93 Civ. 8298 (KTD) (RLE), 1996 WL 469660 at *3 (S.D.N.Y. Aug. 16, 1996); see also 8A Wright & Miller, *supra* note 55, § 2031.1.

⁸⁶ See Advisory Committee Notes to the 1993 Amendments to Fed. R. Civ. P. 26.

⁸⁷ See Fed. R. Civ. P. 26(b)(4)(A).

⁸⁸ See, e.g., *Ross v. Burlington Northern Railroad Co.*, 136 F.R.D. 638, 638 (N.D. Ill. 1991); *In re Shell Oil Refinery*, 132 F.R.D. 437, 440 (E.D. La. 1990).

⁸⁹ *Trigon Insurance v. United States*, 204 F.R.D. 277, 282 (E.D. Va. 2001).

⁹⁰ *Weil v. Long Island Savings Bank*, 206 F.R.D. 38, 39 (E.D.N.Y. 2001).

⁹¹ Compare, e.g., *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (discoverable), with *Haworth Inc. v. Herman Miller Inc.*, 162 F.R.D. 289, 292 (W.D. Mich. 1995) (not discoverable).

⁹² See, e.g., *B.C.F. Oil Refinery v. Consolidated Edison Co.*, 171 F.R.D. 57, 66–67 (S.D.N.Y. 1997).

⁹³ See, e.g., *Barna v. United States*, No. 85-C6552, 1997 U.S. Dist. Lexis 10853, at *8 (N.D. Ill. July 18, 1997).

⁹⁴ See, e.g., *Sheek v. Asia Badger Inc.*, 235 F.3d 687, 694 (1st Cir. 2000); *Reliance Insurance v. Louisiana Land and Exploration Co.*, 110 F.3d 253, 257 (5th Cir. 1997).

⁹⁵ Fed. R. Civ. P. 65(a)(2).

By contrast, motions for summary judgment are considered exclusively on documentary evidence. Although Rule 56 speaks of affidavits submitted in support of or in response to the motion for summary judgment, in practice parties often rely extensively on depositions. Local practice may vary as to whether filing the transcript of the entire deposition is necessary; attaching excerpts to the motion for summary judgment or the memorandum in opposition is more frequently permissible.

Discovery by or from you sometimes facilitates settlement. The opposing party may be induced to settle in order to avoid the effort, expense, and possible embarrassment of responding to your discovery requests. When you respond to discovery and show the strength of your case, the opposing party may also be encouraged to settle.

Discovery is especially valuable in preparing for and conducting a trial. A deposition may be used to impeach a witness or may be offered into evidence as the testimony of a party, or of a witness who is unavailable for trial.⁹⁶ When offered to impeach the testimony of a witness, deposition testimony is admissible as substantive evidence rather than simply as evidence of the witness's lack of credibility.⁹⁷ Requests for production and interrogatories also generate trial evidence, and requests for admission may pare down the issues which must be tried.

J. SHIFTING COSTS OF DISCOVERY

Depositions can be expensive due to stenographers' fees, videotaping costs, the fee of any expert whom you depose, and transportation and lodging for you to attend out-of-state depositions or to bring a witness to the deposition. In federal court only one part of these deposition costs may be taxed in favor of the prevailing party.⁹⁸ Pursuant to Federal Rule of Civil Procedure 54(d), this part consists of "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case."⁹⁹ Taxation of such fees is permitted, and the concept of "necessarily obtained" gives the court substantial discretion to award or refuse to tax costs. Very generally these fees for a deposition are taxed as costs when the deposition is received in evidence.¹⁰⁰ They also are so taxed when used in support of a successful motion for summary judgment.¹⁰¹

K. PROTECTIVE ORDERS

Protective orders may be sought in different contexts and with varying goals. In general, protective orders may be granted to avoid undue embarrassment, oppression, or expense, to protect private matters, and to protect trade secrets.¹⁰² Before seeking such an order, the movant is required by this rule to confer with the opposing party in an effort to resolve the dispute without court action. If this effort is unsuccessful, the movant has the burden to show why—including a particular and specific demonstration of fact as distinguished from stereotyped and conclusive statements—a protective order is necessary.¹⁰³ The decision to enter a protective order is within the court's discretion.¹⁰⁴

Protective orders are sometimes sought to avoid producing responsive information completely.¹⁰⁵ Other times, particularly in the context of document production, protective orders are sought not to foreclose discovery but to prohibit fur-

⁹⁶*Id.* 32(a).

⁹⁷Fed. R. Evid. 801(d)(1)(A).

⁹⁸There is an extensive body of case law on who is a "prevailing party." See 10 CHARLES A. WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE § 2667 (3d ed. 1998). The Legal Services Corporation (LSC) restrictions concerning attorney fees to do not apply to costs. 45 U.S.C. § 1642.2(b)(4).

⁹⁹28 U.S.C. § 1920(2).

¹⁰⁰*See, e.g., Templeman v. Chris Craft Corp.*, 770 F.2d 245, 249 (1st Cir.), *cert. denied*, 474 U.S. 1021 (1985); *In re Nissan Antitrust Litigation*, 577 F.2d 910, 918 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

¹⁰¹*See, e.g., Tilton v. Capital Cities/ABC Inc.*, 115 F.3d 1471, 1474 (10th Cir. 1997); *Bathke v. Casey's General Stores*, 64 F.3d 340, 347 (8th Cir. 1995).

¹⁰²Fed. R. Civ. P. 26(c).

¹⁰³*Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981); *In re Terra International*, 134 F.3d 302, 306 (5th Cir. 1998); *Securities and Exchange Commission v. Dowdell*, 175 F. Supp. 2d 850, 854 (W.D. Va. 2001); *Reed v. Bennett*, 193 F.R.D. 689, 691 (D. Kan. 2000).

¹⁰⁴*Thomas v. International Business Machines*, 48 F.3d 478, 482 (10th Cir. 1995).

¹⁰⁵*See, e.g., Cockrum v. Johnson*, 917 F. Supp. 479, 481–82 (E.D. Tex. 1996) (letters of prisoner to his daughter).

ther disclosure, limit use of the information to the case at hand, or require return of documents at the end of the litigation or all three. For example, in Title VII litigation, in which plaintiffs are required to demonstrate pretext, courts customarily allowed wide discovery of personnel files, subject to a protective order requiring that they be maintained in confidence, utilized only for purposes of the subject litigation, and returned or destroyed at the conclusion of the litigation.¹⁰⁶ Information shielded from disclosure by the Privacy Act is similarly discoverable only subject to appropriate protective orders.¹⁰⁷ Such orders permanently prohibiting disclosure of documents produced in discovery are frowned upon except with respect to trade secrets.¹⁰⁸ As to such secrets, Rule 26(c) of the Federal Rules of Civil Procedure states: “Upon motion by a party or by the person from whom discovery is sought . . . and for good cause shown” the court may order “that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.”¹⁰⁹ Such an order may interfere with your ability freely to interview or depose current or former employees of an opposing party.

The general principles regarding protective orders set forth in Rule 26(c) apply, of course, to interrogatories as well. An additional objection which may be raised is that an interrogatory is a “contention interrogatory,” which is an interrogatory asking for a description of all facts on which a party bases its contention. Such interrogatories are not *per se* improper. However, answering them may be deferred until the end of discovery.¹¹⁰ They may be objectionable as burdensome if they seek too much detail.¹¹¹

With respect to depositions, a protective order may be sought to bar entirely the taking of the deposition or simply to limit its scope or duration. Protective orders prohibiting a deposition from being conducted are unusual and require a showing of “extraordinary circumstances.”¹¹² Some courts apply a balancing test, weighing the movant’s proffer of harm against the adversary’s significant interest in preparing for trial.¹¹³ A claimed lack of knowledge is not a sufficient ground for a protective order.¹¹⁴ Similarly “the fact that the witness has a busy schedule is simply not a basis for foreclosing otherwise proper discovery.”¹¹⁵ Such orders may, however, be granted in a number of different contexts:

- where it clearly appeared that the information sought was wholly irrelevant and could have no possible bearing on the issue;¹¹⁶
- as to a high-level corporate executive who lacks unique or superior knowledge of the facts in dispute;¹¹⁷
- where the deposition would necessarily involve attorney work product;¹¹⁸
- as to an opposing party’s attorney, except where the party seeking the attorney’s deposition establishes no other means to obtain the information except to depose opposing counsel;¹¹⁹ and
- for high-ranking public officials.¹²⁰

¹⁰⁶See, e.g., *Onwuka v. Federal Express Corp.*, 178 F.R.D. 508, 517 (D. Minn. 1997); *Lynch v. Anheuser-Busch Co.*, 164 F.R.D. 62, 68–69 (E.D. Mo. 1995); *Miles v. Boeing Co.*, 154 F.R.D. 112, 115 (E.D. Pa. 1994).

¹⁰⁷See, e.g., *Laxalt v. McClatchy*, 809 F.2d 885, 888–89 (D.C. Cir. 1987); *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980); *Broderick v. Shad*, 117 F.R.D. 306, 312 (D.D.C. 1987).

¹⁰⁸See, e.g., *Baxter International Inc. v. Abbott Laboratories*, 297 F.3d 544, 548 (7th Cir. 2002); *First National Bank of Princeton v. Cincinnati Insurance*, 178 F.3d 943, 945 (7th Cir. 1999).

¹⁰⁹See, e.g., *Cuno Inc. v. Pall Corp.*, 117 F.R.D. 506, 508 (E.D.N.Y. 1987).

¹¹⁰Fed. R. Civ. P. 33(c); *B. Braun Medical Inc. v. Abbott Laboratories*, 155 F.R.D. 525, 527 (E.D. Pa. 1994).

¹¹¹*IBP Inc. v. Mercantile Bank of Topeka*, 179 F.R.D. 316, 321 (D. Kan. 1998).

¹¹²*Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Prozina Shipping Co. v. Thirty-Four Automobiles*, 179 F.R.D. 41, 48 (D. Mass. 1998). See also 8 WRIGHT & MILLER, *supra* note 55, § 2037.

¹¹³See, e.g., *Jennings v. Family Management*, 201 F.R.D. 272, 275 (D.D.C. 2001).

¹¹⁴*Digital Equipment Corp.*, 108 F.R.D. 742, 744 (D. Ma. 1986); *General Star Indemnity Co. v. Platinum Indemnity Ltd.*, 210 F.R.D. 80, 83 (S.D.N.Y. 2002).

¹¹⁵*CBS Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984).

¹¹⁶See 8 WRIGHT & MILLER, *supra* note 55, § 2037; *Rosin v. New York Stock Exchange Inc.*, 484 F.2d 179, 185 (7th Cir. 1973), *cert. denied*, 415 U.S. 977 (1984); *Securities and Exchange Commission v. Dowdell*, No. C99-3055-MWB, 2002 U.S. Dist. Lexis 19980 (W.D. Va. Oct. 11, 2002).

¹¹⁷See, e.g., *Thomas v. International Business Machines*, 48 F.3d 478, 482 (10th Cir. 1995); *Lewelling v. Farmers Insurance of Columbus*, 879 F.2d 212, 218 (6th Cir. 1989); *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979).

¹¹⁸*Securities and Exchange Commission v. Rosenfeld*, No. 97 CIV. 1467 (RPP), 1997 WL 576021 (S.D.N.Y. Sept. 16, 1997).

¹¹⁹*Shelton v. American Motors Corp.*, 805 F.2d 1323, 1326 (8th Cir. 1986); *Simmons Foods Inc. v. Willis*, 191 F.R.D. 625, 630 (D. Kan. 2000).

¹²⁰*United States v. Morgan*, 313 U.S. 409, 422 (1941); *Rogan v. City of Boston*, 267 F.3d 24, 28 (1st Cir. 2001).

Once a deposition begins, a protective order may be sought regarding particular questions or conduct.¹²¹ When a protective order is sought while a deposition is in progress, the motion may be presented to the court in which the action is pending or the court in the district where the deposition is being taken.¹²² The latter court may, however, elect to transfer the dispute to the court where the action is pending.¹²³ Such a transfer is less likely when the protective order is sought by a nonparty who is being deposed.¹²⁴ The award of expenses in connection with a protective order is governed by Rule 37(a)(4).

L. MOTIONS TO COMPEL

Although the rules contemplate cooperative discovery, many lawyers unfortunately practice obstruction. Should you encounter late, incomplete, or ambiguous responses, or improper objections to interrogatories, requests for production, and requests for admission, you should write a demand for compliance, specifying a short time limit for a reply. If a satisfactory reply is not forthcoming within your specified time limit, move under Rule 37(a) to compel discovery and, when appropriate, for Rule 37(b) sanctions. Rule 37(a)(2) requires any motion seeking to compel discovery (or to compel Rule 26(a) disclosures) to include “a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.” Never threaten unless you intend to act; you must show strength when dealing with obstruction or you will encourage more obstruction.

When you move to compel or for sanctions, you must explain clearly and simply what the dispute is about. You should begin by setting forth the discovery request, the improper response or objection, and your attempt to resolve the dispute. Then explain both why you are entitled to discovery and why the discovery sought is important. Before filing your motion, check your local rules, which frequently specify how discovery materials are to be presented to the court in the context of motions to compel.

Trial courts have wide discretion in managing discovery. To obstruction, Rule 37 in general contemplates an escalating judicial response, beginning with an order to compel and proceeding through increasingly severe sanctions, such as fines or an award of attorney fees.¹²⁵ Courts generally are more willing to impose harsher sanctions for violations of their own orders, as opposed to preliminary actions obstructing counsel’s discovery attempts. Apart from Rule 37, the court also has inherent authority to control the proceedings before it as necessary to the exercise of its judicial function.¹²⁶ This inherent power encompasses the power to sanction attorney or party misconduct and includes the power to enter a default judgment.¹²⁷

Serious obstruction of discovery may result in an order precluding the admission of certain evidence.¹²⁸ Because issue-related sanctions are fundamentally remedial rather than punitive and do not preclude a trial on the merits, they do not require a heightened standard of proof. Rather, they may be imposed “whenever a preponderance of the evidence establishes that a party’s misconduct has tainted the evidentiary resolution of the issue.”¹²⁹

The ultimate sanctions for discovery abuse are the entry of a default judgment against the defendant and dismissal with prejudice against the plaintiff. Imposition of these sanctions, however, generally requires a clear record of delay or contumacious conduct.¹³⁰ Where the guilty party engages in wholesale destruction of primary evidence regarding a num-

¹²¹Fed. R. Civ. P. 30(d)(4). *See, e.g., Quantachrome Corp.*, 189 F.R.D. at 701.

¹²²Fed. R. Civ. P. 26(c).

¹²³*See, e.g., In re Subpoenas Duces Tecum To: Schneider National Bulk Carriers*, 918 F. Supp. 272, 273 (E.D. Wis. 1996); *Socialist Workers Party v. Attorney General of the United States*, 73 F.R.D. 699, 700 (D. Md. 1977); WRIGHT & MILLER, *supra* note 55, § 2463.

¹²⁴*Smithkline Beecham Corp. v. Synthen Pharmaceuticals Ltd.*, 210 F.R.D. 163, 169 (M.D.N.C. 2002).

¹²⁵LSC-funded programs are not precluded from accepting attorney fees awarded as sanctions. 45 C.F.R. § 1642.2(b).

¹²⁶*See Chambers v. NASCO Inc.*, 501 U.S. 32, 46 (1991).

¹²⁷*See id.* at 43–45; *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118–19 (1st Cir. 1989).

¹²⁸*See, e.g., Marrocco v. General Motors Corp.*, 966 F.2d 220, 225 (7th Cir. 1992).

¹²⁹*Shepherd v. ABC*, 62 F.3d 1469, 1478 (D.C. Cir. 1995).

¹³⁰*See, e.g., Ciaverelli v. Stryker Medical*, No. 002873, 2002 U.S. App. LEXIS 3349, at *2–3 (3d Cir. 2002); *Aoude*, 892 F.2d at 1119 (willful deception of the court); *Ford v. Fogarty Van Lines*, 780 F.2d 1582, 1583 (11th Cir. 1986); *Synanon Church v. United States*, 820 F.2d 421, 423 (D.C. Cir. 1987); *Williams v. Employment Service*, 2001 U.S. Dist. LEXIS 11817 (N.D. Iowa 2001).

ber of issues and the district court cannot fashion an effective issue-related sanction, default or dismissal may be granted.¹³¹ Courts of appeal also demand an explanation of why lesser sanctions were likely to be ineffective.¹³² However, this does not mean that courts must first impose the lesser sanction.¹³³

Discovery problems can surface at trial when testimony changes and documents suddenly appear. When a witness changes testimony from that given at a deposition, you can impeach the witness on cross-examination. When, however, a document is produced that was not disclosed in response to a request for production or interrogatory, the producing party may argue that the request is unclear, that earlier production fully complies with the request, or that the material is newly discovered. Properly prepared document requests and interrogatories, as well as strategic requests for admission, protect against the first two arguments; thorough discovery requests should make the claim of newly discovered documents incredible.

Trial courts have broad discretion—ranging from granting a continuance to excluding a document—in dealing with surprise documents. However, unless you can show prejudice or willful, bad-faith failure to produce, the court is likely to allow the document into evidence. Your opposition to admissibility is stronger if the document was omitted from disclosure required in a pretrial conference; then the court is more likely to exclude it. The message is clear: discovery requires careful planning and execution and continuing vigilance.

II. Conferences and Scheduling

Initial scheduling orders are governed by Federal Rule of Civil Procedure 16(b). The conferences which result in initial scheduling orders are typically conducted by telephone conference call with a member of the judge's staff. While the conferences are relatively informal, care should be taken in preparing for them.

A. SCHEDULING ORDERS AND PRETRIAL CONFERENCES

Consider your discovery needs and the desirability, if any, for a quick resolution of the case. Subsequent pretrial conferences will result in the formulation of additional scheduling orders.¹³⁴ Attention must also be given to any local rule governing pretrial conferences.

Courts permit or deny modification of a scheduling order depending on whether the “good cause” required by the rule has been shown.¹³⁵ Additional scheduling orders may be issued following any pretrial conference. Rule 16(e) provides that “[t]he order following a final pretrial conference shall be modified only to prevent manifest injustice.” Rule 16(f) authorizes the imposition of sanctions for failing to obey a scheduling or pretrial order, including the ultimate sanction of dismissal.¹³⁶ The district court's decision to impose or refuse sanctions is overturned only for an abuse of discretion.¹³⁷

¹³¹ See, e.g., *Century ML-Cable Corp. v. Carillo*, 43 F. Supp. 2d 176, 184 (D.P.R. 1998); *Skeete v. McKinsey and Company*, 1993 U.S. Dist. LEXIS 9099, *8 (S.D.N.Y. July 7, 1993); *Telectron Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 135 (S.D. Fla. 1987).

¹³² *Shepherd*, 62 F.3d at 1469 (vacating default judgment); *Hathcock v. Navistar International Transportation Corp.*, 53 F.3d 36, 40–41 (4th Cir. 1995) (vacating default judgment); *Henry v. Gill Industries*, 983 F.2d 943 (9th Cir. 1993) (upholding dismissal and setting out a five-part test); *Wilson v. Volkswagen of America Inc.*, 561 F.2d 494, 503–5 (4th Cir. 1977), cert. denied, 434 U.S. 1020 (1978) (setting forth a four-part test: the court must determine (1) whether the noncomplying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of noncompliance, and (4) whether less drastic sanctions would have been effective).

¹³³ *Beil v. Lakewood Engineering and Manufacturing*, 15 F.3d 546, 552 (6th Cir. 1994); *Aoude*, 892 F.2d at 1118; *Automated Datatron Inc. v. Woodcock*, 659 F.2d 1168, 1169–70 (D.C. Cir. 1981).

¹³⁴ Examples of subjects for consideration under Rule 16(a) and (c) include amendments to pleadings, controlling discovery, admissions of fact and of documents, identification of witnesses and documents, exchanging pretrial briefs, settlement, and a reasonable limit on the time allowed for presenting evidence.

¹³⁵ Compare *Summers v. Missouri Pacific Railroad*, 132 F.3d 599, 604 (10th Cir. 1997), and *Burton v. United States*, 199 F.R.D. 194, 197 (D. W. Va. 2001) (permitting modification), with *Book v. Nordrill Inc.*, 826 F.2d 1457, 1461 (5th Cir. 1987) (refusing to permit new expert to testify); *Gestetner Corp. v. Case Equipment Co.*, 108 F.R.D. 138, 140 (D. Me. 1985) (denying modification).

¹³⁶ *Spain v. Board of Education of Meridian Community Unit School District*, 214 F.3d 925, 930 (7th Cir. 2000).

¹³⁷ See, e.g., *Sanders v. Union Pacific Railroad*, 193 F.3d 1080, 1082 (9th Cir. 1999) (en banc).

B. ASSIGNMENT OF MAGISTRATE JUDGES

The role and authority of federal magistrate judges is governed by 28 U.S.C. §§ 631 *et seq.* and Federal Rules of Civil Procedure 72 and 73. Rule 72 permits magistrate judges to decide pretrial matters referred to them by district court judges, and Rule 73 permits them to conduct trials “[w]hen specially designated ...by local rule or order of the district court and when all parties consent.” Magistrate judges may act as special masters, and may have additional duties established by court order or local rule, so long as these are not “inconsistent with the Constitution and laws of the United States.”¹³⁸ In all of these situations, magistrate judges are authorized to act only to the extent granted by the district court. The question of the advisability of referring matters to a magistrate judge is one of the subjects to be discussed at a pretrial conference. The manner in which cases are allotted to magistrate judges is determined by local rule. In most instances, it is the same as the manner in which cases are assigned to the judges.

The “pretrial matters” covered by Rule 72 include virtually any motion made before trial and are both “(a) nondispositive matters” and “(b) dispositive motions and prisoner petitions.” Determining which matters are dispositive is not always easy.¹³⁹ As for nondispositive matters, the magistrate judge has the authority to enter an order deciding the matter unless the order of reference directs her merely to make a recommendation. A party who is displeased with the magistrate judge’s ruling may file objections within ten days of being served with the order.¹⁴⁰ Unless the matter was referred solely for a recommendation, the standard of review set forth in Rule 72(a) is highly deferential: “clearly erroneous or contrary to law.”¹⁴¹ Objections are heard by the district judge to whom the case is assigned, and may be made in any manner permitted by local rule. Failure to object constitutes a waiver of the right to review of the magistrate judge’s order, but the district judge may elect to review it nevertheless.

Much of the foregoing discussion also applies to dispositive pretrial motions under Rule 72(b), with a few exceptions. With respect to dispositive motions, the magistrate judge may make findings and a recommendation, but does not enter an order. The objections thereto must be “specific.”¹⁴² The party opposing the objection is explicitly permitted to file a written response within ten days of service of the objections. And the review by the district judge assigned to the case is “de novo,” as befits the importance of the matter.¹⁴³ A record of the proceedings before the magistrate judge is made in order to permit such de novo review, and the party objecting must “promptly arrange” for its transcription.¹⁴⁴ A district judge has no obligation to review the magistrate judge’s recommendation on a dispositive matter in the absence of an objection.¹⁴⁵

¹³⁸28 U.S.C. § 636(a), (b)(3).

¹³⁹*See, e.g., Vogel v. U.S. Office Products Co.*, 258 F.3d 509, 516 (6th Cir. 2001) (order of remand); *Yang v. Brown University*, 149 F.R.D. 440, 441 (D.R.I. 1993) (order precluding testimony of expert witness as discovery sanction).

¹⁴⁰Fed. R. Civ. P. 72(b).

¹⁴¹Particularly in the discovery context, this is viewed as an abuse-of-discretion standard. *See, e.g., Anjelino v. New York Times Co.*, 200 F.3d 73, 88 (3d Cir. 1999). As to matters referred for recommendation only, the review is de novo. *See European Community v. RJR Nabisco Inc.*, 134 F. Supp. 2d 297, 302 (E.D.N.Y. 2001).

¹⁴²The right to de novo review is confined to the specific issues raised by the objection. *See, e.g., Whitehead v. Oklahoma Gas and Electric Co.*, 187 F.3d 1184, 1190 (10th Cir. 1999).

¹⁴³Fed. R. Civ. P. 72(b).

¹⁴⁴*Id.*

¹⁴⁵*See, e.g., Thomas v. Arn*, 474 U.S. 140, 153 (1985).

Upon review of objections, the district judge “may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions.”¹⁴⁶ The district judge must not, however, merely rubber-stamp the recommended decision.¹⁴⁷ Even so, no specific findings are necessary to satisfy the judge’s review responsibility.¹⁴⁸ In conducting the required de novo review, only with respect to disregarding the credibility determinations by the magistrate judge may the district court be limited, but even that is not entirely clear.¹⁴⁹

Rule 73, implementing 28 U.S.C. § 636(c), gives magistrate judges authority to “conduct any or all proceedings, including a jury or non-jury trial, in a civil case” on two conditions. The first is that they have been “specially designated to exercise such jurisdiction by local rule or order of the district court,” and the second is that all parties consent. To protect against a party feeling coerced into accepting such a referral, Subsection (b) of the rule provides that each party’s position on consent is to be filed but not revealed to the judge or magistrate judge unless all parties consent. Implied consent to trial by the magistrate judge is permitted “when the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge.”¹⁵⁰ If any parties are added to the case after the original parties have consented to trial before the magistrate judge, care must be taken to obtain their consent, too.¹⁵¹ Once the matter is referred, the order of reference can be vacated by the district judge “for good cause shown on its own motion, or under extraordinary circumstances shown by a party.”¹⁵² There is some authority that a magistrate judge may also permit withdrawal of consent.¹⁵³

The only exception to the magistrate’s plenary power to hear a case referred under Rule 73 is that she may not find parties in contempt. Section 636(e) mandates that the district judge hear such matters when the magistrate issues an order to show cause. A record of the proceedings before the magistrate judge must be kept unless the parties agree otherwise; they may also agree on a method of recording other than the use of a court reporter.¹⁵⁴ Under Rule 73(c), appeal from a judgment entered by a magistrate judge “will lie to the court of appeals as it would from a judgment of the district court.” Review in the court of appeals is the same as if the judgment had been entered by a district judge.¹⁵⁵

III. Motions Practice

To a great extent, federal litigation practice is a motions practice. Legal aid advocates often challenge agency regulations or practices on constitutional or statutory grounds or both. Facts are not in dispute and plaintiffs seek judgment as a matter of law. In such cases, neither discovery nor settlement features prominently in the litigation strategy. Rather, the case is resolved through motions to dismiss or for summary judgment.

A. PROCEDURE ON MOTIONS

A motion is a request for a court order. Rule 7(b)(1) requires that all motions, except those made at trial, be made in writing and state with particularity the grounds supporting the motion and the relief or order sought. As discussed below, other rules set out specific requirements for specific kinds of motions. Typically the motion is accompanied by a memorandum of law and a proposed order. When appropriate, you may establish facts in support of any motion by appending a declaration or an affidavit, which, in turn, may authenticate or discuss attached documents or both. All motions are to be signed in accordance with Rule 11.¹⁵⁶

¹⁴⁶Fed. R. Civ. P. 72(b).

¹⁴⁷*See, e.g., Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991).

¹⁴⁸*Garcia v. City of Albuquerque*, 232 F.3d 760, 766 (10th Cir. 2000).

¹⁴⁹*See United States v. Raddatz*, 447 U.S. 667, 673 (1980); *see generally* CHARLES A. WRIGHT & ARTHUR R. MILLER, 12 FEDERAL PRACTICE AND PROCEDURE § 3070.2 (3d ed. 1998) (“In sum, the district judge’s power to reject the magistrate judge’s recommendation is almost unlimited.”).

¹⁵⁰*Roell v. Withroow*, 123 S. Ct. 1696, 1703 (2003).

¹⁵¹*Mark I Inc. v. Gruber*, 38 F.3d 369, 370 (7th Cir. 1994).

¹⁵²Fed. R. Civ. P. 73(b).

¹⁵³*Sockwell v. Phelps*, 906 F.2d 1096, 1097 n.1 (5th Cir. 1990).

¹⁵⁴28 U.S.C. § 636(c)(5).

¹⁵⁵*See, e.g., Lady v. Neal Glaser Marine Inc.*, 228 F.3d 598, 601 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

¹⁵⁶Fed. R. Civ. P. 7(b)(3).

Local rules of court typically provide detailed requirements regarding the form, content, length, and timing of motions, memoranda, and proposed orders.¹⁵⁷ Motions generally are quite brief and simply state the nature of the motion and invite the court to review the accompanying memorandum.¹⁵⁸ Local rules frequently require motions to certify that the movant consulted unsuccessfully with opposing counsel to resolve the matter at issue. Clerk's offices refuse to permit filing of such motions without a required certification. Review your local rules with care and comply with all such certification requirements.

Motions practice may be governed by—in addition to the local rules—standing orders of the court, standing orders issued by the particular judge hearing the case, or specific scheduling orders issued pursuant to Rule 16(b). Some courts use case management tracking systems based on the expected complexity of the case and direct cases into alternative dispute resolution procedures. If you are new to the district in which you are practicing, consult with senior attorneys in your office for advice on the sources of local written litigation procedure as well as the unwritten local customs and practices that judges and opposing counsel expect you to follow.

The amount of factual detail and legal support necessary for a memorandum of law depends on the nature of the motion involved, the anticipated position of the opposing party, and the expectations of the court. Most memoranda contain a brief introduction to familiarize the court with the case and the issue presented in the motion, sections containing the pertinent facts, statutory framework, and legal argument and conclude with the specific relief requested in the motion. The content should be concise, simple, and persuasive without being argumentative or inflammatory.

Unless your local practice provides otherwise, a motion should be accompanied by a proposed order granting the relief your client requests. It should be cast in the present tense, so that the judge may execute the order in the presence of counsel at the time of presentation. A carefully considered and drafted proposed order may well be signed by a busy federal judge. If you are seeking several forms of relief, set forth each in a separately numbered paragraph. Do not assume that the judge will simply ignore your proposed order and craft her own. A thoughtfully prepared proposed order is itself an advocacy piece and may create a framework for oral argument and the judge's consideration of your motion.

Although there are differences of opinion about the importance of oral argument, the better practice is to request oral argument on any motion critical to your case. If your motion hinges on complicated concepts or if opposing counsel has made strong or appealing arguments, oral argument is probably imperative. If the judge assigned to your case is unfamiliar with or unsympathetic to the issues of legal aid clients, you may want an opportunity to answer any questions that the court may have or to persuade the court of the basis of the claims. If you have been constrained by the court's page limits on briefs, oral argument is an opportunity to elaborate on issues of particular interest to the judge.

Check your local rules or unwritten practices to see what steps are necessary for you to have oral argument on a motion. In some districts, oral argument must be specifically requested; in others, it will be granted only upon a "proper showing" to the presiding judge. In many jurisdictions, oral argument is uncommon. If the assigned judge allows oral argument, find out how that judge conducts motions hearings. Sit in the courtroom for a few hours to observe; talk to other attorneys who have appeared before the judge. Find out whether the judge limits the time for argument and whether there is opportunity for rebuttal. The more you can anticipate how a hearing might proceed, the more prepared and relaxed, and therefore the more effective, you can be.

At the hearing, having clearly identified clients in court may lend force and credibility to the oral presentation. Assume that the judge does not know the facts, argue your case and not your opponent's case, hit the common sense and justice of your position hardest, and be brief. Always make specific references to the record and an offer of proof. Be clear that you and your clients have been most reasonable in your efforts to settle the matter or the motion without resort to a court order, but that an order or relief is necessary.

¹⁵⁷Local federal court rules can be found on the Internet, using the links at www.uscourts.gov or going to the "Federal Resources" section of www.FindLaw.com.

¹⁵⁸Some local rules, however, require the motion to set forth supporting rules and cases as authority.

B. MOTIONS ADDRESSED TO THE PLEADINGS AND PARTIES

In many cases, a defendant's first response to a complaint is to file a motion to dismiss on any or several of the grounds listed in Rule 12(b).¹⁵⁹ When such a motion is evaluated, the well-pleaded allegations of the complaint are taken as true and all reasonable inferences are drawn in favor of the plaintiff.¹⁶⁰ Nonetheless, your complaint must anticipate possible grounds for a motion to dismiss and, to the extent possible, allege facts that preclude dismissal.

In response to a Rule 12(b)(6) motion—the Rule 12(b) motion you are most likely to encounter—you may oppose the motion or seek to supplement or amend the complaint if the defendant offers a colorable argument that the complaint is legally deficient. Consistent with Rule 11, you may wish to amend the complaint to allege sufficient facts to support each element in your claim. At the same time or alternatively you may change parties and allege new or different legal theories.¹⁶¹

Rule 15(a) allows a plaintiff to amend the complaint without filing a motion once as a matter of right before the defendant files a responsive pleading. Because a motion to dismiss is not a responsive pleading, it does not terminate the right to amend without leave of court.¹⁶² Once the defendant answers, leave of court or written consent of the adverse party is necessary. Leave to amend should be freely given; outright refusal to grant leave to amend without justification is an abuse of discretion.¹⁶³ Typically the motion for leave to file an amended complaint attaches the amended complaint, which is deemed filed when the motion is granted.

Legal aid advocates should have a working knowledge of Federal Rule of Civil Procedure 19, which deals with the compulsory joinder of parties. Rule 19(a) establishes the rule for determining whether a party is “necessary” and who must therefore be joined if possible. Joinder may, however, not be feasible if the person is not subject to service of process, if joinder deprives the court of subject-matter jurisdiction and if the person properly objects to venue.¹⁶⁴ In such cases, Rule 19(b) requires the court to determine whether the action should proceed without the necessary party or whether the party is indispensable, and therefore the case must be dismissed.¹⁶⁵

In class actions, the complaint contains allegations concerning the class drafted in light of Rule 23. It will allege facts to support the requirements of numerosity, commonality, typicality, and representativeness. When practical, a motion for class certification can and should be filed with the complaint. Other cases require discovery to establish the factual basis for class certification. A motion for class certification and accompanying memorandum must contain evidence and argument that the prerequisites of Rule 23(a) are met and that the action is maintainable under one or more of the forms of class actions listed in Rule 23(b). Again be sure to consult your local rules, because many districts have specific requirements on the form of class action complaints and a limited time, often sixty or ninety days, after filing the complaint within which the motion for class certification must be filed.¹⁶⁶

¹⁵⁹ A Federal Rule of Civil Procedure 12(b)(6) motion will be treated as a motion for summary judgment under Rule 56 if matters outside the pleading are presented to and not excluded by the court. The advocate should also be familiar with Federal Rule of Civil Procedure 12(g) and 12(h), governing when certain defenses may be waived.

¹⁶⁰ *Albright v. Oliver*, 510 U.S. 266 (1994); *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Conley v. Gibson*, 355 U.S. 41, 47 (1957). See also *Swierkiewicz v. Sorema National Association*, 534 U.S. 506, 512 (2002) (complaint need only give fair notice of plaintiff's claim and ground upon which it rests; detailed factual statement not required).

¹⁶¹ A motion to supplement under Federal Rule of Civil Procedure 15(d) is used to set forth transactions or events that have occurred since the date of the original pleading. It is allowed only by leave of court, and response is required only if the court so orders.

¹⁶² *Camp v. Gregory*, 67 F.3d 1286, 1289 (7th Cir. 1995), cert. denied, 517 U.S. 1244 (1996); *Vernell v. United States Postal Service*, 819 F.2d 108 (5th Cir. 1987); *Madden v. Cleland*, 105 F.R.D. 520 (N.D. Ga. 1985).

¹⁶³ See *Franks v. Ross*, 313 F.3d 184 (4th Cir. 2002); *YWCA v. Allstate Insurance Co.*, 214 F.R.D. 1 (D.D.C. 2003); *Anthony v. City of New York*, No. 00 Civ. 4688, U.S. Dist. LEXIS 7189 (S.D.N.Y. Apr. 25, 2002).

¹⁶⁴ Fed. R. Civ. P. 19(a).

¹⁶⁵ See *Provident Tradesmen's Bank v. Patterson*, 390 U.S. 102 (1968).

¹⁶⁶ Before filing a class complaint or motion for class certification, be sure to read this MANUAL's Chapter 7 on class actions.

In class actions in which you seek a temporary restraining order (TRO) or preliminary injunction for the named plaintiff only, deferring the motion for class certification may be appropriate. However, if you seek a TRO or preliminary injunction on behalf of the class, you should move immediately for conditional class certification under Rule 23(c). A district court may not—the U.S. Supreme Court suggested in *dicta* and federal circuit courts held—award classwide preliminary relief before class certification.¹⁶⁷ In certain circumstances courts recognized an implicit class certification.¹⁶⁸ You can seek to amend a conditional class certification order later if necessary.

Legal aid attorneys most often move to substitute parties under Rule 25 when a client dies or becomes incompetent. The motion must be made within ninety days after the death “is suggested upon the record by service of a statement of the fact of the death.”¹⁶⁹ Otherwise the action is dismissed as to the deceased party. When a public officer is a party to a pending action and dies, resigns, or ceases to hold office, the successor is automatically substituted as a party. A suggestion of substitution may be filed by either party.

C. PRELIMINARY RELIEF

Rule 65 governs motions for TROs and preliminary injunctions. Because complex and varying circumstances often arise, trial courts are given broad discretion over granting or denying preliminary relief. Such orders accordingly are reviewed for abuse of discretion. The standards for both TROs and preliminary injunctions are formulated by case law rather than by rule or statute; the standards are sometimes formulated differently in different circuits. You should examine recent precedent in the circuit in which you practice for the governing standard. The majority of courts consider four factors when deciding whether to grant preliminary relief:¹⁷⁰

- the substantial likelihood or reasonable probability of success on the merits,¹⁷¹
- whether there will be irreparable injury to the plaintiff(s) if preliminary relief is denied,¹⁷²
- whether there will be irreparable injury to the defendant(s) or the overall balance of hardships on each side, and
- whether an injunction would serve the public interest.¹⁷³

Courts also generally aim to preserve the status quo or the “last peaceable uncontested status” existing between the parties.¹⁷⁴

Occasional cases suggest that when a statute authorizes injunctive relief, no showing of irreparable injury is necessary to obtain a preliminary injunction.¹⁷⁵ However, the prevailing view is that a plaintiff must establish the threat of irreparable injury even when seeking statutorily authorized injunctive relief.¹⁷⁶

Under Rule 65(b), the court may grant a TRO *ex parte*, without notice to the opposing party only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition and (2) the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.¹⁷⁷

¹⁶⁷ *Baxter v. Palmigiano*, 425 U.S. 308, 310, n.1 (1976); *National Center for Immigrants’ Rights v. Immigration and Naturalization Service*, 743 F.2d 1365, 1371 (9th Cir. 1984).

¹⁶⁸ *See, e.g., Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1334 (1st Cir. 1991).

¹⁶⁹ Fed. R. Civ. P. 25; *see generally* 7C CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1951 (2d ed. 1986).

¹⁷⁰ *See generally* 11A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948 (1995), for a thorough discussion of the relevant case law in the various circuits.

¹⁷¹ The Supreme Court recently characterized the first part of the test as requiring, “by a clear showing, a probability of success on the merits.” *Pharmaceutical Research and Manufacturers v. Walsh*, 123 S. Ct. 1855 (2003).

¹⁷² *See generally* WRIGHT ET AL., *supra* note 170, § 2948.1.

¹⁷³ *Id.* § 2948.4.

¹⁷⁴ *See, e.g., Bell Atlantic Business System Services v. Hitachi Data System Corp.*, 856 F. Supp. 524 (N.D. Cal. 1993).

¹⁷⁵ *Dataphase System Inc. v. C.L. System Inc.*, 640 F.2d 109, 112–13 (8th Cir. 1981) (en banc).

¹⁷⁶ *See, e.g., Taylor v. Florida State Fair Authority*, No. 94-1376-CIV-T-17E, U.S. Dist. LEXIS 17513 (Nov. 15, 1995).

¹⁷⁷ *See generally* WRIGHT, ET AL., *supra* note 170, § 2952.

A TRO expires at any time that the court fixes, not to exceed ten days.¹⁷⁸ However, the court may extend the order for another period of ten or fewer days for good cause shown or for a longer period if the adverse party consents. After an *ex parte* TRO is granted, the motion for a preliminary injunction is set for hearing at the earliest possible time and takes precedence over all other matters except older matters of the same character. On two days' notice to the party who obtained the *ex parte* TRO, or shorter notice if the court so prescribes, the adverse party may move for modification or dissolution of the TRO. Rule 65(b) also sets out specific actions that must be taken or findings that must be entered into the record.

Rule 65(c) requires an applicant for a TRO or preliminary injunction to post security for the issuance of preliminary relief in the event that the court later finds that the opposing party was wrongfully enjoined. Because this is likely to be a problem for legal aid clients, you must seek a waiver of this requirement and document your client's inability to post security. The court may dispense with security when the applicant does not have the resources to post a bond.¹⁷⁹ Alternatively the court may require modest or nominal security.¹⁸⁰

The federal rules do not favor *ex parte* TROs, and you should avoid them whenever possible. Courts do not appreciate being rushed into decisions or having to decide anything without hearing from your opponent. Usually you will have sufficient time to notify opposing parties or counsel, at least orally, while you are preparing the complaint or motion for a TRO.

If the client needs a TRO, try first to negotiate a settlement with the opposing party—you may be able to obtain some or all of the necessary relief. The court will want to know that you have attempted to resolve matters without taking valuable time on an emergency basis. During negotiations, you may want to give to opposing counsel a draft of your TRO memorandum or explicit notice of the statutory, regulatory, or case authority upon which you are relying. As a general proposition, the more candid you are in attempts to resolve matters without court involvement, the more reasonable you will appear to the court, and the more likely the court will be to grant at least some of the relief you request. Therefore, no matter how hurried you are, keep a record of all contacts with the opposing party or counsel and confirm them in a letter at the earliest possible time.

If a temporary settlement is not feasible, or is too time-consuming, call the court clerk's or district judge's office, depending on who does scheduling in your district, and request a hearing time. As soon as you schedule a hearing, notify opposing counsel or parties by phone followed by a confirming letter. Review all of your documents at this point to make sure they are in order, and in particular check your proposed order to see that it contains the detail required by Rule 65(d).

Although TRO hearings are often held in chambers and without evidence, be prepared to present witnesses to prove your need for a TRO. Whether or not you are in chambers, presentation of the facts is crucial. Of the elements for a TRO, proof of imminent irreparable injury is probably the most important. In litigation over public benefits, the client's loss of a social welfare benefit can be irreparable injury.¹⁸¹ Requiring the government to implement the program serves the public interest.¹⁸² At a hearing on a motion for preliminary injunction, you should be prepared to present live testimony. The witnesses should be present even if the practice of the court is not to take such testimony. Many judges conduct a "minitrial" on a preliminary injunction. Therefore be prepared to present a compelling and sympathetic case that the client has been badly injured, will be irretrievably harmed if preliminary relief is not granted, and will probably ultimately prevail on the merits.

An element of the plaintiff's case is to show that preliminary relief will not harm the defendant or that such harm is outweighed by the harm to the plaintiff from denying preliminary relief. In some cases, the plaintiff should be prepared to subpoena and examine the defendant. Although presenting a case only through the client and favorable witnesses is better, having the welfare administrator, housing bureaucrat, or correctional worker before the court not only increases the likelihood that the court will hear testimony but also ensures that the court can, in fact, enter preliminary relief in the presence of the opposing party.

Note that Rule 65(a)(2) allows for the consolidation of the preliminary injunction hearing with the trial on the merits. In some cases this may be to your client's advantage, particularly when discovery is not essential.

¹⁷⁸Fed. R. Civ. P. 65(b).

¹⁷⁹*Pharmaceutical Society v. New York State Department of Social Services*, 50 F.3d 1168 (2d Cir. 1995).

¹⁸⁰*MacDonald v. Chicago Park District*, 132 F.3d 355 (7th Cir. 1997).

¹⁸¹*Mayer v. Wing*, 922 F. Supp. 902 (S.D.N.Y. 1996); *McMillian v. McCrimmon*, 807 F. Supp. 475 (C.D. Ill. 1992). See also WRIGHT ET AL., *supra* note 170, § 2951.

¹⁸²*Johnson v. U.S. Department of Agriculture*, 734 F.2d 774, 788–89 (11th Cir. 1984).

D. SUMMARY JUDGMENT

Summary judgment is the procedural device intended to dispose of factually or legally meritless claims and defenses before trial. Federal Rule of Civil Procedure 56 authorizes summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Thus a motion for summary judgment pierces the pleadings to consider the facts of the case.

Either party may move for summary judgment and may do so with or without supporting affidavits.¹⁸³ If used, affidavits must be based on “personal knowledge” and “set forth such facts as would be admissible in evidence.”¹⁸⁴ Unless the objection is waived, hearsay, for example, may not support a motion for summary judgment. The movant may also want to support its motion for summary judgment with documents, answers to interrogatories, and deposition transcripts obtained in discovery. Your local federal court rules will specify the procedures for filing a motion for summary judgment; the procedures include whether a statement of material facts not in dispute must be filed with the motion.

The moving party always bears the burden under Rule 56 to establish the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. An issue of material fact is one “that might affect the outcome of the suit under the governing law.”¹⁸⁵ A genuine dispute is one which a reasonable jury can resolve against the moving party.¹⁸⁶ While the judge’s role is not to weigh the evidence, but instead must merely determine whether there is a relevant and triable factual issue, some evaluation of the evidence is necessary to determine whether a jury can reasonably find in favor of the nonmoving party.

That evaluation must account for the standard of proof at trial. In the typical case, the judge determines whether a jury can find for the nonmoving party by a preponderance of the evidence. In *Anderson v. Liberty Lobby* the Supreme Court held that, when the standard of proof was clear and convincing evidence, summary judgment should be granted to the defendant if “a reasonable jury could find by clear and convincing evidence in favor of the nonmoving party.”¹⁸⁷

Moreover, in *Celotex Corp. v. Catrett* the Court tied the nature of the movant’s burden to the allocation of the burden of production in the underlying litigation.¹⁸⁸ *Celotex* was a wrongful-death case against various asbestos manufacturers and distributors. During discovery, Celotex served interrogatories asking plaintiff to identify any witnesses who could testify to the decedent’s exposure to Celotex products. When plaintiff failed to identify any witnesses, Celotex moved for summary judgment on the ground that plaintiff lacked evidence proving that exposure to Celotex products caused the disease. Plaintiff opposed the motion on the ground that Rule 56 required the defendant to establish the absence of a genuine issue of material fact by filing affidavits specifically negating her claim that the decedent was exposed to Celotex products.

The Court held that the defendant was entitled to summary judgment even though it did not file any affidavit to negate the claim of causation.¹⁸⁹ The Court reasoned that because the plaintiff would have borne the initial burden of production on the issue of causation, had the case proceeded to trial, the defendant would have been entitled to judgment as a matter of law unless the plaintiff produced evidence showing that her husband had been exposed to Celotex products.¹⁹⁰ Summary judgment was proper even though Celotex filed no affidavits because the plaintiffs’ lack of evidence on an issue on which she bore the burden of production necessarily made every other issue nonmaterial.¹⁹¹

The principal holding of *Celotex* is clear: Rule 56 requires the entry of summary judgment (after an adequate time for discovery) against a nonmoving party on a claim or defense on which it bears the underlying burden of production whenever the moving party shows that the nonmoving party lacks sufficient evidence to establish one or more elements of that claim or defense. The court must resolve all ambiguities and draw all permissible factual inferences against the movant, and issues of credibility should not generally be resolved by summary judgment. When, however, as in *Celotex*, a plaintiff cannot prove an essential element of a claim, all other factual issues are immaterial; hence “no genuine issue as to any material fact” can then exist.¹⁹²

¹⁸³ *Celotex v. Catrett*, 477 U.S. 317, 323 (1986).

¹⁸⁴ Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

¹⁸⁵ *Anderson*, 477 U.S. at 248.

¹⁸⁶ *Id.*

¹⁸⁷ *Anderson*, 477 U.S. at 242.

¹⁸⁸ *Celotex*, 477 U.S. at 324.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 323–24.

¹⁹¹ *Id.* at 322.

¹⁹² *Id.*

Celotex makes clear that the party moving for summary judgment can easily satisfy the initial burden of showing the absence of a genuine issue of fact when the nonmoving party bears the burden on the claim or defense at issue. The motion need not be supported by evidence negating the claim. Rather, the moving party can meet the Rule 56 burden without filing negating affidavits if the responses to discovery show that the nonmoving party will not be able to establish an element of the claim or defense.

Celotex does not affect summary judgment practice when the moving party has the burden of production on the underlying claim or defense. When the moving party has the underlying burden, it must produce affidavits and other material that, if offered at trial, would entitle it to judgment as a matter of law. Thus *Celotex* principally affects plaintiffs, for plaintiffs ordinarily bear the burden of production on all elements of a claim. However, because defendants bear the burden of production on most affirmative defenses, *Celotex* may be invoked against an unsupported affirmative defense.

When faced with a motion for summary judgment, the nonmoving party is likely to try to establish a material factual dispute.¹⁹³ If discovery is not complete when the motion is filed, the nonmoving party may file under Federal Rule of Civil Procedure 56(f) a motion and affidavit in which it must explain that it cannot yet oppose the motion because relevant discovery has not been had. If discovery is complete, the nonmovant generally needs to produce discovery or affidavits (or both) demonstrating the existence of a genuine issue of material fact which a reasonable jury can decide in the nonmovant's favor.

The *Celotex* and *Anderson* decisions have encouraged the greater use of summary judgment practice to resolve federal court litigation. The message of the cases for plaintiffs is clear: prompt and thorough discovery is crucial.

The impact of *Celotex* and *Anderson* in cases involving questions of motive, intent, or state of mind is still unfolding. On the one hand, the finding of facts which may be colored by assessment of credibility, demeanor, and state of mind is uniquely a jury function. On the other, virtually all cases involve some such element and to deny summary judgment reflexively in all such circumstances would undermine the utility of the summary judgment procedure. The nonmoving party is advised to scour the record for questions of credibility on particular, relevant issues. This underscores the need to approach discovery with great care.

IV. Alternative Dispute Resolution

Some form of ADR process is likely to be offered, or may be required, before or after filing a federal action. Before an action is filed in court, many federal agencies make use of either voluntary or mandatory, nonbinding ADR procedures as part of their investigative or adjudicative operations.¹⁹⁴ In certain cases, consumers and employees may be bound by contract to submit their claims of violation of federal law to mandatory, binding private arbitration.¹⁹⁵ When the contract is enforceable, access to federal court may be precluded. In cases not so precluded, federal courts are mandated to provide for nonbinding ADR procedures, although the courts have discretion to determine which cases are appropriate for ADR referral.¹⁹⁶ Settlement offers made during the litigation of a claim, either as part of ADR process or informal negotiations, may present challenging ethical, strategic, and legal issues for the practitioner. This section examines the ADR issues that are most likely to come up in cases handled by legal aid attorneys.

A. EARLY USE OF ADR

A well-prepared plaintiff may want to pursue settlement of a case through use of the federal court's ADR procedures. Sending a final settlement offer or a demand for relief to defendant or to defendant's counsel shortly before filing the action is often wise. If for no other reason, doing so permits the plaintiff to say that the plaintiff and plaintiff's counsel attempted to resolve the matter outside of court. Plaintiff's counsel may want to present a written settlement offer again to defense counsel before the first pretrial conference. The court's ADR process requires a report of prior attempts at settlement.

¹⁹³See generally WRIGHT ET AL., *supra* note 169, § 2725.

¹⁹⁴While the Social Security Administration does not yet make use of alternative dispute resolution (ADR) for claims, the Equal Employment Opportunity Commission uses voluntary mediation of its private-sector discrimination complaints, and it implements compulsory mediation of its federal employment complaints. The details of the federal agency's ADR policies are accessible on its website, www.eeoc.gov/federal/md110/chapter3.html. See 29 C.F.R. § 1614.102(b)(2).

¹⁹⁵An arbitration agreement in an application for employment can be enforced against an employee even though there is no written employment contract. *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

¹⁹⁶See, e.g., *In re Atlantic Pipe Corp.*, 304 F.3d 135 (1st Cir. 2002).

The plaintiff's request to refer the action to ADR forces the defendant who does not want to participate to have to object in a settlement conference. Participation in the first pretrial conference, typically before a magistrate judge, is an excellent opportunity to seek such a referral. The ADR process may be set for a date during the authorized discovery period.¹⁹⁷ Early use of ADR process may advantage the plaintiff in several ways.

First, if the case is not fully settled through ADR, the defendant may be pressured to stipulate to key facts, and thus the need for expensive discovery is avoided. Second, when there is statutory authority for award of attorney fees (and the plaintiff is not represented by a legal services program funded by the Legal Services Corporation), the settlement conference is an opportunity for the mediator to discuss with the defendant and its counsel the costs potentially involved in further litigation. Third, a plaintiff who prepares a thorough and factually detailed complaint before conclusion of discovery can present a more nearly complete explanation of the case and relevant law than defense counsel. Typically, at an early stage of the litigation, plaintiff's counsel is better prepared to discuss the underlying facts and relevant law than defense counsel. This may result in pressure by the mediator to the defendant to settle.

B. ENFORCEABILITY OF ARBITRATION AGREEMENTS

The existence of a contract provision requiring the parties to submit disputed claims to binding arbitration may be enforced to preclude litigation of federal statutory claims in federal court. Enacted in 1925 to encourage nonjudicial resolution of commercial disputes was the Federal Arbitration Act.¹⁹⁸ The Act, the Supreme Court held, manifests a liberal federal policy favoring arbitration of claims.¹⁹⁹ Enforcement of federal statutory rights may be subjected to mandatory, binding arbitration unless there is specific provision in the legislation sought to be enforced precluding such alternative resolution of claims.²⁰⁰ When, however, a federal agency is the plaintiff and has statutory authority to select a nonarbitral forum, that choice governs even though the individuals on behalf of whom it has sued would have been subject to mandatory arbitration.²⁰¹

A federal agency's involvement enforcing a statute is not, by itself, sufficient to preclude enforcement of mandatory arbitration.²⁰² The party seeking to avoid arbitration must show that there is an inherent conflict between arbitration and the purpose of the statute sought to be enforced in federal court.²⁰³ In *Green Tree Financial Corp.—Alabama v. Randolph*, the Supreme Court noted that large arbitration costs might be shown by a consumer to create a conflict between enforcement of the arbitration agreement and the federal statute.²⁰⁴ The Court noted, but declined to address, another argument against enforcement of the arbitration agreement: preclusion of opportunity to bring a class action to enforce the consumer protection law.²⁰⁵

¹⁹⁷ Scheduling a settlement conference early in the case, before completion of discovery, can be helpful to a legal services program with limited resources to pay for deposition transcripts. Consider asking to set the settlement conference after the time for service of initial written discovery and before holding any depositions. A plaintiff with good command of the facts may want to set the conference for a date after service of the written discovery, but before answers are due, to give incentive for the defendant to settle without having to complete time-consuming discovery.

¹⁹⁸ U.S.C. §§ 1 *et seq.*

¹⁹⁹ *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

²⁰⁰ *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991) (an agreement requiring binding arbitration of an age discrimination complaint was enforceable because Congress, in enacting the Age Discrimination in Employment Act, did not explicitly preclude arbitration of complaints). An example of such an explicit preclusion of mandatory arbitration is in the Magnuson Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312 (vehicle warranty claims).

²⁰¹ *Equal Employment Opportunity Commission v. Waffle House*, 534 U.S. 279 (2002) (the Equal Employment Opportunity Commission may sue employer in federal court under the Americans with Disabilities Act).

²⁰² *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989).

²⁰³ *Gilmer*, 500 U.S. at 24.

²⁰⁴ *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79 (2000).

²⁰⁵ The Third Circuit rejected this argument as a basis to escape subjecting a Truth in Lending Act claim to private arbitration. See *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

An example of a plaintiff meeting the burden to demonstrate unaffordability of arbitration was *Phillips v. Associates Home Equity Services Inc.*²⁰⁶ In *Phillips* the court noted that the filing fee for arbitration would likely be at least twelve times what it cost to file a case in federal court.²⁰⁷ Although there was language in the arbitration agreement allowing for the possibility of either waiving the fees or shifting the costs from the consumer, the district court followed the Supreme Court's *Green Tree* decision and found that the possible benefit of the waiver language was too speculative to ensure avoiding excessive costs in the arbitral forum.

Courts decline to adopt a *per se* rule against enforcement of mandatory arbitration when the agreement calls for the parties to split the fees. A fee-splitting agreement may be unenforceable, but complaining parties must meet the burden to show that they are unable to afford fees or that enforcement of the agreement would foreclose protection of an important substantive right in the arbitration forum.²⁰⁸

A significant factor in meeting the standard to show unaffordability may be whether the party qualifies for *in forma pauperis* status. In *Camacho v. Holiday Homes* the plaintiff alleged Truth in Lending Act violations in a retail installment agreement, and she successfully argued that enforcement of a mandatory arbitration agreement would preclude her from vindicating statutory rights because the arbitral forum was financially inaccessible to her.²⁰⁹ The plaintiff qualified for *in forma pauperis* status, but she did not rely on that determination alone to make the unaffordability argument. She also filed a detailed declaration of her financial condition. The district court noted that not all of the arbitration fees were subject to waiver or deferral on a showing of "extreme hardship" under the commercial American Arbitration Association rules, and therefore the agreement could not be enforced.²¹⁰ However, the court also stated that it would reconsider its decision if the creditor agreed to bear the costs associated with arbitration.²¹¹ The D.C. Circuit similarly agreed to uphold arbitration of an employee's Title VII discrimination claim only if the employer assumed responsibility for payment of the arbitration fees.²¹² Since utilizing arbitration is often in the creditor's or employer's interest, these decisions provide authority to negotiate for the defendant to pay the arbitration fees fully, in exchange for the potential plaintiff's agreement to waive objection to submitting the case for arbitration.

When a party is required to proceed in an arbitral forum, all rights granted by the statute(s) sought to be enforced are applicable.²¹³ The Federal Arbitration Act provides an opportunity to appeal arbitration decisions to federal court, but the standard of review of the decision is very deferential. Generally, the award must be shown to manifest a disregard of applicable law, conflict with a strong public policy, be arbitrary and capricious, be completely irrational, or fail to draw its essence from the underlying contract.²¹⁴

²⁰⁶ *Phillips v. Associates Home Equity Services*, 179 F. Supp. 2d 840 (N.D. Ill. 2001).

²⁰⁷ *Id.*, 179 F. Supp. 2d at 847.

²⁰⁸ See *Bradford v. Rockwell Semiconductor Systems Inc.*, 238 F.3d 549 (4th Cir. 2001); *Shankle v. B-G Maintenance Management of Colorado*, 163 F.3d 1230 (10th Cir. 1999). See also *Blair v. Scott Speciality Gases*, 283 F.3d 595 (3d Cir. 2002). An arbitration agreement requiring each party to pay their own attorney fees, regardless of the outcome, can render the agreement unenforceable. *McCaskill v. SCI Management Corp.*, 298 F.3d 677 (7th Cir. 2002).

²⁰⁹ *Camacho v. Holiday Homes*, 167 F. Supp. 2d 892 (W.D. Va. 2001).

²¹⁰ *Id.* at 897.

²¹¹ *Id.*

²¹² *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997).

²¹³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985).

²¹⁴ See *Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752, 758 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000).

C. FORMS OF JUDICIAL ADR

The Alternative Dispute Resolution Act of 1998 requires that “[e]ach United States district court shall authorize, by local rule, the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy”²¹⁵ ADR process “includes any process or procedure, other than adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration”²¹⁶ There are many variations in ADR processes used in the federal court system, but most common is some type of mediation. The use of ADR in a case is frequently first raised at the initial Rule 16(b) pretrial conference, and the parties may be ordered to participate in a settlement conference held before or after completion of discovery.²¹⁷

The Civil Justice Reform Act of 1990 authorized district courts to hold mandatory settlement conferences. Although the settlement or mediation process is generally nonbinding, good-faith participation by representatives authorized to settle can be enforced. This participation requirement applies to the federal government.²¹⁸ While participation in ADR can be compelled, binding arbitration of cases in court is limited to districts identified in the 1988 legislation.²¹⁹

D. APPROACHES TO SUCCESSFUL USE OF ADR

What guidance is given to the judge, magistrate, or other neutral who conducts a settlement conference or other mediation is helpful to know. The *Civil Litigation Management Manual* makes the following recommendations for the person who will facilitate the process:²²⁰

Without taking a position on the merits, discuss with the participants the issues and the probable risks that each party faces:

- Ask the attorneys, in front of their clients, how much litigating the case through trial will cost and then suggest to their clients that they put this sum toward settlement.
- Help parties focus on their underlying interests (e.g., resuming a profitable business relationship) rather than disputed facts or legal principles.
- Meet separately with each side (parties and counsel) for candid evaluations of the parties’ prospects and the costs of continuing the litigation.
- Suggest that the corporate principals meet without counsel to reach an agreement as business people.
- Defer recommendations of potential settlement figures for the parties to consider until the outline of a probable settlement becomes apparent.
- Delay having parties state their “bottom lines” so as to keep the negotiating positions flexible.
- Direct attention to damages, including possible tax consequences, instead of emphasizing liability issues. In many settlements, money rather than principle is the one that ultimately matters; if it becomes clear to the parties that a settlement on financially acceptable terms is possible, there is little point in continuing to debate liability.

²¹⁵ Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(b).

²¹⁶ *Id.* § 651(a).

²¹⁷ See Fed. R. Civ. P. 16(c)(9).

²¹⁸ See *Schwartzman v. ACF Industries*, 167 F.R.D. 694, 698 (D. N.M. 1995). See also Executive Order No. 12,988, 61 Federal Register 4729 (Feb. 5, 1996); Memorandum of Guidance on Implementation of the Litigation Reforms of Executive Order 12,988, 62 Federal Register 39250–52 (1997).

²¹⁹ The Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 11-702, 102 Stat. 4642 (codified as amended in scattered sections of 28 U.S.C.), authorized judicial arbitration of cases in a maximum of twenty districts; the ADR Act continued this limitation on implementation of arbitration as a form of judicial ADR. Some good, free publications on ADR have been issued by the Federal Judicial Center. The Web address for the Federal Judicial Center is www.fjc.gov. Two of the ADR publications currently available are ROBERT J. NIEMIC ET AL., *GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR* (2001), and ROBERT J. NIEMIC, *MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURT OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (1997). The Federal Judicial Center is a good source of other publications on federal court procedure. The *Civil Litigation Management Manual*, issued jointly by the Federal Judicial Center and the Judicial Conference of the United States, the Committee on Court Administration and Case Management (adopted Mar. 2001), includes sections on ADR and judicial settlement guidelines and offers helpful insight into many other aspects of federal practice.

²²⁰ CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 219, at 62–63.

- Sever one or more issues for a separate trial if doing so will be the basis for settlement of other issues.
- Look for imaginative and innovative solutions, such as structured payouts, payment in kind, future commercial relations, concessions, apologies or admissions, establishment of a training or recruiting program, or correction of a defect.
- Discuss settlement in the parties' language (e.g., with two business litigants, ask, "How many widgets will the litigation costs buy? What are your daily profits against the costs of this case?").
- Devise a structure, when the parties are dug in, to help them exchange offers (e.g., ask the plaintiff to "come up with the next offer;" ask the defendant to make a counteroffer, and ask them to continue exchanging offers until settlement or impasse is reached). This forces movement but takes the burden off the parties to make the first move.
- Inject realities, such as the difficulties of collecting a judgment from a financially strapped defendant and the risk of bankruptcy.
- Recommend or encourage the parties to exclude punitive damages as an element of the claim for settlement purposes.
- Encourage the defendant to make a Federal Rule of Civil Procedure 68 offer, carefully drafted to avoid later disputes. An offer of judgment can be helpful in a case in which attorney fees may be awarded by the court since such an offer can cover all liability. The offer must be unambiguous to permit a determination whether the final judgment is more favorable.
 - Settle only some issues in the case or the claims of some but not all parties.
 - Keep the negotiations going despite lack of agreement.

Most federal courts exempt *pro se* cases from their ADR programs because of the difficulty of dealing with requests for advice from the *pro se* party, compromising neutrality, and the perception or misperception about the fairness of the process when only one party is represented. The *Civil Litigation Management Manual* encourages judges to consider appointment of pro bono counsel (limited to representation with the ADR process) for *pro se* parties to enable them to have access to facilitated settlement discussions.²²¹

If the local ADR process uses third-party neutrals (not court officers or court staff) there could be an issue regarding the expense of compensating the neutral. If the court previously granted permission to proceed *in forma pauperis*, there may not be a requirement for the indigent party to pay anything. The local ADR rule may provide a procedure to substitute a magistrate or court officer for the third-party neutral when the expense of ADR is an issue. The other party may agree to cover the full cost to utilize a third-party neutral. If ADR cost is a concern, the problem should be raised before the court issues a referral order requiring participation in the ADR process. The referral order addresses compensation of the neutral when there is a cost to the parties. Whether the court uses a standard form referral order or modifies one for particular cases, asking to see the court's form well before a referral may be made is a good idea.

Perhaps the most common type of ADR process utilized in federal court practice is referral to a mediator (magistrate judge or private counsel) who will conduct a settlement conference. The referral order to ADR will probably require the parties to submit at least one settlement conference statement. The local procedure may call for exchanging these statements, followed by filing of a confidential letter or supplementary statement given only to the mediator. There is no commonly employed format for settlement conference statements; they may not even be uniform within the same district. Typically the referral order may require exchanging statements approximately one week before the conference and filing confidential statements the day before the conference.

On the date of the settlement conference, counsel and the parties are expected to appear (in person or by telephone) and orally summarize their litigation positions. The magistrate judge (or other mediator) typically meets separately with counsel and the parties to discuss the case and facilitate reaching a partial or full settlement of the action.

²²¹See *supra* note 218.

The instructions for preparation of the settlement statements emphasize that either they should be concise or they may set a short page limit. A page limit on the written statements is a significant advantage for the plaintiff who filed a detailed complaint. Attaching copies of the favorable cases to the statements and including the citations in the written statements may be helpful. One reason to prepare a more detailed complaint than is required by the federal rules is to have a full exposition of the legal claims and a fairly full statement and thus reduce the amount that needs to be stated in the settlement conference statement.²²²

An issue that may arise in settlement discussions when monetary relief or damages are sought is how to deal with a lump-sum offer. The plaintiff may be asked to offer a number for settlement of any monetary claims. How do you calculate this when you are seeking future wages or private disability benefits for an unknown duration? The amount of such prospective income can be discounted to present-day value, and there are various formulas to calculate this, depending upon assumptions about inflation and other factors.²²³ The well-prepared plaintiff should anticipate this issue. For the mediation or settlement conference, plaintiff's counsel should have available the relevant case authority for the formula to be used in computing interest, inflation, and the like.

E. ETHICAL ISSUES IN SETTLEMENT OF CASES

With settlements the principal ethical issue that has posed a challenge for legal aid advocates occurs when the case includes a statutory claim for attorney fees.²²⁴ Ordinarily a nonfederally funded legal services organization agrees to represent the client without charging a fee, except for recovering what may be awarded pursuant to a statute granting fees. If the defendant offers a lump-sum settlement, including all monetary and nonmonetary relief, there are two potential problems: (1) the offer is conditioned upon waiver of attorney fees or (2) the monetary offer is inclusive of all damages and attorney fees and does not identify the amount of the award allocated to fees. Simultaneously negotiating the best settlement terms for the client and an award of fees for the legal work can create a conflict of interest between attorney and client. The Supreme Court acknowledged this problem but decided that encouraging settlements was a more important policy objective than helping plaintiff's attorneys avoid an ethical challenge.²²⁵

The Supreme Court addressed enforcement of a waiver of attorney fees in an offer settling a class action of a Section 1983 claim in *Evans v. Jeff D.*²²⁶ The defendant in *Evans* offered to settle the action—brought to address violations of rights of a class of handicapped children—by agreeing to the nonmonetary relief likely to be awarded if the case went to an adjudicated conclusion. But it conditioned the settlement offer on a requirement for the plaintiffs to waive their claim for statutory attorney fees under 42 U.S.C. § 1988. The Supreme Court held that a court had discretion, to be exercised on a case-by-case basis, to determine if an attorney fee waiver included in a settlement was unreasonable.

The Supreme Court's decision in *Evans* made it very difficult, but not impossible, to challenge attorney fee waiver settlement offers. The decision addressed only waiver of fees under 42 U.S.C. § 1988, and other fee statutes can present different considerations or a different context for court review of the terms of settlement. An objection to waiver of attorney fees survived a motion to dismiss in *Johnson v. District of Columbia*.²²⁷ Under the federal Individuals with Disabilities Education Act Johnson filed suit against the District of Columbia. Johnson claimed that the governmental defendant violated the right to counsel and attorney fee provisions of the Act by including waiver of attorney fees in a settlement offer. The court distinguished the fee argument in *Evans* from the claims presented under the Act and found that the district's waiver practice sought to undermine the federal law's provision for the right to be represented by counsel.

²²² Another complaint drafting technique that can have particular benefit for later use in ADR is the practice of annexing key documents as exhibits to the complaint. Reading the correspondence and notices preceding the filing of the action can help give the mediator a more objective impression of the history of the dispute (and the lack of responsiveness of the defendant in resolving the dispute without need for litigation). A defendant who does not similarly annex the key supportive documents to the answer may be at a comparative disadvantage when there are page limits to settlement conference statements.

²²³ *Jones and Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

²²⁴ This is at present only a challenge for advocates from firms or organizations that do not receive funding from LSC since LSC-funded organizations are prohibited from seeking recovery of attorney fees.

²²⁵ *White v. New Hampshire Department of Employment*, 455 U.S. 445, 453 n.15 (1982).

²²⁶ *Evans v. Jeff D.*, 475 U.S. 717 (1986).

²²⁷ *Johnson v. District of Columbia*, 190 F. Supp. 2d 34 (D.D.C. 2002).

A challenge to waiver of attorney fees in a Section 1983 action was allowed to be litigated by the Ninth Circuit in *Bernhardt v. County of Los Angeles*.²²⁸ The Ninth Circuit reviewed a claim that the defendant county had a practice of settling civil rights actions only on a lump-sum basis, including all attorney fees, and this practice, in violation of Section 1988, prevented the *pro se* plaintiff from being able to secure representation from an attorney. The Ninth Circuit accepted as true the factual allegation that the plaintiff had been unable to obtain assistance of counsel because of the settlement policy and allowed the plaintiff to proceed to try to prove a claim for damages for the claimed interference with her implied federal right to counsel. The Ninth Circuit did not assess the plaintiff's likelihood of being able to prove this assertion but agreed that she had stated a cause of action for violation of her statutory rights.

When there is no demand for waiver of fees, incorporating fees in a lump-sum settlement offer presents a serious challenge to the plaintiff's attorney. The attorney must negotiate the maximum monetary and nonmonetary relief for the client while also trying to recover the costs of the action. Since law firms representing indigent civil rights plaintiffs typically limit their requirement for the client to pay attorney fees to what can be recovered from the defendant, there is also an ethical challenge when the lump-sum does not allocate the portion of the award that represents the amount included for the fees of the plaintiff's attorney. The legal aid programs addressing these challenges have generally reached the same conclusion: the representation agreement completed with the client needs to address specifically the possibility of a settlement offer which will include an amount for payment of fees. The agreement needs to specify that the fees for work performed up to the settlement will be deducted, that the fees will be calculated in a certain way, and that an accounting of the total fees will be shown to the client at the time a settlement offer is made so that an informed decision can be made to accept or reject the offer. Even with full disclosure and agreement from the client, negotiating these lump-sum settlement offers is challenging.

F. RULE 68 OFFERS OF JUDGMENT

An offer of judgment under Rule 68 of the Federal Rules of Civil Procedure is very different from an offer to settle a case made during nonbinding ADR discussions.²²⁹ If a written settlement offer cites Rule 68, the plaintiff must carefully consider the response. Because Rule 68 offers have special consequences and requirements, during mediation the facilitator may request that an initial offer or counteroffer from the defendant not be designated as a Rule 68 offer to facilitate discussion and negotiation.²³⁰ The earlier a Rule 68 offer is made in the litigation, the greater the potential risk in rejecting it. If an offer is made before discovery, the defendant may incur substantial discovery costs and expert witness costs that may ultimately be awarded by the court. Also, in estimating potential damages recoverable after trial, the plaintiff has less to base a calculation on if there has not yet been an opportunity for discovery.

The issue of award of attorney fees has been the subject of litigation under Rule 68. Some statutes define attorney fees as an element of costs, and other statutes that address award of fees provide for them separately from recovery of costs. When attorney fees are within the definition of costs in the statute at issue, a Rule 68 offer must include agreement to pay those fees.²³¹ The offer does not identify the amount of the costs (which will be later determined), and it does not need to identify specifically that attorney fees are included in the offer. If a Rule 68 offer is silent on whether it includes attorney fees, the plaintiff may be able to submit a claim for fees after the offer is accepted; or, depending upon the statute, the plaintiff may be precluded from such an application. You need to know exactly what the fee statute says and whether attorney fees may be deemed to be costs.²³²

²²⁸ *Bernhardt v. County of Los Angeles*, 279 F.3d 862 (9th Cir. 2002).

²²⁹ The Equal Employment Opportunity Commission administratively implements a comparable procedure for discrimination adjudications: an offer of resolution. If the complainant does not accept the defendant agency's offer and ultimately obtains no more relief than was proposed in resolution of the case, no attorney fees or costs are payable for work done after rejection of the settlement. 29 C.F.R. pt. 161.

²³⁰ Federal Rule of Civil Procedure 68 provides that when the defendant makes an offer of judgment, and the plaintiff rejects it, if the judgment ultimately obtained is not more favorable than the offer rejected, the plaintiff must pay the costs incurred by the defendant subsequent to the offer. The rule also provides that the defendant's offer must include payment of plaintiff's costs accrued up to when the offer is made.

²³¹ *Marek v. Chesny*, 473 U.S. 1 (1985).

²³² The court looks to the substantive law of the plaintiff's civil rights claim to determine what the preoffer costs are. See *Said v. Virginia Commonwealth University/Medical College of Virginia*, 130 F.R.D. 60 (E.D. Va. 1990). However, in *McGinnis v. Local Union No. 710*, 1986 U.S. Dist. LEXIS 22774 (N.D. Ill. July 15, 1986), the plaintiff accepted a Rule 68 offer that did not include agreement to pay attorney fees. Since the statute at issue did not include attorney fees within the definition of costs, the plaintiff was precluded by the terms of the settlement from later seeking an award of statutory fees from the court.

A Rule 68 offer is an exception to the general rule restricting introduction into evidence of information about settlement of the case; the offer may be admitted to help determine what costs should be awarded by the court. Rule 68 provides a basis for the plaintiff to be denied costs and for the defendant to be awarded some costs, but it is not an attorney fee-shifting statute: the defendant cannot claim an award of attorney fees from the plaintiff when costs are awarded to defendant under the rule.²³³

The attorney fee issue under Rule 68 is more complicated when there are multiple claims. In *Haworth v. Nevada* the Ninth Circuit reversed an award of attorney fees in a case brought pursuant to the Fair Labor Standards Act.²³⁴ The plaintiff rejected a Rule 68 offer to settle a number of claims of violation of the Act but then prevailed on only one of the claims. The Ninth Circuit held that the district court should have considered the reasonableness of the fee sought in light of the results obtained, even though the plaintiff was entitled to seek additional fees incurred after rejection of the settlement offer for the work in obtaining relief on the single, prevailing claim. The district court's award of costs to the plaintiff was—based upon rejection of the offer—reversed.

You must carefully read the terms of the offer describing what attorney fees are included (if they are mentioned). The plaintiff may or may not be able to claim fees for preparation of the accounting of costs and fees. The wording of the offer rather than the text of the rule controls what attorney fees must be included.²³⁵ The well-prepared plaintiff (both to have a thorough accounting for the client and to maximize the fee recovery) should keep a running calculation of fees, including the time required to prepare the accounting, in anticipation of receiving a Rule 68 offer that may cut off coverage of any further costs or attorney fees or both.

V. Trial Practice

A full development of trial principles and practices is best left for specialized trial practice courses. Trial practice treatises and handbooks are useful resources when a trial approaches.²³⁶ Nonetheless a brief review of the basics may assist the busy practitioner. The key to a successful trial is thorough preparation and good organization. Maintaining a trial notebook helps you achieve both of these objectives. A bench book for the judge which contains exhibits, pleadings, and precedent may also prove helpful in both jury and nonjury cases. Thorough preparation and good organization will also enhance your being perceived as trustworthy and dependable, and this is essential to the success of your case.

A. WAIVER AND JURY SELECTION

Jury trials are not available in cases seeking only equitable relief.²³⁷ However, juries can be requested in several kinds of legal aid cases, including some consumer cases, fair housing claims, and damage actions brought against police and correctional or governmental personnel. A jury must be demanded in the complaint or by written demand served within ten days thereafter.²³⁸ Otherwise jury trial is waived.²³⁹

In a complex case, or when you represent an unsympathetic plaintiff, you may consider waiving a jury trial. One possible approach is to omit the jury demand from your complaint and wait to see to which judge the case is assigned before deciding whether to request a jury. If you decide to waive the jury, the defendant may elect to request a jury trial for the very reasons you chose not to. Another option is to plead only the issues not triable by jury or to omit a plea for damages.

Attorneys should never underestimate the common sense, independence, and intelligence of juries. Literature is replete with instances confirming the centuries-old value of jury trials. That value lies principally in the freedom, freshness, and independence of a juror's perspective. Jurors, unlike judges, are not infected by the cynicism of the routine. A jury writes on a fresh slate and may be receptive to arguments that a judge or hearing officer may have stopped listening to long ago. Juries may also be more generous in awarding reasonable compensation for a wrong. For this reason, knowing the composition of the pool from which the jurors are chosen is helpful.

²³³ See *Payne v. Milwaukee County*, 288 F.3d 1021 (7th Cir. 2002).

²³⁴ *Haworth v. Nevada*, 56 F.3d 1048 (9th Cir. 1995).

²³⁵ See *Guerrero v. Cummings*, 70 F.3d 1111 (9th Cir. 1995), in which the court of appeals denied a request for fees on obtaining fees (allowed in Section 1988 applications) because the terms of the offer specifically limited fees to those incurred before the date of the offer.

²³⁶ E.g., A.J. STEPHANI & GLEN WEISSENER, FEDERAL CIVIL PROCEDURE LITIGATION MANUAL § 6.

²³⁷ U.S. Const. amend. VII.

²³⁸ Fed. R. Civ. P. 38(b).

²³⁹ *Id.* 38(a).

A jury trial docket may move more slowly than a bench or court trial docket. Always determine whether the client can afford a delay. Of course, a delay may be an inconvenience or imposition for the other side as well. Thus, when determining whether to have a jury trial, consider whether the imposition is greater for your client or the opposition.

In a jury trial, you will have an opportunity to “select” the jury. Jury selection actually involves the rejection of prospective jurors, not the selection of acceptable ones. The procedure and who conducts it varies from jurisdiction to jurisdiction. Nonetheless every jurisdiction affords counsel an opportunity, typically by voir dire, to acquaint prospective jurors with some of the anticipated proof and issues in the case and to excuse certain proposed jury members. Before conducting voir dire, investigate how the judge handles the process, including how and when she requires challenges to be exercised. Check local court rules, if any.

The selection process involves questioning prospective jurors to determine whether they have knowledge about the case, know the parties, witnesses, or counsel, and whether anything in their backgrounds or experience would make it difficult for them to decide the case fairly. Before beginning jury selection, consider the profile of the ideal juror for your particular case.

Voir dire may be awkward because you are delving into the personal backgrounds of strangers in public while simultaneously trying to win them over to your client’s claims. You have the right to excuse a biased juror for cause or to use a peremptory challenge to remove individuals who will be difficult to persuade about the merits of your case. Under 28 U.S.C. § 1870, each party in a federal jury trial is entitled to three peremptory challenges unless they share an identity of interest, in which case the judge has discretion to limit each such group to three peremptories.

During your questioning, you must also educate the jurors about the theme of your case and the strength of your evidence, establish your credibility, and develop a rapport with them. An abbreviated opening statement or preface to the voir dire is useful to give a broad overview of the case and to show the jurors that you believe in your case. You may wish to defuse in advance any apparent weaknesses or prejudicial aspects of your case. To learn as much as possible, ask some open-ended questions. To keep the jury from getting bored, ask new or altered questions to different jurors, and personalize some questions to a particular individual’s background. If you must delve into potentially sensitive personal information, ask the juror if she would prefer to talk about it with counsel and the judge alone. If possible, have a colleague take notes about juror answers so that you appear cordial, respectful, and concerned about their answers. At a minimum, have a system that will allow you to manage the jurors’ names and information that they convey.

B. OPENING STATEMENT AND CLOSING ARGUMENT

Opening statements and closing arguments serve very different purposes and make different demands on the advocate. Each is a form of art requiring careful analysis and preparation. Opening statements and closing arguments should be delivered with minimal reference to notes, in a well-paced and well-modulated manner. In a jury trial, be sure not to patronize the jurors or insult their intelligence; you must appear to believe in and respect them. When addressing a jury directly, be yourself. Do not try a new or unfamiliar style or you will come across falsely and lose the jury’s trust.

1. Opening Statement

The opening must be tailored to your audience. Judges sometimes read pretrial briefs and are familiar with the issues, but juries certainly will not be. From the jury’s perspective, trials are like impromptu theater, and you are on stage at all times. In your opening and throughout the trial, you must tell a story that rings true and resonates.

The opening is a statement; overt argument is improper. Nevertheless, the opening is intended to persuade the fact finder about the legitimacy of your case. Jurors often make up their minds by the time the opening statements conclude. They pay careful attention because it is the first time they are being told the full story, they are not yet bored or jaded, they are still anxious about what their duties are in this novel context, and they tend to remember best what they hear first (and last). If they develop a strong opinion based upon the opening, they will tend to support their conclusions and beliefs with selected evidence and explain away any contrary evidence.

Never devalue your own statements or waste your time by starting with disclaimers like “what I say is not evidence” or “the evidence will show.” In a jury trial, the judge will already have stated this to the jury. Instead utilize the well-accepted principle of primacy to capture the attention of the fact finder immediately. During the first minute, you should introduce your client, simply establish your theme, and explain the agenda for your statement. Give a road map to the case and highlight coming attractions and priority information. Most important, say something early on that will gain the sympathy and pique the interest of the fact finder. Then tell your story in a way that a listener unfamiliar with your case will be able to follow and find compelling.

Keep your story dramatic, human, and organized. Do not include every detail of your case, but include enough to convey a clear picture. Anchor your case to basic points of right and wrong. Be enthusiastic about your client and confident

in your case; be a leader, a guide, a teacher, someone who can be trusted. To facilitate communication, repeat key words and phrases, repeat the theme, pause for emphasis, and move around a bit. Use visual aids when permissible. Headlines that announce a new topic help the listener follow your statement. Maintain eye contact. Reference to a few notes is acceptable, but reading your statement is not.

Emphasize vital pieces of evidence or witnesses. Confront and minimize the weaknesses in your case but stress the weaknesses of your opponent's case. End on a strong note or by recapitulating your key points. Tell a jury that you are confident that when they hear the evidence, they will return a verdict in your client's favor.

2. Closing Argument

Although you must review key evidence in your closing argument, the closing argument is not a mere summation of the evidence. It is a one-way conversation designed to persuade. An outline of the closing should be prepared *before* the trial begins and should sound the same themes developed in the opening statement, the direct examination, the cross-examination, and the instructions. As the trial progresses, you can add to your outline specific notes about the actual proof that is entered into evidence.

Start with the theme of your trial, one grounded in justice and ethics. If possible, relate it to an accepted standard with which the fact finder is likely to be familiar. The summation should anticipate and be tied to the jury instructions that the judge has agreed to give. Refer to specific instructions and explain how the evidence meets the standards set forth in the instructions. You need to give the jury reasons to support your contentions so that the jurors can feel reasonably certain that they are doing the right thing. This will also help them argue for your point of view with other jurors. Show them why each finding you want is right. Liberal reference to exhibits offered and received in evidence is highly recommended, and a chart outlining some or all of the issues and the evidence bearing on each may be useful. Using specific quotes or paraphrasing testimony to emphasize key points is an effective technique as well. Explain and unify the evidence to support your conclusions.

Analogies drawn from common experience and rhetorical questions help the jury do the thinking on its own to reach the conclusions you are urging. Repetition of key facts and themes in moderation is persuasive. Pace yourself, but build passion and energy into your closing.

Question the credibility of the opponent's witnesses, the facts they assert, and the common sense of what the opponent contends. Try to show what the other side wants the fact finder to believe is improbable. Refer to your client by name. Use few notes and maintain eye contact. Keep the argument reasonably short and never boring. To the extent possible, try to convey a humane understanding of the harm to your client and the need for the redress sought.

C. PREPARATION AND EXAMINATION OF WITNESSES

Even though you are questioning a friendly witness, a good direct examination is often more difficult to achieve than effective cross-examination.

1. Direct Examination

Most attorneys tend to be less attentive and aggressive with their own witnesses. Direct examination requires (1) that basic facts be made understandable to people who are unfamiliar with them; (2) that continuity be maintained despite objections and interruptions; (3) that the witness convey his belief in his testimony and not appear rehearsed; (4) that the rules of evidence be observed; and (5) that a clear record be created in the event of an appeal.

Direct examination requires painstaking preparation. Before trial, write out your questions and review them with your witnesses. Review exhibits and the witness's deposition or statements with him. In preparing the witness to testify, bear in mind who the audience will be, and try to guide your suggestions on dress, style, eye contact, and demeanor accordingly. Any trial advocacy text will contain at least two dozen suggestions for specific instructions to lay witnesses about how to testify. Two of the most important ones are to testify only as to what you know and always to tell the truth.

Keep your questions short and simple and use plain language. Organize them in a logical fashion, and cover subjects that are consistent with the theory of your case. Although you may refer to notes during the examination, do not read your questions. For particularly important matters that you want to highlight, ask your witnesses to "tell the jury (or judge)" or "please explain to the jury (or judge)." Listen carefully to the witness' answers for two reasons: (1) to determine if the question is answered adequately and (2) so that you appear interested to the trier of fact. When answers are inadequate or deviate from expectation, you can ask the witness to elaborate or explain, or ask the question in a different way, or simply repeat the question. If all else fails, ask a leading question, then follow the expected objection with a direct one.

Headlines to introduce a new subject help both the witness and the fact finder follow your line of questioning. To maintain the fact finder's attention, vary the rhythm and pace of the examination. Visual aids are invaluable in keeping the jury's attention and making your case understandable. Liberal use of enlargements of exhibits and charts is recommended. Exhibits should be shown to the jurors as soon as they are formally admitted if an enlargement is not available for them to view.

The use of exhibits requires careful preparation. All exhibits should be numbered, keyed to, and offered through witnesses qualified to testify about them. The witness need not have created the exhibit. The witness need only testify as to authenticity or accuracy. To establish a foundation for authenticity or accuracy, the witness should first testify as to the witness' capacity or relationship to the exhibit—for example, custodian of business records or caseworker on a particular case. Exhibits should also be reviewed with opposing counsel before the hearing to identify objections and their grounds.

Objectionable questions lower your credibility and should be avoided. That does not mean, however, that you may not use any leading questions. Leading questions are permissible on direct in three circumstances: (1) on preliminary matters that are not reasonably in dispute, (2) when questioning very young or very old witnesses, and (3) possibly with a forgetful witness.

Prepare your own witness for cross-examination as well as for direct. If possible, the attorney offering direct examination should rehearse with an associate conducting mock cross-examination, drawing all imaginable objections and preparing either to avoid them or to respond to them. Tell your witness to explain an answer given on cross when he feels he cannot just answer yes or no, even if pressed to do so by opposing counsel. Objections and how you respond to them should be anticipated when planning your witness' testimony. To avoid raising objections that are sustained, be sure to lay a proper foundation showing that the witness is competent, through experience, position, or relationship, to testify about the matter.

Typically objections either go to the form of a question, the relevance of a question, or the competence of a witness to answer a question. Counsel should anticipate all of these objections and deal with them in a way that maintains her own credibility. This may mean rephrasing a question and asking it in proper form or arguing the relevance of a question within the framework of the issues of the case.

When the opportunity arises, present witnesses who can demonstrate in a compelling and sympathetic way that the issues profoundly affect human beings. Often the judge, jury, or hearing officer comes from a social and economic background far removed from the client's. Thus a wise move is to have the clients and witnesses present in the courtroom and to bring them to the stand whenever possible. Dry legal issues are never as compelling as human experience presented through live testimony.

2. Cross-Examination

Before you cross-examine, you must listen to and make notes about the witness' testimony on direct. You must also decide whether to object when a rule of evidence is apparently being violated. Objections and interruptions should be minimized in jury trials. This view seems paradoxical since the rules of evidence are more stringent and rigorous in a jury case. However, a jury that is trying to understand the issues and evidence is apt to resent objections. Thus, whenever possible, raise potential objections in a pretrial conference by a motion *in limine* and raise expected objections in the courtroom while the jury is absent. Before objecting in the presence of the jury, know how much or how little your judge wants to hear in support of the objection.

When you are permitted to cross-examine, keep in mind one or all of the three possible goals for cross-examination: (1) to obtain helpful information, (2) to discredit the witness or her testimony, and (3) to bolster the credibility of a third person who will then discredit the witness. In general, do not conduct cross-examination unless you expect to gain something from it. Indeed, simply having no questions of a witness is acceptable.

Like direct examination, cross-examination requires complete familiarity with the subject matter on which the witness testifies. Proper preparation includes organizing exhibits, deposition transcripts, and documents in your trial notebook for easy reference and retrieval. The key to successful cross-examination is using impeachment material with familiarity and ease. This requires preparation and practice. Good cross-examination demands—in addition to thorough preparation—that you pay careful attention to the witness' demeanor and testimony during both direct examination and cross. She may change her testimony from that given at a deposition or information in a report or reveal unexpected information that contradicts opposing counsel's arguments.

On cross-examination, the questions should be brief, declarative but always leading and directive, calling for yes or no answers. In essence, the attorney testifies through her questions. This requires ingenuity, clear perception, patience, and caution. Two common mistakes on cross-examination are asking a question to which the examiner does not know the answer and asking a witness to explain an answer. Counsel should know the answers to all questions in advance, from discovery or from the necessary implications of the direct examination. You may be tempted to ask for an explanation when the witness gives a surprising answer. Do not do so. The wiser response is to leave the answer alone and deal with it in rebuttal testimony or closing argument.

Another common mistake is asking questions after you get the answers you want. You should stop after you obtain the information you need to support the argument you plan to make in summation. Do not ask the witness to repeat testimony she gave on direct unless you believe you can weaken it or are seeking to have her explain or elaborate on testimony that was favorable to your cause. Otherwise, do not ask her to explain answers; the less opportunity she has to educate the fact finder, the better. And never quarrel with the witness. Particularly in a jury trial, the jurors identify with the witnesses, not with you. Unless you are fairly sure that the jury dislikes the witness, always be courteous and avoid anger or hostility.

D. QUALIFICATION AND EXAMINATION OF EXPERTS

Federal Rule of Evidence 702 governs the qualification of witnesses as experts entitled to offer opinions. The rule establishes a tripartite test. The witness must possess “knowledge, skill, experience, training, or education” regarding some “scientific, technical or specialized knowledge” to “assist the trier of fact to understand the evidence or to determine a fact in issue.” The witness need not be a leading light in the field. So long as her “knowledge, skill, experience, training, or education” is sufficient to assist the trier of fact, she should be permitted to testify.²⁴⁰ The weight to be given to the witness’ testimony depends on how much expertise she has.

1. Qualification of Expert Witnesses

The trial judge decides whether to permit a proffered expert to give opinions. Usually the examination by the party offering the witness and the opposing party conducting a voir dire on her qualifications takes place in the presence of the jury. The judge also has discretion to decide whether the witness may offer opinions on particular subjects and may choose to wait until specific questions are addressed to her to assess the context of the questions better.

When the science upon which the expert relies is well established, the reliability of the testimony is for the jury to decide, taking into account the usual considerations in evaluating any witness’ credibility. However, when the testimony is based on scientific theories which have not garnered wide support, the trial judge must decide whether the expert should be permitted to testify. In *Daubert v. Merrell Dow Pharmaceuticals* the Supreme Court held that an expert should not be permitted to testify unless both the reasoning or methodology underlying the testimony and the application of that reasoning or methodology to the facts in question are scientifically valid.²⁴¹ The court in *Daubert* provided standards by which the judge should determine whether scientifically valid reasoning and methodology has been employed. These include: (1) whether the theory or technique can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential rate of error; and (4) the degree of acceptance within the relevant scientific community.²⁴²

²⁴⁰ See, e.g., *Lanni v. New Jersey*, 177 F.R.D. 295, 301 (D.N.J. 1998).

²⁴¹ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

²⁴² *Id.* at 593–94.

The basic principle of *Daubert* was extended to include expert testimony based on technical, experiential, or specialized knowledge in *Kumho Tire Co. Ltd. v. Carmichael*.²⁴³ In *Kumho* the Court held that trial judges had wide discretion to determine which factors were pertinent to the determination of reliability.²⁴⁴ The trial judge may consider whether the expert's testimony is logical and not contrary to common sense. The judge may rely on the expert's own testimony as to whether the matters on which he bases his opinion

- are "of a type reasonably relied on by experts in the particular field,"²⁴⁵ or
- may require additional evidence, or
- may even take judicial notice.²⁴⁶

For example an application of the *Daubert-Kumho* test to an expert's economic analysis would not require validating the conclusion, but only whether an accepted methodology was used in conducting the analysis.²⁴⁷

Daubert-Kumho does not necessarily apply at the preliminary stages of a case, such as a class certification hearing.²⁴⁸ It may or may not be used in determining admissibility for summary judgment purposes, where the judge is the trier of fact and where full voir dire is not necessarily available.²⁴⁹ Similarly a relaxed standard applies to bench trials.²⁵⁰ In jury trials an *in limine* hearing, generally referred to as a *Daubert* hearing, should be held where there is a material dispute as to the admissibility of the witness' opinions.²⁵¹

2. Examination of Experts

Successful examination of experts on both direct and cross requires extensive preparation. You must try to learn as much in the narrow area of examination as the expert knows. Your expert can help you design her testimony after you explain the needs of your case. Before trial, when you are preparing your expert to testify, be sure to have her respond verbally to the key questions that you intend to ask at trial in order to be certain that the manner in which she phrases the answer is both clear and legally acceptable. Remember that professors are usually good teachers, familiar with effective teaching techniques. The average expert, however, is not a good communicator or is not accustomed to explaining complex matters to lay people. Their explanations can be somewhat more sophisticated in a bench trial; nevertheless the explanations must be expressed in a way that makes them interesting. Also, experts are not likely to self-edit, thus necessitating careful preparation to avoid extraneous information or opinions. A practice session with role playing can be invaluable, particularly with a novice expert. Review with your expert the questions you anticipate on cross of him. Create or review with the expert whatever visual aids might help the jury understand the testimony or stay interested in it. Remind the expert to maintain poise and not bicker with a difficult questioner.

²⁴³*Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)

²⁴⁴The concurring opinion in *Kumho* noted that the type of discretion that the trial court was afforded was limited to discretion in choosing a reasonable means of including or excluding expert testimony, not general discretion to abandon the gatekeeping function in its entirety. Thus a failure to apply at least one of the *Daubert* factors would constitute an abuse of discretion. 526 U.S. at 159 (Scalia, J., concurring).

²⁴⁵Fed. R. Evid. 703.

²⁴⁶*Id.* 201; *Adams v. Pro Transportation*, No. 8:00CV558, U.S. Dist. LEXIS 6088 (D. Neb. Jan. 9, 2000).

²⁴⁷See, e.g., *United States v. Diaz*, 300 F.3d 66 (1st Cir. 2002); *Atlantic Richfield v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1166 (10th Cir. 2000); *Blue Dane Simmental Corp. v. American Simmental Association*, 178 F.3d 1035 (8th Cir. 1999); *Figueroa v. Boston Scientific Corp.*, 254 F. Supp. 2d 361 (S.D.N.Y. 2003).

²⁴⁸*In re Visa Check/Mastermoney Antitrust Litigation*, 192 F.R.D. 68, 76 (E.D.N.Y. 2000).

²⁴⁹*Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 249 (6th Cir. 2001).

²⁵⁰*Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000).

²⁵¹In addition to evidentiary treatises and 29 CHARLES A. WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6266 (2d ed. 2001), a good source of more information and cases on *Daubert* is www.daubertontheweb.com.

In working with your expert and in preparing your case for trial, consider the foundation on which you will rely as the basis for her opinion. Expert opinions may be based on firsthand knowledge, evidence admitted at the hearing, and other facts or data if “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”²⁵² Thus an expert witness may rely on hearsay or unauthenticated evidence.²⁵³ Whether the inadmissible evidence is disclosed to the jury, however, is within the judge’s discretion, as provided in the last sentence of Rule 703: “Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”

The extent to which the opinion is based on inadmissible evidence may also influence whether the court permits the expert to give her opinion before disclosing the basis for it.²⁵⁴ Experts are not barred from expressing opinions on the “ultimate issue to be decided by the trier of fact.”²⁵⁵

Notwithstanding that experts are entitled to base their opinions on facts perceived by or made known to them, testifying experts may be excluded from the courtroom during the testimony of other witnesses under Rule 615 unless their presence is “essential.”²⁵⁶ Generally, if the expert has no firsthand knowledge of the facts, she is permitted to remain in the courtroom.²⁵⁷ If the court appoint its own experts, you are entitled to depose and cross-examine them.²⁵⁸

Cross-examination of experts requires the same type of preparation as direct. You must have thorough familiarity with the subject matter and relevant literature, especially anything the witness has written. Review previous testimony and reports by the expert or other experts in the case, and keep accessible any materials you will use for the examination. Statements in learned treatises recognized as such by the expert are a particularly potent source of cross-examination since they are admissible despite their hearsay status.²⁵⁹

E. JURY INSTRUCTIONS

Before trial begins, counsel should draft proposed jury instructions citing supporting authority and reflecting counsel’s theory on key points. They must be an accurate, clear, and plain statement of the legal and factual issues in the case. Instructions should cover all tried material issues supported by competent evidence.²⁶⁰ They should relate the law to the evidence that you expect to introduce rather than merely state abstract propositions. Sources of pattern jury instructions include Edward J. Devitt, Charles B. Blackmar, Michael A. Wolff, and Kevin F. O’Malley’s *Federal Jury Practice and Instructions* and, in some circuits, model instructions adopted by the court of appeals.²⁶¹

Under the federal rules, proposed instructions must be submitted “at the close of the evidence or at such earlier time during the trial as the court reasonably requests.”²⁶² Some judges include in their trial order a requirement that the parties submit joint jury instructions insofar as possible, and then a list of disputed instructions. You must obtain a ruling on your objections as early as possible to permit you to begin shaping your summation. Since the judge is not required to share his charge to the jury with counsel in advance of delivering it, the more comprehensive your requests for instructions, the more advance notice you receive regarding jury instruction. Often these rulings can be obtained at a “charge conference,” at which objections are raised and the grounds for them stated. If the instruction is given despite the objection, the objection generally must be raised again after the charge is given to the jury, but the reasons probably do not need to be restated.²⁶³

²⁵²Fed. R. Evid. 703.

²⁵³*Boone v. Moore*, 980 F.2d 539, 542 (8th Cir. 1992) (hearsay).

²⁵⁴See Fed. R. Evid. 705.

²⁵⁵*Id.* 704(a).

²⁵⁶*Id.* 615 (3).

²⁵⁷See, e.g., *Malek v. Federal Insurance Co.*, 994 F.2d 49, 54 (2d Cir. 1993).

²⁵⁸Fed. R. Evid. 706.

²⁵⁹*Id.* 803.

²⁶⁰See, e.g., *FDIC Federal Deposit Insurance Corp. v. UMIC Inc.*, 136 F.3d 1375 (10th Cir. 1998).

²⁶¹See, e.g., www.lb5.uscourts.gov/juryinstructions/cf_jury.cfm.

²⁶²Fed. R. Evid. 51.

²⁶³See *Little v. Green*, 428 F.2d 1061, 1070 (5th Cir. 1970).

Under Rule 51, the failure to object to an instruction or to the refusal to give what you believe are necessary instructions *before* the jury retires to deliberate constitutes a waiver of such objections. An exception to this rule is sometimes recognized where it is plain that a renewed objection would be useless.²⁶⁴ In other cases the exception is recognized for plain error or to prevent a miscarriage of justice.²⁶⁵ Most judges deliver their jury instructions after argument by counsel, but this is discretionary with the judge.²⁶⁶ The instructions are given in open court, and may be repeated or supplemented at the request of the jury or by the judge *sua sponte*. Federal judges are permitted, at their discretion, to comment on the evidence when charging the jury.²⁶⁷

VI. Appellate Practice

Appellate practice raises some questions similar to those presented in the district court, but it also introduces new issues and procedures.

A. ISSUES AND PROCEDURES

Concerns about whether to appeal often mirror the inquiries raised when litigation is first contemplated, while the *process* of appealing differs greatly from district court litigation. This section focuses primarily on the procedural aspects of an appeal, with some attention paid to the internal inquiry regarding the strategy of appealing. The substantive aspects of brief writing and oral argument are not discussed.

For the most part, the process of taking an appeal is thoroughly set forth in the Federal Rules of Appellate Procedure, in the local rules which each circuit issues in conjunction with the federal rules, and in the internal operating procedures or other explanatory manuals and handbooks which the circuits also often publish. While this section cites some circuit rules as examples, practitioners should not assume that their circuit has a comparable rule. Since failure to comply with the circuit rules can result in dismissal of the appeal, practitioners are urged to review their circuit's local rules carefully before embarking on an appeal.²⁶⁸

B. THE RIGHT TO APPEAL

The basic rule is that “[t]he courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts”²⁶⁹ The Supreme Court interprets this “to mean that an appeal ordinarily will not lie until after final judgment has been entered in a case.”²⁷⁰ This final judgment rule provides that “a decision is not final, ordinarily, unless it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”²⁷¹ In practice, there may be some confusion about whether a judgment is indeed final. For example, a judgment is final even though a request for attorney fees is still pending.²⁷² When a matter remains pending despite the entry of a judgment, research the finality issue carefully and quickly.

Federal Rule of Civil Procedure 54(b) sets forth the final judgment rule in multiclient and multiparty cases. The court may “make express direction for the entry of judgment” on fewer than all the claims or as to fewer than all the parties “upon an express determination that there is no just reason for delay.” The rule speaks to disposition of claims, rather than of legal theories or requests for relief.²⁷³ As a result, if particular claims are dismissed in a multiclient or multiparty case, you will need to consider whether to seek a Rule 54(b) order.

²⁶⁴ *Hammer v. Gross*, 932 F.2d 842 (9th Cir.), *cert. denied*, 502 U.S. 980 (1991); see *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1 (1st Cir. 1998).

²⁶⁵ *Farley v. Nationwide Mutual Insurance Co.*, 197 F.3d 1322 (11th Cir. 1999).

²⁶⁶ Fed. R. Civ. P. 51.

²⁶⁷ See, e.g., *McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals*, 140 F.3d 288 (1st Cir. 1998).

²⁶⁸ See, e.g., *In re O'Brien*, 312 F.3d 1335, 1337 (9th Cir. 2002) (dismissal of appeal because brief and excerpts of record failed to comply with federal and circuit rules).

²⁶⁹ 28 U.S.C. § 1291.

²⁷⁰ *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203 (1999) (citations omitted).

²⁷¹ *Id.* at 204 (internal quotation marks and citations omitted).

²⁷² *Budinich v. Becton Dickinson and Company*, 486 U.S. 196, 199–202 (1988).

²⁷³ *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 742–43 (1976).

Statutory and common-law exceptions to the final judgment rule allow interlocutory appeals in specific instances. The most important of these for legal aid attorneys allows appeals from “[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . .”²⁷⁴ Thus any action which a district court takes, or declines to take, involving a request for or implementation of a preliminary or permanent injunction arguably establishes an automatic right to appeal, but this exception to the final judgment rule is narrow and strictly construed.²⁷⁵

There are two other important statutory provisions for interlocutory appeals, but their applicability rests entirely in the courts’ discretion. Upon the district judge’s written statement that an otherwise unappealable order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation,” a request to appeal may be made to the court of appeals within ten days of the entry of the order.²⁷⁶ The court of appeals then finally decides whether to allow the appeal.²⁷⁷ Both courts act within their discretion in making the determination.²⁷⁸

A recent amendment to the Federal Rules of Civil Procedure vests in the court of appeals the discretion to allow an appeal from an order granting or denying a motion for class certification if the request is made within ten days of the order’s entry.²⁷⁹ The courts of appeal have established a variety of standards for exercising this discretion. These standards include whether the decision below was manifestly in error, whether there is a need to clarify a fundamental issue of law which otherwise might not be considered, and whether the ruling on class certification might represent a death knell for either party independent of the merits.²⁸⁰ They all agree that the right to appeal should be granted only sparingly. The rule also expressly states that allowance of the appeal does not act to stay proceedings below.²⁸¹

The “collateral order doctrine,” a common-law doctrine, interprets “final decision” to include some orders that do not end the litigation. To be appealable, an order within this “small category” must be “conclusive, . . . resolve important questions separate from the merits, and . . . [be] effectively unreviewable on appeal from the final judgment in the underlying action.”²⁸² The standard is extremely difficult to meet, so that a practitioner contemplating this approach should do considerable research on the intricacies of the doctrine.

C. WHETHER TO APPEAL

Deciding whether to appeal involves balancing a host of potentially competing factors. Obviously the clients’ needs and desires are at the top of the list.

Another crucial consideration is the likelihood of success. This requires a careful review of the merits of the issue, of the strength of the district judge’s findings and the validity of her conclusions, of the standard of review to be applied, and of the composition and reputations of the particular court of appeals. For instance, while an adverse decision on a close legal question subject to de novo review on appeal might be appropriate for an appeal, the denial of a preliminary injunction because the plaintiffs had not demonstrated irreparable harm would require the more demanding showing that the district court had abused its discretion, rendering the appeal considerably more problematic.

²⁷⁴28 U.S.C. § 1292(a)(1).

²⁷⁵See, e.g., *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978).

²⁷⁶28 U.S.C. § 1292(b).

²⁷⁷*Id.*

²⁷⁸*Swint v. Chambers County Commissioner*, 514 U.S. 35, 47 (1995).

²⁷⁹Fed. R. Civ. P. 23(f).

²⁸⁰See *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) (reviewing and summarizing decisions from several other circuits on the appropriate standard), *cert. denied*, 123 S. Ct. 2252 (2003); *In re Lorazepam and Clorazepate Antitrust Litigation*, 289 F.3d 98, 102–4 (D.C. Cir. 2002) (same).

²⁸¹Fed. R. Civ. P. 23(f).

²⁸²*Swint*, 514 U.S. at 42. See also *Digital Equipment Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 878–79 (1994) (refusal to enforce settlement agreement); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy Inc.*, 506 U.S. 139, 143–44 (1993) (Eleventh Amendment immunity); *Cauwenbergh v. Biard*, 486 U.S. 517, 530–31 (1988) (forum non conveniens dismissal); *Richardson-Merrill Inc. v. Koller*, 472 U.S. 424 (1985) (attorney disqualification).

Furthermore, practitioners should familiarize themselves with the federal appellate court that would hear the appeal. This involves knowing the backgrounds, reputations, and experience of both active and senior judges and of calculating what the chances are for a “good” or “bad” panel.²⁸³ Not every federal appellate court is as inclined for or against the poor and minorities as the Fourth and Ninth Circuits presently are, but information about the court’s membership should be part of the decision making in every instance.²⁸⁴

At the same time the possibility of success on the appeal has to be balanced against the impact of appealing or not appealing. For instance, if the district court rules adversely on the merits while certifying a class, the latter action may counsel in favor of an appeal since there may be little to lose. The more common concern, however, arises when the plaintiffs’ loss at the district court level affects only themselves, while an unsuccessful appeal would have a far broader impact since it would create binding precedent in the circuit. This consideration is of particular importance when practitioners are aware that other public interest advocates in the circuit filed or are about to file litigation on the same issue which may have a better chance of success in the district court.

Several other factors may need to be considered. These include

- whether there are nonsubstantive aspects of the decision which favor or disfavor an appeal (e.g., a good ruling on standing or mootness which could be threatened by a cross-appeal if the adverse decision on the merits is appealed);
- whether an appeal might result in a split of authority in the circuits, thereby increasing the risk of the issue going to the Supreme Court;
- whether the practitioner’s office has the time, resources, and skills to devote to an appeal; and
- whether the decision to be appealed from is likely to be published (and therefore more likely to have an impact in some way).

In short, the decision to appeal is similar to the decision to bring the litigation in the first place, but with at least one significant difference: while a decision not to bring the litigation can be changed (subject to the statute of limitations), the decision not to appeal is the end of the line on that issue for those plaintiffs. Taking that step is sometimes difficult, but cutting losses to prevent a worse result is often the smartest move a practitioner may make.

D. HOW TO INITIATE AN APPEAL

The first step in an appeal is filing a notice of appeal. This is a one-sentence statement indicating who is appealing, from which order or judgment (including the date) the appeal is taken, and to which court.²⁸⁵ When you represent more than one party, you need not name all the plaintiffs who are appealing.²⁸⁶ But the safer approach is to specify all of them.²⁸⁷ The notice has the district court caption and, along with the fee for docketing the appeal, is filed in the district court, and the clerk then serves copies on the other parties’ counsel.²⁸⁸ If the appeal is from a final judgment, but the intention is to appeal orders issued during the course of the litigation, you need not specify each order to be appealed; the judgment encompasses all the orders entered.

²⁸³While most appellate courts regularly invite judges from other appellate courts and from the district courts to sit by designation on their panels, the D.C. Circuit currently uses only its own appeals court judges. This kind of information can be useful in gauging the odds of a sympathetic panel.

²⁸⁴In addition to or instead of word of mouth, a good source of information about federal appellate judges is the *Almanac of the Federal Judiciary* (published by Aspen), a two-volume looseleaf updated at least twice a year; it has basic biographical information and anonymous evaluations by lawyers of judges’ perceived strengths, weaknesses, and political predispositions. Volume 2 of the *Almanac* describes the appellate judges.

²⁸⁵Fed. R. App. P. 3(c)(1). Form 1 attached to the Federal Rules of Appellate Procedure is a “Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court.” See Fed. R. App. P. 3(c)(5).

²⁸⁶*Id.* 3(c)(1)(A).

²⁸⁷Under the prior version of Federal Rule of Appellate Procedure 3(c)(1), the Supreme Court had held that naming one plaintiff as appellant, followed by “et al.,” was not sufficient to designate the unspecified plaintiffs as appellants. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317–18 (1988). The rule was then liberalized to eliminate this trap for the unwary. See, e.g., *Garcia v. Walsh*, 20 F.3d 608, 609 (5th Cir. 1994).

²⁸⁸Fed. R. App. P. 3(a)(1), (d)(1), (e). As a matter of courtesy, however, appellants’ counsel also should serve the notice of appeal on the other parties. See, e.g., Handbook of Practice and Internal Procedures § III.B.1., at 13 (D.C. Cir. Dec. 1, 2002) [hereinafter D.C. Circuit Handbook].

Since the filing of the notice of appeal is jurisdictional, filing the notice timely is critical.²⁸⁹ In civil cases not involving the federal government, the notice must be filed within thirty days after entry of the judgment or order from which a party is appealing.²⁹⁰ But, “[w]hen the United States or its officer or agency is a party,” the time period for filing the notice is sixty days after entry of judgment for “any party.”²⁹¹ A notice of appeal filed before the entry of judgment or order appealed from, but after it has been announced, is treated as being filed on the date of that entry.²⁹² Similarly, a notice of appeal filed after a judgment is announced or entered, but before disposition of a Rule 59(e) motion for reconsideration, or other such postjudgment motions, is effective when the motion is resolved.²⁹³ The filing of a timely notice of appeal by any party extends the time for another party to file a cross-appeal to the later of fourteen days from the date that the first notice of appeal was filed or to the deadline that was originally applicable.²⁹⁴

A party may request that the district court extend the time to file the notice of appeal by filing a motion within thirty days after the deadline for filing a notice of appeal.²⁹⁵ The decision to extend the time for appeal lies within the district court’s discretion.²⁹⁶ Under an amendment effective on December 1, 2002, the party so requesting must show “excusable neglect or good cause,” regardless of whether the motion is filed during the original time to appeal or within the thirty days thereafter.²⁹⁷

After the notice of appeal and the docketing fee are received by the clerk of the court of appeals, the clerk usually issues a standard order directing the parties to take certain actions within set time frames. Without an order stating otherwise, however, counsel for the appellant will have ten days to order a transcript of relevant court proceedings from the court reporter (or to certify that no transcript will be ordered).²⁹⁸ The details of how to proceed from that point on are either in an order from the court of appeals’ clerk’s office or in the circuit rules which supplement the Federal Rules of Appellate Procedure.

To appeal *in forma pauperis*, a party must first file a motion with the district court.²⁹⁹ If that motion is granted, the party may proceed without paying fees.³⁰⁰ But if the motion is denied by the district court, the party may then file a motion with the court of appeals.³⁰¹ A party allowed to proceed *in forma pauperis* in the district court is entitled automatically to proceed *in forma pauperis* in the court of appeals, unless the district court determines to the contrary.³⁰²

²⁸⁹ See, e.g., *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58–59 (1982); see also Fed. R. App. P. 3(a)(2).

²⁹⁰ Fed. R. App. P. 4(a)(1)(A).

²⁹¹ Fed. R. App. P. 4(a)(1)(B). The rules regarding judgments are almost metaphysical. According to Federal Rule of Appellate Procedure 4(a)(7), a judgment is considered to be “entered” when there has been compliance with Federal Rule of Civil Procedure 58, which requires the judgment to be “set forth on a separate document.” Only then is the judgment “effective.” Fed. R. Civ. P. 58; see *Shalala v. Schaeffer*, 509 U.S. 292, 302–3 (1993). Adding to the complexity is that the real date on which the judgment is considered entered is “the date of entry of a civil judgment on the clerk’s docket,” which may not be shown on the docket sheet. *Houston v. Greiner*, 174 F.3d 287, 289 (2d Cir. 1999). Using the date file-stamped on the judgment as beginning the time to appeal is the safest approach.

²⁹² Fed. R. App. P. 4(a)(2).

²⁹³ *Id.* 4(a)(4)(B)(1).

²⁹⁴ *Id.* 4(a)(3).

²⁹⁵ *Id.* 4(a)(5)(A).

²⁹⁶ See, e.g., *Allied Steel v. City of Abilene*, 909 F.2d 139, 142 (5th Cir. 1990).

²⁹⁷ *Id.*

²⁹⁸ Fed. R. App. P. 10(b)(1).

²⁹⁹ *Id.* (a)(1). The necessary information for the accompanying declaration appears in Form 4 of the Federal Rules of Appellate Procedure. See *id.* 24(a)(1)(A).

³⁰⁰ *Id.* 24(a)(2).

³⁰¹ *Id.* 24(a)(5).

³⁰² *Id.* 24(a)(3).

E. MOTION PRACTICE IN THE COURTS OF APPEALS

Most appeals are resolved after full briefing and oral argument, with each court having different policies and procedures for those activities. The content of the briefs and of the appendix to the briefs is set out in detail in Federal Rules of Appellate Procedure 28 and 30 and is not discussed here. But, in addition to entertaining plenary briefing and argument, the appellate courts consider numerous motions, which can be either procedural or substantive and which, in some instances, are dispositive. A brief discussion of some of the more important motions follows.

To obtain a stay or injunction pending appeal, a party must normally move first for that relief in the district court, but, when that is “impracticable,” the motion may be made originally in the court of appeals.³⁰³ The standard is essentially the same as for a preliminary injunction.³⁰⁴ Opposing a stay (in either court) can make the difference between immediate relief for the plaintiffs and a one- to two-year wait while the appeal winds its way through the system and the lower court proceeds to the merits. If the stay is granted, however, consideration should be given to moving for an expedited appeal, which would speed up the appellate process, at least through the point of oral argument. Similarly, although obtaining an injunction pending appeal is particularly difficult, combining it with a motion for an expedited appeal is probably a good tactic since the court may be willing to take that action in lieu of the more extreme one of issuing an injunction pending appeal.³⁰⁵

Another motion to consider is for summary disposition, that is, for affirmance or reversal without plenary review. This is especially useful if the court entertains it before full briefing and views the procedure positively.³⁰⁶ Although the standard is invariably strict and such a motion is rarely granted (especially summary reversal), summary disposition has the advantage of resolving the appeal quickly and with considerably less work and expense.³⁰⁷ Also, since the motion is based on a strict standard which may not require a careful inquiry into the merits and usually does not result in more than a pro forma, unpublished disposition stating that the standard has not been met, there is little risk involved.³⁰⁸ Losing the motion should not have any impact on the ultimate outcome. If a reasonable chance of success is seen, a motion for summary disposition has the additional advantage of having two bites at the apple. Needless to say, however, practitioners should not abuse this approach but reserve it for the truly deserving case.

Oral argument on motions in the appellate courts is the exception rather than the rule.³⁰⁹ Consequently, while the need to be succinct remains, there is probably no opportunity to explain arguments beyond the written briefs.

³⁰³*Id.* 24 8(a)(1), (2). The rule is somewhat illogical in requiring the appellant first to seek emergency relief pending appeal in the district court. If the district court grants a stay, it is effectively contradicting the rationale of its own previous decision to issue an injunction. *See, e.g., Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2d Cir. 1999) (in reversing preliminary injunction which had been stayed by the district court, court of appeals states that “grant of a stay of a preliminary injunction pending appeal will almost always be logically inconsistent with a prior finding of irreparable harm”). And the request for an injunction pending appeal from the district court is almost certainly an exercise in futility because of that court’s denial of the request for an injunction on the merits. Nevertheless the effort should be made in order to satisfy the terms of the rule.

³⁰⁴*See, e.g., Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 572 (6th Cir. 2002); *see also, e.g., Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (standard for stay pending appeal); *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002) (same); Rule 8(a)(1), Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit (standard for both a stay and an injunction pending appeal).

³⁰⁵In some instances the statute under which a case is brought specifies the circumstances in which the appeal may be expedited. *See, e.g.,* D.C. Circuit Rule 47.2(a). Otherwise, the standard often is the traditional “good cause”; *see, e.g.,* Rule 27-12, Circuit Rules of the United States Court of Appeals for the Ninth Circuit. Rule 27.5, Circuit Rules of the United States Court of Appeals for the Fifth Circuit, may be more demanding, such as in requiring “irreparable injury” and in that the decision under review be “subject to substantial challenge.” D.C. Circuit Handbook § VIII.B, at 33.

³⁰⁶The Fourth Circuit, for instance, discourages motions for summary disposition and considers them only after briefing is completed. Rule 27(f), Circuit Rules of the United States Court of Appeals for the Fourth Circuit. *But see, e.g.,* D.C. Circuit Rule 27(g)(1) (requiring the motion to be filed within forty-five days of docketing); D.C. Circuit Handbook § VIII.I at 36 (“Parties are encouraged to file such motions where a sound basis exists for summary disposition.”); *see also, e.g.,* Rule 27.4, Third Circuit Local Appellate Rules (must “alleg[e] that no substantial question is presented”).

³⁰⁷*See, e.g., Taxpayers Watchdog Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987).

³⁰⁸*See, e.g., Indianapolis Power and Light Co. v. Surface Transportation Board*, 2002 WL 1349542 (D.C. Cir., June 19, 2002).

³⁰⁹Fed. R. App. P. 27(e); *but see, e.g.,* Rule 27(b), Local Rules of the Second Circuit.

