

FEDERAL RULES OF CIVIL PROCEDURE AND EVIDENCE

ERIC J.R. NICHOLS
Beck, Redden & Secrest, L.L.P.
1221 McKinney Street, Suite 4500
Houston, Texas 77010-2010
(713) 951-3700

LEGAL ASSISTANT UNIVERSITY

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Eric J.R. Nichols
BECK, REDDEN & SECREST, L.L.P.
Partner

Mr. Nichols is a partner in the firm of Beck, Redden & Secrest, L.L.P. His practice concerns a wide variety of trial and arbitration matters, including both commercial and products liability/personal injury matters, in which he has represented plaintiffs and defendants. He was profiled in 2001 by the *Texas Lawyer* as one of “40 Under 40” judges, lawyers and law professors “across the state whose accomplishments distinguish them among their peers.”

Mr. Nichols’ trial and arbitration experience has included oil and gas disputes, lender/borrower disputes, intellectual property disputes, securities matters, environmental matters, employment discrimination claims, and personal injury and wrongful death claims. Prior to joining Beck, Redden & Secrest, L.L.P. in 1994, Mr. Nichols served as an Assistant United States Attorney for the Southern District of Texas. As an Assistant United States Attorney, he prosecuted white-collar federal criminal matters, including fraud cases relating to health care, banking, investments, customs enforcement, bankruptcy, tax matters, and government procurement. In addition to this trial practice, he prepared and argued cases on behalf of the federal government before the United States Court of Appeals for the Fifth Circuit. Prior to joining the office of the United States Attorney, Mr. Nichols served as judicial law clerk to the Honorable David Hittner, United States District Judge for the Southern District of Texas.

Mr. Nichols obtained a J.D. Degree with honors from the University of Texas School of Law, where he served as Editor-in-Chief of the *Texas Law Review*. He holds a B.A. degree, with distinction, from the University of Virginia. Mr. Nichols has authored several publications on trial practice and procedure for legal journals and law reviews, and actively writes and lectures for various continuing legal education programs throughout the United States. One such publication, a co-authored chapter with Judge Hittner, appears in the multi-volume treatise BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS (West Publishing 1998).

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by

Eric J.R. Nichols

SCOPE OF DISCUSSION

The Federal Rules of Civil Procedure and Evidence do not always explicitly provide the answers to the mechanics of working up and trying a case in federal courts. However, there is a good deal of information and guidance set out in these rules, that can be used by every member of a lawsuit “team” in handling a federal lawsuit on a day-to-day basis. This discussion covers those provisions of the Federal Rules of Civil Procedure and Evidence that may help guide efforts to initiate the prosecution or defense of the case, to work the case up through the discovery process, and to prepare the case for trial. This discussion also points out the need to be familiar with the Local Rules of the federal district in which the case is filed and any procedures manual particular to the federal judge.

COMMENCEMENT OF THE CASE

FRCP 3, 4, 8, and 9

Drafting the pleading to start the case begins with the following guidelines:

A civil action is commenced by filing a complaint with the court. (Rule 3)

A pleading . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . ., (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. (Rule 8(a))

There are higher standards for pleading fraud; such allegations

shall be stated with particularity (Rule 9(b))

There may also be statutes that describe the detail needed for pleading, such as the Private Securities Litigation Reform Act of 1995.

Drafting the defense begins with the following guidelines:

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party

is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. (Rule 8(b))

A sample defensive pleading might be as follows:

With regard to the averments in paragraph (5) of the Complaint, [Defendant] admits that he orally announced his resignation on [date]. [Defendant] is without knowledge or information sufficient to form a belief as to the truth of the averments as to events at the company since [date]. [Defendant] denies the remaining averments in paragraph (5) of the Complaint.

SERVICE OF COMPLAINT AND OTHER DOCUMENTS

FRCP 4 and 5

A summons shall be served together with a copy of the complaint (Rule 4(c))

Service may be effected by any person who is not a party and who is at least 18 years of age (Rule 4(c))

Serving an individual can be done personally, by leaving at a home with a “person of suitable age and discretion then residing therein” (Rule 4(e))

Serving an individual can also be done pursuant to the law of the state in which the case is filed, or in which the service is effected (Rule 4(e))

Serving upon corporations or other business associations done through managing or general agent or agent for service of process (Rule 4(h))

Foreign service is done commonly through the Hague Convention (Rule 4(f))

Waiver of service is now a commonly used process, especially in situations where the defendant is a corporation or the identity of counsel for the party being served is readily available (Rule 4(d))

Every order, motion, pleading, discovery paper, notice, demand, offer of judgment, designation, and similar paper shall, except as otherwise provided in these rules, be served upon each of the parties. (Rule 5(a))

Each party to the lawsuit must receive a copy of any pleading or document filed with the court. After a lawyer has appeared for a party, service is made through the lawyer. When there is an unusually large number of parties or counsel in a suit, the judge may put in place rules that allow for fewer than all attorneys or parties to be served. Also, courts have started to authorize plans for electronic service, or web-based service.

B. “Proper Methods of Service.” *Service on a party represented by an attorney is made on the attorney unless the court orders service on the party. Service under this rule is made by hand delivery, leaving it at the person’s office with a clerk or other person in charge, or a conspicuous place if no one is in charge. If the person has no office or the office is closed, it may be left at the person’s dwelling or usual place of abode with a person of suitable age and discretion residing there. Mailing a copy to the last known address also constitutes valid service.*

The rules allow service upon a party either by mail or in person. For documents served by mail, service is complete upon mailing, using the post-mark as the date of service. Use of certified mail with a return receipt requested is helpful when it may be necessary to establish receipt. The green cards that are returned following a successful delivery are instrumental in a hearing challenging service.

Delivering the pleading by hand to the party also constitutes valid service. It is equally effective to leave it at the person’s office with a clerk or person in charge when the party cannot be found. If no one is available at the office, the pleading may be left in

a conspicuous place at that office. Also, facsimile constitutes delivery, and a facsimile transmission carries a confirmation.

C. **“Filing with the Court.”** *The filing of papers with the court shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge.*

All pleadings, motions, and other papers should ordinarily be filed with the court clerk. (During trials or hearings, a representative of the clerk’s office – the court’s case manager – may accept filings in the courtroom.) The filing may be done in person, by mail, or electronically, if permitted by the local rules. If the document is mailed, it is critical to send it far enough in advance so that it reaches the clerk on or before the deadline because a document may not be considered filed until the clerk actually receives it. *McIntosh v. Antonino*, 71 F.3d 29, 36 (1st Cir.1995). The “mailbox rule” only applies to service of documents on opposing parties. A judge may also accept a filing and forward it to the clerk. Keep in mind that a judge’s “procedures manual” may call for or prohibit delivery of “courtesy copies” directly to court chambers.

D. **“Prohibition Against Filing Discovery Material.”** *Disclosures under Rule 26(a)(1) or (2) and discovery requests and responses must not be filed until they are used in the proceeding or the court orders the filing.*

The court will not accept any filing of discovery materials unless the court orders it or if they will be used in an upcoming proceeding. Materials included in this prohibition are Rule 26(a) disclosures, deposition transcripts, interrogatories, requests for admissions, and requests for documents.

PRETRIAL CONFERENCES AND SCHEDULING ORDERS

FRCP 16

A. “Pretrial Conferences.” *In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial.*

The purpose of a pretrial conference is to narrow the issues and dispose of other matters, thus aiding in the final disposition of the action. *See Marschand v. Norfolk & W. Ry.*, 81 F.3d 714, 716 (7th Cir.1996). The rule authorizes the court to make appropriate orders to increase the efficiency and economy of the trial. Check the local rules regarding pretrial conferences because the courts and even the individual judges have different rules and requirements for pretrial conferences.

B. “Scheduling and Planning.” *The district judge, or magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties, enter a scheduling order.*

Scheduling orders are used to set limits and timelines for the trial. Among other things, dates are set for the end of discovery, for other conferences, and for the start of the trial. Once the order is entered, it supercedes all prior pleadings and governs the issues and evidence to be presented at trial. *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 206 (5th Cir.1998). Prior to the scheduling conference, the parties are required to have a “Rule 16 conference” in which they draft and propose a scheduling order to the Court. The form of report relating to the Rule 16 conference is set out in the district’s local rules

or in the judge's "procedures manual." These forms are available at the courthouse (and possibly on the district's website).

C. **"Sanctions."** *If a party or a party's attorney fails to obey a scheduling order or pretrial order, fails to appear at a scheduling or pretrial conference, is substantially unprepared to participate in the conference in good faith, the judge, upon the motion or own the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B),(C),(D).*

Failing to appear at the pretrial conference or disobeying the scheduling order will lead to sanctions. The court has a wide array of penalties it may impose depending on the severity of the violation. The court can dismiss the action, exclude evidence, strike pleadings, hold a party in contempt, or utilize other options available under FRCP 37(b)(2)(B), (C), and (D). The court also has the discretion to require the violating party to pay the reasonable expenses incurred because of the noncompliance, including attorney's fees.

TIME COMPUTATION

FRCP 6 – In computing any period of time prescribed or allowed by these rules, the day of the act from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

When a deadline is triggered, the counting of days begins the following day and it will expire on the last day of the deadline. For example, a defendant must file his answer within 20 days of being served with the plaintiff's complaint. If service is made on October 1, then the clock starts running on October 2 and the answer must be filed by October 21. When the final day lands on a weekend or national holiday, the deadline is extended to the next business day that is not a national holiday.

Deadlines expressed in months or years refer to calendar months or years. The court does not make adjustments for months of differing lengths or leap year, thus a one-year deadline starting January 1, 2003, ends on December 31, 2003.

Keep in mind that unlike many situations in state court, the parties to a federal case cannot unilaterally extend deadlines. If a deadline is approaching, it is best to advise the court by filing a “notice of agreement” that attaches a letter agreement (such as a letter agreement extending an answer date).

DISCOVERY

FRCP 26

A. **“Required Initial Disclosures.”** *Except in categories of proceedings specified under Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties initial disclosures of basic facts.*

In order to speed up the discovery process, the rules require parties to make an initial disclosure of basic facts. The name, address, and phone number of each individual that is likely to have discoverable information must be disclosed, as well as a copy or description of all the documents or tangible things in possession, control, or custody of a party that might be used in support of its position. The plaintiff or counter-claiming defendant must also disclose the method used in calculating the damages sought. If the party learns that the information it initially provided was materially incorrect or incomplete, it has a duty to supplement its previous answers.

B. **“Expert Testimony.”** *A party shall disclose to other parties the identity of any person who may be used at trial to present expert testimony.*

Each party must disclose the identity, qualifications, and the amount of compensation of any expert who might testify. A party must also provide a written report that contains a complete statement of the expert’s opinions and any exhibits to be used in support of that position. In addition, a list of all publications authored by the witness in the last 10 years and a list of cases in which he or she has testified as an expert within the last 4 years must be produced. If the information contained in the written report changes

or requires any additions during the case, the party has a duty to amend its previous report.

C. “Final Pretrial Disclosures.” *A party must provide to other parties and promptly file with the court, at least 30 days before trial, information regarding the evidence that it may present at trial other than solely for impeachment.*

As the trial date nears, a party will be required to provide the name, address, and telephone number for each witness it expects to call. If a party plans on presenting testimony by deposition, it must designate the witnesses and what portions of the deposition it plans to use. If the deposition was not taken stenographically, a transcript must be provided to the other parties. An appropriate identification of each document and exhibit, including summaries, must also be provided. A judge has the discretion to disallow the presentation of evidence or testimony that was not disclosed during this phase. *R.M.R. v. Muscogee Cty. Sch. Dist.*, 165 F.3d 812, 818 (11th Cir.1999).

A party is only required to disclose the evidence and witnesses it intends to use during its case in chief and is not required to anticipate the need to impeach a witness. However, local rules may differ. In addition, there is a risk that the court will determine that the evidence is not solely for impeachment purposes and might exclude it from trial. *Wilson v. AM Gen. Corp.*, 167 F.3d 1114, 1122 (7th Cir.1999).

DEPOSITIONS UPON WRITTEN QUESTIONS

FRCP 31 – *A party may take the testimony of any person, including a party, by depositions upon written questions without leave of the court.*

This is a useful and inexpensive method to take limited testimony from witnesses that have only a minor significance to the case (such as, for example, a records custodian). A party must send a copy of the deposition notice and the questions to the court officer that will administer the oath and ask the questions, and to every party. A subpoena is only required when the person to be deposed is not a party to case. Written depositions should be used carefully because they count against the ten deposition limit.

PRODUCTION OF DOCUMENTS AND THINGS

FRCP 34 – Any party may serve on any other party a request to produce and permit the party to inspect and copy any designated documents, writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations, which are in possession, custody, or control of the responding party, from which data can be obtained.

The producing party is required to produce all relevant documents and things in its possession or control that are responsive to the requests for production. Control is defined as the legal right, authority, or ability to obtain documents upon demand. The documents should ordinarily either be organized as they are kept in the normal course of business or organized and labeled to each particular category or request. *Riddell Sports Inc. v. Brooks*, 158 F.R.D. 555, 560 (S.D.N.Y. 1994). If the responding party produces a massive number of documents that have no semblance of order, the requesting party can move for relief.

LOCAL RULES

FRCP 83 – *Each district court, acting by a majority of its district judges, may make and amend rules governing its practice.*

Before any action is taken in a new court, it is important to obtain a copy of the local rules. A copy of the local rules may be picked up at the district court clerk's office or found online.

