

***WINNING* MOTIONS**

IN

FEDERAL COURT

NEW TACTICS, RULES AND PROCEDURES

HYPOTHETICALS

- A. McAne objects to the anti-SLAPP motion, arguing that it is a state procedural rule that has no application in a federal forum. Should the court allow the anti-SLAPP motion to be heard in federal court?

[*United States ex rel. Newsham v. Lockheed Missile & Space Co.* (9th Cir. 1999) 190 F3d 963; *Gasperini v. Center for Humanities, Inc.* (1996) 518 US 415; *PRAC. GUIDE* § 1:63 ff.]

- B. Add to the facts: Assume that the state's anti-SLAPP suit also requires that discovery be stayed until resolution of the motion. Must the federal court follow this rule?

[*Rogers v. Home Shopping Network, Inc.* (CD CA 1999) 57 F.Supp.2d 973; *Rosales v. Honda Motor Co.* (5th Cir. 1984) 726 F2d 259; *Hamm v. American Home Products Corp.* (ED CA 1995) 888 F.Supp. 1037; *Irizarry v. Digital Equipment Corp.* (ND IL 1996) 919 F.Supp. 301; *Baird v. Celis* (ND GA 1999) 41 F.Supp.2d 1358; *PRAC. GUIDE* § 1:63.8]

- C. Change the facts: Assume McAne brings the same claim, but this time in federal court in Nevada. The action proceeds and shortly before trial, Sludge makes an Offer of Judgment for \$10,000.00 pursuant to FRCP 68. McAne does not accept. In Nevada, there is also a state law offer of judgment statute that allows for the award of attorneys fees should a plaintiff reject an offer of judgment, and subsequently lose at trial. Following an eight-day jury trial, the district court grants Sludge's motion for judgment as a matter of law. Sludge then moves under FRCP 54 to recover attorneys' fees it incurred in defending the suit after the date of McAne's rejection of the Rule 68 offer of judgment based on the state law offer of judgment statute. How should the Court rule on Sludge's motion for attorneys' fees?

[*MRO Communications Inc. v. American Telephone & Telegraph Co.* (9th Cir. 1999) 197 F3d 1276; *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.* (7th Cir. 1995) 60 F3d 305; *Tanker Management, Inc. v. Brunson* (11th Cir. 1990) 918 F2d 1524; *PRAC. GUIDE* § 1:57.27]

- D. Change the facts again: Assume McAne generally seeks discovery of Sludge's computer data and software that allows immediate and widespread distribution of his reports on the Internet. Sludge responds that his method of distribution is a "trade secret" and argues that under the governing state statute, all discovery should be stayed until the request is made with more particularity. Should the court follow the state statute?

[*Computer Economics v. Gartner Group, Inc.* (SD CA 1999) 50 F.Supp. 980; see also *Morton v. Brockman* (D ME 1999) 184 FRD 211; *Fitzgerald v. Expressway Sewerage Const.* (1st Cir. 1999) 177 F3d 71; *PRAC. GUIDE* § 1:64.8]

HYPO 2

"New Rules Triggering the Removal Time Clock"

George W. Bush files a complaint in state court against Al Gore for defamation on January 26, 2000. Bush alleges that Gore has been "lying about his record to the American people." Specifically, Bush alleges that Gore misrepresented his (Bush's) academic record and falsely stated that he (Gore) had better grades in college.

Bush did not serve Gore on the 26th, but did fax him a "courtesy copy" of the file-stamped complaint on January 29th. Bush formally served Gore under local law by certified mail on February 12, 2000. On March 12, 2000 (29 days after service but 43 days after receiving the faxed copy of the complaint), Gore removed the action to federal district court. The basis for subject matter jurisdiction is diversity.

- A. Assume complete diversity exists and the amount in controversy is satisfied. Bush brings a motion to remand, based on the fact that the 30-day period specified in 28 USCA §1446(b) has expired. How should the court rule on the remand motion?

[*Murphy Brothers, Inc. v. Michettit Pipe Stringing Inc.*, (1999) 119 S.Ct 1322; see PRAC. GUIDE § 2:899 ff.]

B. Change the facts: Mr. Bush files and serves the state court complaint on the same date, January 26, 2000. Again, assume complete diversity exists. The complaint, however, is silent as to the amount-in-controversy. Gore deposes Bush in the state court action on February 15, 2000. At his deposition, Bush states that he seeks in excess of \$300,000 in damages. Gore then deposes Bush's economist, who will testify as an expert witness on damages. The expert produces his expert report at the expert's March 19, 2000 deposition. The report calculates damages at \$1,000,000. Gore files a notice of removal on March 29, 2000, contending that the expert report provided the first notice that the amount-in-controversy requirement was satisfied. Bush moves to remand the action, arguing that Gore was put on notice of the amount in controversy at Bush's February 15, 2000 deposition. Therefore, the 30-day period to remove expired on March 16, 2000. How should the court rule on the remand motion?

[*Huffman v. Saul Holdings Ltd. Partnership*, (10th Cir 1999) 194 F3d 1072, 1078; *Chapman v. Powermatic, Inc.* (5th Cir. 1992) 969 F2d 160; *PRAC. GUIDE* § 2:920]

C. Change the facts again: This time Bush sues Gore and also names Hillary Clinton for her statement that "unlike George Bush," she is "a true baseball fan, i.e., a lifetime Yankees fan." Bush is a citizen of Texas, Gore is a citizen of Washington, D.C. and Mrs. Clinton is alleged to be a citizen of New York. Gore is served on February 15, 2000 and does not remove the action to Federal court. However, Mrs. Clinton is served on March 20, 2000 and she immediately files a Notice of Removal, joined in by Mr. Gore. Mr. Bush again moves to remand on the ground that the removal was untimely. How should the court rule on Bush' s remand motion?

[*Brierly v. Alusuisse Flexible Packaging Co.*, (6th Cir. 1999) 184 F3d 527; *Brown v. Demco, Inc.* (5th Cir. 1986) 792 F2d 478; *New York Life Ins. Co. v. Deshotel* (5th Cir. 1998) 142 F3d 873; *Ford v. New United Motors Mfg., Inc.* (ND CA 1994) 857 F.Supp. 707; PRAC. GUIDE § 2:905 ff.]

- D. Change the facts again: This time assume that Bush files his action in federal court premised on diversity. Instead of serving the summons and complaint by the traditional means, Bush serves the summons and complaint on the two defendants by email. Both defendants receive the email. Is service proper?

[*Mid-Continent Wood Products, Inc. v. Harris* (7th Cir. 1991) 936 F.2d 297, 301; *PRAC. GUIDE* § 5:165 ff.; *WAWA, Inc. v. Christensen*, (ED PA 1999) 1999 WL 557926; *Columbia Ins. Co. v. Seescandy.com*, (ND CA 1999) 185 FRD 573]

HYPO 3

"Latest Developments in Internet Contacts"

Wecon, an Oklahoma corporation, operates an Internet access service that gives its customers access to the World Wide Web. In addition, Wecon carries their e-mail messages. Wecon's Internet address ("domain name") is Wecon.net.

Online New England ("Online"), is a large Delaware corporation doing business in the New England states. Online offers an Internet access service that includes email access for its customers. Due to complex federal telecommunications regulations, Online is not allowed to carry telephone transmissions across state lines. Instead, Online is required to use another "Global Service Provider" ("GSP") to transmit email messages. Starting in July 1999 Online often used the services of a GSP called WeConnect, also located in Delaware. WeConnect's domain name is "weconnect.net."

In late October 1999, as a result of a technical error, Online began routing messages to wecon.net instead of weconnect.net. This resulted in about 12,000 of Online's customers using Wecon's computer servers for their email instead of WeConnect's. Due to the high volume of traffic being routed to Wecon's server, Wecon's customers experienced substantial slow downs and information logjams. Wecon's CEO contacted Online's CEO shortly after the problem was discovered in November, and Online's CEO replied that he'd "see what they could do." The problem, however, continued. Wecon contacted Online several times and asked Online simply to block Online customers from using their email until Online fixed the problem. Online refused to do so and stated they would find a way to fix the problem that would not inconvenience Online's customers. Meanwhile, the service slowdowns for Wecon's customers continued. Finally, in February 2000, Online resolved the problem.

Wecon then sues Online in the Western District of Oklahoma, seeking to recover damages caused by the improper use of its server to transmit email for Online's customers. Online brings a motion to dismiss based on lack of personal jurisdiction. In its motion, Online stated that it did no business in Oklahoma and that it resolved the problem "as quickly as it reasonably could."

A. How should the Court rule on Online's FRCP 12(b)(2) motion?

[*Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*
(10th Cir. 2000) 2000 WL 262929; PRAC. GUIDE § 3:76 ff.]

- B. Change the facts: This time Wecon also sues Weconnect. Weconnect has no contacts with Oklahoma. It does however, maintain a web site advertising its services as a GSP. A would-be customer can subscribe to Weconnect via the web site. Weconnect also brings a FRCP 12(b)(2) motion. How should the court rule on Weconnect's motion?

[*Coolsavings.com, Inc. v. IQ Commerce Corp.*, (ND IL 1999) 53 F.Supp.2d 1000; *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* (WD PA 1997) 952 F.Supp. 1119; *Cybersell, Inc. v. Cybersell, Inc.* (9th Cir. 1997) 130 F3d 414; *Millennium Enterprises v. Millennium Music, L.P.*, (D OR 1999) 33 F.Supp.2d 907; *Stomp, Inc. v. Neato, LLC* (CD CA 1999) 61 F.Supp.2d 1074; *Mink v. AAAA Development, LLC*, (5th Cir. 1999) 130 F3d 333, 336; *GTE New Media Services, Inc. v. BellSouth Corp.* (DC Cir. 2000) 199 F3d 1343; *Bochan v. LaFontaine* (ED VA 1999) 68 F.Supp.2d 692; *Barrett v. Catacombs Press* (ED PA 1999) 44 F.Supp.2d 717; PRAC. GUIDE § 3:208.20 ff.]

B. Change the facts: After discovery, the court grants the team's motion for summary judgment, ruling that there is no factual basis for the federal claims. Is the court free to continue with the case against the teammates?

[Practice Guide § 2:144 ff.; 28 USC § 1367; *Reynolds v. San Diego* (9th Cir. 1996) 84 F3d 1162]

HYPO 5
"Winning Through Discovery"

Mary Plein is hired by the World Wrestling Federation ("WWF") as a ringside attendant and is given the stage name "Sable." Her job involves appearing ringside and alternately taunting and fawning over the WWF wrestlers. Sable quickly becomes a hugely popular star on the wrestling circuit. After a contract dispute with the WWF, she quits and starts a personal web site where users can download images of her. On the site, she continues to use the WWF name Sable and references other WWF trademarks.

WWF sues Sable in federal court. The WWF alleges that Sable is using the WWF trademarks without authorization. Sable counterclaims for interference with prospective business advantage, unfair competition and emotional distress.

Pursuant to the court's scheduling order, the original parties had a FRCP 26(f) meeting. At the initial scheduling conference held pursuant to FRCP 16, the court entered an initial pretrial order. Sable then impleads Rocky Riskin, a former WWF executive, whom Sable claims gave her permission to continue using the Sable moniker. Sable immediately propounds discovery on Rocky. Rocky responds that any discovery from him is premature because all the parties have not met and conferred as required by Rule 26(f).

A. Does Rocky need to respond to Sable's discovery requests?

[*Steppes Apartment, Ltd. v. Armstrong* (D UT 1999) 188 FRD 642; *PRAC. GUIDE* § 11:114]

- B. Add to the facts: Discovery goes forward. In response to a Request for Production of documents from WWF, third party defendant Rocky produces two email communications with the defendant/third party plaintiff, Sable.

Sable had not produced any email messages to the WWF, despite its requests for "all documents" related to the litigation. Sable informed the WWF that she had a "custom and practice" of deleting email soon after sending or receiving email. Sable also claims to have deleted the email from the "trash" section on her hard drive.

WWF states that it believed Sable continued this practice during the pending litigation, regardless of whether any of the messages may have been responsive to document requests. The WWF moves for an order permitting it to make a "mirror-image" of Sable's personal computer hard drive in order to review and recover deleted emails. Defendant opposes the motion on the ground that it is procedurally defective, given that plaintiff never made a request for information specifically relating to the hard drive. Defendant further opposes the motion on the grounds that her personal web site business will suffer losses if her computer is taken because it will cause her site to be shut down. Sable further argues that copying the hard drive would constitute an invasion of privacy and would potentially violate attorney client privilege, at least as far as any emails between Sable and her attorney.

How should the court rule on WWF's motion to produce the hard drive?

[*Illinois Toolworks, Inc. v. Metrowork Products, Ltd.* (ND ILL 1999) 43 F.Supp.2d 951; *Playboy Enterprises v. Welles* (SD CA 1999) 60 F.Supp.2d 1050; *PRAC. GUIDE* § 11:697]

- C. Change the Facts: Same facts as above except here, Sable claims she sold their business computer shortly after she was served with the complaint in this matter and is no longer aware of the whereabouts of it. Thus, Sable is unable to provide copies of emails, or a mirror image of the hard drive. WWF moves for sanctions. Sable claims she was under no obligation to preserve her computer. How should the court rule on WWF's motion for sanctions?

[*Kronisch v. United States* (2nd Cir. 1998) 180 F3d 112;
Procter & Gamble Co. v. Haugen (D UT 1998) 179 FRD 622;
Winters v. Textron, Inc. (MD PA 1999) 187 FRD 518;
Nationwide & Mutual Insurance Co. v. Ford Motor Co. (6th Cir. 1999) 174 F3d 801; *JOM Inc. v. Adell Plastics, Inc.* (1st Cir. 1999) 193 F3d 47; *PRAC. GUIDE* § 11:19.5 ff.]

- D. Change the Facts: Prior to leaving the WWF, Sable tape-recorded a meeting with WWF officials with their knowledge. At the meeting, the parties discussed many of the facts at issue in the current proceedings, including whether she had the right to use the Sable moniker after she left the wrestling world. Now, the WWF requests the production of the tape. Sable agrees to produce the tape, but seeks a protective order that would allow her to refrain from producing the tape until after she deposes those same WWF officials. Sable hopes that by denying the opposing side the tape until after the deposition, Sable will obtain the opposing side's unrehearsed and unrefreshed recollection of what was said at the meeting.

The WWF opposes the motion for the protective order, arguing that the tape is substantive evidence to which they are entitled to forthwith.

How should the court rule on Sable's motion for a protective order?

[*Jepson, Inc. v. Makita Elec. Works, Ltd.* (7th Cir. 1994) 30 F.3d 854; *Pro Billiards Tour Association, Inc. v. R. J. Reynolds Tobacco Co.* (MD NC 1999) 187 FRD 229; FRCP 26(c); PRAC. GUIDE § 11:84]

- E. Change the Facts: Sable serves requests for production on the WWF. They include a request for the personnel files of several other WWF employees not parties to the lawsuit. The WWF moves for an order limiting access to the personnel files of the non-party employees. How should the court rule on the motion?

[*Knoll v. American Telephone & Telegraph Co.* (6th Cir. 1999) 176 F.3d 359; *Hicks v. Robeson County* (ED NC 1999) 187 FRD 232; *PRAC. GUIDE* § 11:83.2]

HYPO 6

"Winning Through Summary Judgment"

Donald Trump sues Ross Perot and the Reform Party alleging a breach of contract in which the Perot's Reform Party was obligated to pay Trump a percentage of fees generated at Reform Party events where Trump was the featured speaker. Perot brings a motion for summary judgment. In opposition, Trump argues that the motion is premature and files a declaration pursuant to FRCP 56(f). In the Rule 56(f) declaration, counsel asserts that he learned from a "highly reliable source" that Jesse "the Body" Ventura had a similar arrangement with Perot. The declaration adds that Trump had contacted Ventura, who refused to speak to him informally out of fear that Perot would retaliate against him. However, Ventura agreed to submit to a deposition under subpoena. Trump seeks the continuance in order to gain time to notice and depose Ventura. Perot argues the Rule 56(f) declaration is insufficient and is defective because it is based on inadmissible hearsay rather than personal knowledge.

- A. Should the court grant Trump's request for a continuance pursuant to FRCP 56 (f)?

[*Visa v. Bankcard Holders* (9th Cir. 1986) 784 F2d 1472; *Carpenter v. Federal Nat'l Mortgage Ass'n* (DC Cir. 1999) 174 F3d 231; *Stearns Airport Equip. Corp.* (5th Cir. 1999) 170 F3d 518; *Simas v. First Citizens' Fed'l Credit Union* (1st Cir. 1999) 170 F3d 37; *PRAC. GUIDE* § 14:112 ff.]

- B. Change the facts: Perot uncovers Trump's deposition testimony, given in another case, in which Trump denies ever having been promised to receive any fees for speaking at Reform Party events. Perot uses this testimony as the basis for a motion for summary judgment on Trump's breach of contract claim. In opposition, Trump responds with a declaration flatly contradicting his prior deposition testimony introduced by Perot. Should the court grant Perot's motion for summary judgment despite the inconsistent testimony?

[*Cleveland v. Policy Management Systems Corp.* (1999) 526 US 795; *Leslie v. Grupo ICA* (9th Cir. 1999) 1152; *PRAC. GUIDE* § 14:166 ff.]

HYPO 7
"Winning with Experts"

Rick Rockwell, the hapless groom on Fox Television's "Who Wants to Marry Millionaire?" sues Fox Television for negligent infliction of emotional distress. Rockwell alleges Fox Television failed to adequately screen the female contestants on the show and as a result, Rockwell was exposed to public humiliation that affected his mental well-being when the bride of his choosing failed to follow through with the marriage. Rockwell wishes to call three expert witnesses, his neurologist, psychologist and psychiatrist. The defendant, Fox Television objects, arguing any testimony from these witnesses is improper because Rockwell failed to provide expert reports as required by FRCP 26(a)(2)(b). In response, Rockwell argues that the rule cited does not apply in this instance.

A. Should the court allow the experts to testify?

[*Sprague v. Liberty Mutual Ins. Co.* (D NH 1998) 177 FRD 78; *Hall v. Sykes* (ED VA 1995) 164 FRD 46; PRAC. GUIDE § 11:202 ff.; FRCP 26(a)(2)(B)]

B. Change the facts: Rockwell also wishes to call Dr. Bill Froyed, a specially retained "expert" who specializes in the study of television "reality" shows and has concluded that contestants are inherently induced by the circumstances to participate "against their will" even if they expressly consent after being given explicit warnings. Froyed has a PhD in "contemporary culture" and wrote his thesis on "Brainwashing and the Modern Game Show." Fox Television objects to the admissibility of this testimony as inherently unreliable and irrelevant. How should the court rule on the motion?

[*Kumho Tire Co., Ltd. v. Carmichael* (1999) 526 US 137;
PRAC. GUIDE § 14:175 ff.]