



**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

**PRO SE CIVIL GUIDEBOOK**

March 2018

This Guidebook is intended to be an informative and practical resource for understanding the basic procedures of the Court. The statements in this Guidebook do not constitute legal advice and may not be cited as legal authority. This Guidebook does not take the place of the [Federal Rules](#), this Court's [Local Rules](#), or the individual practices of the Judges of this Court. All parties using this Guidebook remain responsible for complying with all applicable rules of procedure. If there is any conflict between this Guidebook and the applicable rules, the rules govern.



## INTRODUCTION

Before you decide to represent yourself in federal court, there are a number of things you should consider. First, it is challenging and time consuming to represent yourself. In addition to knowing the area of law that is the subject of your lawsuit, there are many rules that have to be followed every step of the way, and failure to follow the rules can have serious consequences. If you cannot afford a lawyer, you may want to look for a lawyer who will represent you “pro bono,” which means without charge. This Court’s website has a list of organizations you may contact to try to find a lawyer to represent you pro bono. You should be aware that there is no right to a court-appointed lawyer in a civil case.

Second, there are costs associated with a lawsuit. You will have to pay these costs even if the Court waives the filing fee and the U.S. Marshals Service serves your summons and complaint for you. Those costs may include postage, copying costs, and deposition and transcript costs. If you lose your case, the winning party is entitled to a cost judgment against you for certain costs. For more information about costs that you may have to pay if you lose your case, see [Federal Rule of Civil Procedure 54](#); [28 U.S.C. § 1920](#); and the Court’s [Bill of Costs Guide](#). The potential of having a cost judgment entered against you is another reason why you may want to discuss your case with a lawyer before deciding to represent yourself in a civil action.

This Guidebook is intended to assist you with the procedures you must follow if you decide to represent yourself in this Court. You cannot rely on this Guidebook alone, however, because it does not cover every situation that may arise in your case,



and because this Guidebook does not offer any legal advice or information about the specific issues in your lawsuit. You must be prepared to do your own legal research beyond the assistance offered in this Guidebook. There is a [list of online research resources](#) on this Court's website which may be helpful to you in performing legal research.

The Court encourages you to carefully review this Guidebook together with the [Federal Rules of Civil Procedure](#) and the Court's [Local Rules](#) as you proceed with your case. This Guidebook is generally organized in the order that a typical case proceeds through the Court. It is set up in a question and answer format, so you may skip to the particular question you have. The Table of Contents includes each question that this Guidebook addresses. It may be helpful to start by reviewing the Table of Contents.

There are two types of judges in this Court: magistrate judges, and district judges. When you file your case, both a magistrate judge and a district judge will be assigned to your case. The differences between magistrate judges and district judges are explained in [Chapter Three](#) of this Guidebook. The words "judge" or "presiding judge" may refer to either a magistrate judge or district judge.

Meeting the deadlines that will be set by the judge in your case is very important. This Guidebook sets out the various deadlines you will have to be aware of and comply with throughout the course of your lawsuit. To understand how to count the number of days to determine when something is due, you should refer to [Federal Rule of Civil Procedure 6](#).



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## CHAPTER ONE: GENERAL INFORMATION

### What rules do I have to follow in this Court?

Before you bring a lawsuit, you should look through the rules that explain the Court's procedures. They can be found in several places, and you must follow them all.

First, you must follow the [Federal Rules of Civil Procedure](#). The Federal Rules of Civil Procedure apply in every federal court in the country, including this Court. A party can be sanctioned for violating rules of procedure. For more information about sanctions, see Federal Rules of Civil Procedure 11 and 37. You can review the Federal Rules of Civil Procedure in any law library or on the Court's website at <http://www.mnd.uscourts.gov/Pro-Se/FederalRules.shtml>. This Court does not provide paper copies of the Federal Rules of Civil Procedure.

Second, this Court has what are known as "[Local Rules](#)." The Local Rules of the United States District Court, District of Minnesota apply *only* to this Court. You must follow the Local Rules, and failure to comply with the Local Rules may result in sanctions under [Local Rule 1.3](#). Those sanctions can include excluding evidence, preventing a witness from testifying, striking pleadings or papers, refusing oral argument, or ordering you to pay the opposing party's attorney's fees. You may obtain a copy of this Court's Local Rules from the Court's website, [http://www.mnd.uscourts.gov/local\\_rules/index.shtml](http://www.mnd.uscourts.gov/local_rules/index.shtml). You may also pick up a copy of these rules by visiting any Clerk's Office.

Third, you should consult the [Federal Rules of Evidence](#). These rules define what types of evidence can be presented to the Court. A case can turn dramatically on



what information may and may not be considered by the Court, so you should look at these rules early in your case. You can review the Federal Rules of Evidence in any law library or on the Court's website at <http://www.mnd.uscourts.gov/ProSe/FederalRules.shtml>. This Court does not provide paper copies of the Federal Rules of Evidence.

To bring a case in this Court, you also must know the "substantive law" that applies to your case. For example, your case might concern an employment issue, or a civil-rights violation, or a claim for social security benefits, or many other issues. Each of these issues has a different set of laws, which can be found in statutes, regulations, and case law. When you bring a lawsuit, you are claiming that the defendant has violated one of these laws, so you must understand these laws in order to succeed in your lawsuit. In addition, these laws may have special procedures you must follow along with the procedures set forth in the Federal Rules of Civil Procedure and the Local Rules.

### **What is the Clerk's Office?**

The Clerk's Office is the administrative part of the Court that maintains the Court's records. If you are representing yourself, most of your interaction with the Court will be through the Clerk's Office. This is where you will file your documents and where you should direct your questions about how to proceed through the court system. There are four Clerk's Offices in the District of Minnesota and they are open



most business days from 8:00 a.m. to 5:00 p.m. See the Court's [website](#) for more information.

### **What does it mean to file and serve documents?**

Generally, every document that you wish to have the judge review must be filed in the Clerk's Office and served on the opposing parties. The Clerk's Office keeps track of everything that the parties want the judges to receive. Filing your papers with the Clerk's Office allows the judges to be sure that they have all the case papers and provides you a way to check and make sure that the judges actually have your papers.

Filing your pleadings, motions, briefs, and supporting documents means bringing (or otherwise sending) them to the Clerk's Office at the courthouse and asking that they be filed. Documents can be filed in one of two ways: (1) conventionally, which means mailing or delivering a paper copy to the Clerk's Office; or (2) [electronically](#), which means using the Court's electronic case filing system (CM/ECF) via the Internet. Once you have conventionally filed your complaint, you may file an application with the Clerk's Office to file the rest of your court documents electronically.

After receiving your documents, the Clerk's Office will docket your papers and send them to the judge assigned to your case. It is important that you follow the filing rules, because most of what happens in your case will be based on the papers that you file. All of your communications with the judge and magistrate judge in your case will be in writing, except when the judge has a hearing in your lawsuit. Because most of



your contact with the judge is based on what you write and file, pay close attention to the sections in this Guidebook about filing.

Filing documents with the Clerk's Office should not be confused with serving documents on the other parties to the lawsuit. The requirements for serving a summons and complaint and other pleadings are found in [Rule 4 of the Federal Rules of Civil Procedure](#). The requirements for serving other types of documents are found in [Rule 5 of the Federal Rules of Civil Procedure](#). More information about serving documents is provided in [Chapter Two](#) of this Guidebook.

### **Are there requirements to file documents with the Clerk's Office?**

This Guidebook will explain many of the requirements for filing documents with the Clerk's Office. Keep in mind, however, that [Federal Rule of Civil Procedure 11](#) applies to all documents you file with the Clerk's Office. Rule 11 states that you must (1) sign every pleading (for example, the complaint and the answer), motion, and other paper you file with the Clerk's Office; and (2) provide your address, email address, and telephone number on each filing. Rule 11 also states that by presenting a pleading, written motion, or other paper to the Court, you are certifying that (1) it is not being presented for an improper purpose (such as to harass or cause unnecessary delay); (2) the legal contentions are supported by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law; (3) the factual contentions have evidentiary support or will likely have evidentiary support after a reasonable opportunity for investigation; and (4) the denials of factual allegations are warranted on



the evidence or are reasonably based on belief or a lack of information. If the presiding judge determines that you violated Rule 11, the judge can impose sanctions. Therefore, it is very important to review Rule 11 before filing any document with the Clerk's Office. There is more information on [Rule 11](#) later in this Guidebook.

## CHAPTER TWO: CASE INITIATION

### HOW DO I START A LAWSUIT?

Generally, the first official step in starting a lawsuit is to file a complaint with the Clerk's Office. The complaint is a legal document in which you tell the judge and the defendant or defendants how and why you believe the defendant(s) violated the law in a way that has injured you. You may hear people refer to a lawsuit as "the case" or "the action." These words mean the same thing, and are just other ways of referring to a lawsuit. The actual steps for filing a complaint are described below under the heading "[HOW DO I FILE MY COMPLAINT.](#)" But before you file a complaint, you must write a proper complaint.

### HOW DO I WRITE A COMPLAINT?

There are two ways to write a complaint: You can use a complaint form and fill in the necessary information, or you can write the complaint on your own. Complaint forms are designed to prompt you to include all of the information that is necessary for a proper complaint. If you write a complaint on your own, it must contain certain information, as described below. If you write your own complaint, you must also comply with the formatting requirements of [Local Rule 5.2](#).



## Where can I get a complaint form?

There are three kinds of complaint forms available in the Clerk's Office and on the Court's website: (1) a [general complaint form](#) that you can use for any type of claim; (2) an [employment discrimination complaint](#) form (for example, Title VII or Americans with Disabilities Act claims); and (3) a form for [review of the denial of social security benefits](#). Keep in mind that a form is only a tool. You will need to add to the form all the information specific to your case. You do not have to use a complaint form – you may always write a complaint on your own – but using a complaint form may make writing a complaint easier for you.

## What information needs to be in a complaint?

The complaint must contain all of the following information:

- A caption page;
- A demand for jury trial, if applicable and desired;
- The names and addresses of the parties;
- A jurisdictional statement;
- A statement of venue;
- Facts supporting the claims in your case;
- Counts, also called claims, identifying each violation of law;
- Request for relief; and
- Signature of each plaintiff.

These requirements are described in more detail, below.



## **What is a caption page?**

The first page of any pleading or motion paper you file should be the “caption page.” [Rule 10\(a\) of the Federal Rules of Civil Procedure](#) explains what needs to be on the caption page and how it should look. You can look at the caption on the Court’s [complaint forms](#) for guidance. When you file your complaint, please leave the case number blank. The Clerk’s Office will assign a case number when you file the complaint and will place that number on the complaint.

## **What do I do if I want a jury trial?**

If you want the trial of your lawsuit to be heard by a jury, you should include a “demand for jury trial” in your complaint. [Local Rule 38.1](#) requests that the demand be placed after the title on the front page of the complaint and state “Demand for Jury Trial” or a similar statement. If you give up your right to a jury trial, the trial of your case will be heard and decided by a judge, without a jury. Please note that you are not entitled under the law to a jury trial in every type of lawsuit.

## **How do I identify the parties in the complaint?**

You must identify all of the parties to the lawsuit in your complaint. In a civil lawsuit, the “plaintiffs” are the people who file the complaint and who claim to be injured by a violation of the law. The “defendants” are the people whom the plaintiffs believe injured them in violation of the law. The plaintiffs and the defendants together are referred to as “the parties” or “the litigants” to the lawsuit.



[Rule 10\(b\) of the Federal Rules of Civil Procedure](#) requires you to write your complaint using numbered paragraphs. Under the heading “Parties,” identify the full name and address of each plaintiff in separate numbered paragraphs. Then, identify the full name of each defendant in separate numbered paragraphs. You may also include the addresses of the defendants, if you know them. You can look at the Court’s [general complaint form](#) to see an example of how the numbered paragraphs should look.

### **What is a jurisdictional statement?**

The court system in the United States consists of state courts and federal courts. These courts are completely separate from each other. State courts have the authority to hear almost any type of case (“general jurisdiction”), but federal courts are authorized under the law to hear only certain types of cases (“limited jurisdiction”). This Court, the United States District Court for the District of Minnesota, is a federal court.

If the law permits a court to hear a certain type of case, the court is said to have “subject matter jurisdiction” over that type of case. Generally, but not always, if a federal court does not have subject matter jurisdiction to hear your lawsuit, you should file your case in state court. Some claims, however, must be brought in arbitration, which is completely outside the federal and state court systems.

The two most common types of lawsuits that federal courts are authorized to hear are those where:



- At least one of the plaintiff's claims arises under the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331). This is often referred to as "federal question jurisdiction."
- None of the plaintiffs live in the same state as any of the defendants, and the amount in controversy exceeds \$75,000 (28 U.S.C. § 1332). This is often referred to as "diversity jurisdiction." "Amount in controversy" refers to what you believe you should be paid, or the dollar value of what you want the Court to do.

A jurisdictional statement is the paragraph in a complaint that explains why the Court has the power to decide the issues in your lawsuit. For example, you might state that the Court has federal question jurisdiction over your lawsuit because one of your claims arises under the Americans with Disabilities Act (a federal law). You should put the jurisdictional statement in your complaint in a numbered paragraph under the heading "Jurisdiction," after the "Parties" section of the complaint.

### **What is venue?**

"Venue" means the place where the lawsuit is filed. The law does not allow you to file your federal lawsuit anywhere in the United States. Usually, venue is proper either where the defendants live or where the defendants did a substantial part of the things that you believe violated the law. A venue statement in a complaint explains why you believe the particular district – in this case, the District of Minnesota – is the proper federal court for deciding your lawsuit. You should put the venue statement in a numbered paragraph in your complaint under the heading "Venue" after your jurisdictional statement. The United States Code contains much more detail about venue at 28 U.S.C. § 1391.



## **How do I organize the facts in my complaint?**

It is very important to present the facts that support your legal claims in a manner that the judge can easily follow. This section of the complaint is usually called the “Statement of the Claim,” and comes after the venue paragraph. Each numbered paragraph in this section must discuss only a single set of circumstances. Do not combine different ideas in a single paragraph. Normally, a paragraph in the Statement of Claim section of a complaint consists of one sentence that states an important fact that supports your claim.

## **How much detail should I include in the complaint?**

[Rule 8\(a\)\(2\) of the Federal Rules of Civil Procedure](#) states that a complaint only needs to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Therefore, you should include enough detail that the judge and the defendants can clearly understand what happened, how you were injured, and why you believe that you are entitled to a remedy. You do not need to state every bit of detail that you can remember, but you must provide some description of how each defendant violated the law.

You must include facts to support your legal conclusions. Legal conclusions alone will not suffice. For example, “I sold the defendant my car and he never paid me what he promised” is a factual allegation, but “the defendant breached a contract with me” is a legal conclusion. Remember, it is usually easiest for the judge to understand your complaint if you tell your story in the order it happened.



[Rule 9\(b\) of the Federal Rules of Civil Procedure](#) requires you to include more detail if you are alleging fraud than you would for other types of claims. The alleged fraud must be stated with particularity, which means you must state the “who, what, when, where, and why” of your claim. In other words, you must state the time and place of the fraud, the persons involved, the statements made, and an explanation of why or how those statements were false or misleading.

### **What is a count in a complaint?**

A count, also called a “claim,” is an allegation or assertion in a complaint that a defendant or defendants violated a specific law. [Federal Rule of Civil Procedure 10\(b\)](#) requires you to state each count, or violation of law, separately. List each count in separate numbered paragraphs at the end of the “Statement of Claim” section of your complaint. If you know the specific law that you believe the defendant(s) violated, you should identify that law. If you believe the defendant violated the law, but are not sure specifically which law was violated, describe as best you can the area of law upon which your complaint is based. For example, you might allege, “Defendant violated the federal employment discrimination laws,” or, “Defendant violated the First Amendment of the United States Constitution.” You may want to look at the Court’s [general complaint form](#) to see how to structure your complaint.

### **What is a request for relief?**

The “Request for Relief” section of the complaint is typically placed in the last part of the complaint. In the request for relief, you should state what you want the



judge to order the defendants to do if you win your lawsuit. For example, you can request that the judge order the defendant to pay you money or require the defendant to do something (or to stop doing something). If you are not sure what relief is appropriate, you can also ask the judge to award “all additional relief to which the plaintiff is entitled.” You do not have to write the request for relief in numbered paragraphs as you did with previous parts of the complaint.

### **Why do I have to sign the complaint?**

[Rule 11\(a\) of the Federal Rules of Civil Procedure](#) requires that every document filed in a lawsuit be signed by the parties if they are not represented by a lawyer. At the very end of the complaint, all of the plaintiffs must sign their names and provide their email and mailing addresses and telephone numbers. The purpose of including the addresses and telephone numbers is to ensure that the Court and the defendants have a way to contact you. You must promptly notify the Clerk’s Office and all opposing parties if your address changes while your lawsuit is pending.

### **Can I file attachments with my complaint?**

If you have documents that support your complaint, you can attach copies of those documents to the complaint as exhibits. The purpose of an exhibit generally is to present proof of an allegation or assertion in your complaint. If you decide to attach exhibits to your complaint, then you must refer to that exhibit or otherwise explain in your complaint why you are attaching the exhibit to the complaint. Do not attach copies of any documents that you do not discuss in your complaint.



## How quickly do I need to file a complaint?

Every claim has a time limit associated with it, which is governed by a “statute of limitations.” The statute of limitations sets the amount of time you have to file a complaint after you have been injured or, in some cases, after you became aware of the cause of the injury. Once that time limit has passed, it is too late to bring a lawsuit. If you include a claim in your complaint that is too old, the opposing party may file a motion to dismiss the claim as “time-barred,” which is another way of saying that the time limit set by the statute of limitations has expired on that claim. The statute of limitations is different for every claim, and you should research the statute of limitations for each claim you intend to file before you file that claim. This Court’s website, on the Legal Resources page, has a list of [Internet Resources for Legal Research](#) that you may find helpful.

## What are the consequences if something in the complaint is not true?

[Rule 11\(b\) of the Federal Rules of Civil Procedure](#) states that, by signing the complaint, you are promising to the Court that:

- You are not filing the complaint for any improper purpose, such as to harass the defendant or to force the defendant to spend unnecessary legal fees;
- The legal arguments you make in the complaint are justified by existing law, or you are making an argument in good faith to extend or change existing law; and
- You have evidence to support the facts stated in your complaint or you are likely to have that evidence after a reasonable opportunity for further investigation or discovery.



If the presiding judge later finds that one of these things was not true – for instance, that you filed the complaint to harass the defendant, or that you had no evidence to support the facts you alleged in the complaint – the judge can impose sanctions on you. For example, the judge might order you to pay a fine or the defendant’s attorney’s fees. The judge can also dismiss your complaint or impose any other sanction that she believes is necessary. See Federal Rule of Civil Procedure 11(c) for more information about sanctions. Given the risk of Rule 11 sanctions, it is very important that you investigate the facts and the law *before* you file your complaint.

## HOW DO I FILE MY COMPLAINT?

You can file your complaint by mail or in person at the Clerk’s Office at any of the District of Minnesota’s federal [courthouses](#). Along with your complaint, you must also submit a civil cover sheet, a summons, and either a \$400.00 filing fee or, if you cannot afford to pay the filing fee, an Application to Proceed in District Court Without Prepaying Fees or Costs. (This application is also known as an “IFP application.”) Forms for [civil cover sheets](#), [summonses](#), and [IFP applications](#) are available in the Clerk’s Office or on the Court’s website. You need a copy of the summons and complaint to serve on each defendant named in your complaint. You should also keep copies of these documents for your own files.



### **What is a civil cover sheet?**

The [civil cover sheet](#) is a form provided by the Clerk's Office that is used to gather information about the nature of your lawsuit. You must file a civil cover sheet when you file an original complaint.

### **How can I pay the filing fee?**

The Court charges a \$400.00 filing fee to file an original complaint. The Court will accept payment by cash, check, VISA, MasterCard, Discover, or American Express. Checks should be made payable to the "Clerk of Court."

### **What if I cannot afford the fee for filing a new complaint?**

If you cannot afford the \$400.00 filing fee, you must file an [Application to Proceed in District Court Without Prepaying Fees or Costs](#). This is also known as an application to proceed *in forma pauperis*, or an "IFP application." You must fill out the application completely to the best of your ability if you wish to show the Court that you do not have enough money to pay the filing fee. You can get this form at either the Clerk's Office or from the Court's website.

The complaint and the IFP application will be reviewed by the assigned judge. Typically, a [magistrate judge](#) will decide whether you should be allowed to proceed without paying the filing fee. You will be notified of the judge's decision by mail.



When the judge reviews your IFP application, she will also review your complaint. The judge will dismiss your complaint, even if you cannot afford the filing fee, if your complaint (1) is frivolous or malicious (that is, the complaint's only purpose is to harass the defendant); (2) fails to state a proper legal claim; or (3) seeks money from a defendant who is legally not required to pay money damages. These requirements are set out at 28 U.S.C. § 1915. If the Court dismisses your complaint, your lawsuit has ended. If you do not agree with the Court's decision, then you may file a Notice of Appeal and pursue an appeal with the Eighth Circuit Court of Appeals.

If the judge decides that your complaint meets the requirements of 28 U.S.C. § 1915, but also finds that you *can* afford to pay the filing fee, then you must pay the filing fee within a specified time or your complaint will be dismissed. Only if the judge decides that your complaint meets the requirements of 28 U.S.C. § 1915 and also finds that you *cannot* afford to pay the filing fee will the judge will grant your IFP application.

## **WHAT DO I DO AFTER I FILE MY COMPLAINT?**

After you file your complaint, you will need to serve a copy of the summons and complaint on each defendant, and you will need to file proof of that service with the Clerk's Office, indicating how and when you obtained service. If you are proceeding [IFP](#), the U.S. Marshals Service will serve your summons and complaint for you. If you are not proceeding IFP, you will either have to serve each defendant in the manner described in [Federal Rule of Civil Procedure 4](#), or you will have to obtain a waiver of service from each defendant.



## **How do I obtain a summons for service of process?**

You may obtain a [summons](#) and/or a [waiver of service form](#) from the Clerk's Office or the Court's website. You should complete one summons that includes the name of each defendant named in your complaint. After you file the complaint, a copy of the complaint and a copy of the summons must be served on all of the defendants. This is sometimes referred to as "service of process" or "personal service." Your lawsuit *will not proceed* until you serve the summons and complaint on the defendants.

## **How do I serve my summons and complaint if I am proceeding IFP?**

If you file an application to proceed IFP with your complaint, you should fill out one summons form listing all defendants. If the judge approves your application to proceed IFP, the Clerk's Office will send you a U.S. Marshal's Service form. You must complete this form and mail or deliver it to the Clerk's Office. The U.S. Marshals Service will then serve the summons and complaint on the defendant(s) at no cost to you. If your IFP application was granted, it is not necessary for you to determine how to serve the summons and complaint on your own, and you may ignore the questions and answers below about serving defendants.

## **CAN I CHANGE OR AMEND THE COMPLAINT AFTER I FILE IT?**

Changing a document that has already been filed with the Court is known as "amending" the document. Under [Rule 15\(a\)\(1\)\(A\) of the Federal Rules of Civil Procedure](#), you may amend your complaint one time within 21 days after serving the complaint on the defendant. [Under Rule 15\(a\)\(1\)\(B\) of the Federal Rules of Civil](#)



[Procedure](#), if you have not already amended your complaint, you may amend your complaint one time within 21 days after the defendant files an answer, or within 21 days after the defendant files a motion to dismiss under Rule 12(b), (e), or (f), whichever is earlier. You do not need permission from the presiding judge or the defendant to amend the complaint once under either Rule 15(a)(1)(A) or 15(a)(1)(B).

If you want to amend your complaint more than 21 days after the defendant answers or files a motion to dismiss, or if you want to amend your complaint for a second time, Rule 15(a)(2) lets you do so in one of two ways. First, you can file the amended complaint if you get written permission from the defendant. When you file the amended complaint, you must also file the document showing that you have written permission from the defendant to amend your complaint.

Second, if the defendant will not agree to let you amend your complaint, you must file a motion in compliance with [Local Rule 15.1](#) to get the presiding judge's permission to amend your complaint. In the motion to amend your complaint, you must explain why you need to amend your complaint. Under Local Rule 15.1, you must include (1) a copy of the amended complaint you want to file; and (2) a version of the amended complaint you want to file that shows how the proposed amended complaint is different from what you have already filed. To show how your amended complaint is different from the original complaint, put a line through deleted language and underline the new language. If the Court grants your motion, you can then file your amended complaint. General information about making and filing motions is



available below under the heading "[HOW DO I FILE MOTIONS, BRIEFS AND SUPPORTING DOCUMENTS WITH THE COURT.](#)"

The caption of your amended complaint should say, "FIRST AMENDED COMPLAINT." If you amend your complaint a second time, the caption should say, "SECOND AMENDED COMPLAINT," and so on. An amended complaint completely replaces the complaint that came before it, so any claims or defendants not included in an amended complaint are considered dismissed from the lawsuit.

## **HOW DO I SERVE MY SUMMONS AND COMPLAINT?**

If you are not proceeding IFP, you will either have to serve each defendant in the manner described in [Federal Rule of Civil Procedure 4](#) and file a proof of service with the Clerk's Office, or you will have to obtain a waiver of service from each defendant and file it with the Clerk's Office.

### **How do I get the defendant to waive service of the summons and complaint?**

If you did not apply to proceed IFP or your application was denied, you may want to seek a waiver of service. If a defendant waives service, he agrees to give up the right to insist on formal service by hand and will accept informal service by mail. If a defendant waives service, you will not have to spend money and time hiring a person called a "process server" to serve the summons and complaint. You will still need to be able to prove that the defendant actually got the complaint and required documents, so you need the defendant to sign and send back to you a form saying that the defendant



waived formal service and received a copy of the documents in the mail. The [waiver of service form](#) is available from the Clerk's Office or on the Court's website.

Under [Rule 4 of the Federal Rules of Civil Procedure](#), you can ask for a waiver of service from any defendant *except*:

- A minor or incompetent person in the United States;
- The United States government, its agencies, corporations, officers or employees; or
- A foreign state, state, or local government.

[Rule 4\(d\) of the Federal Rules of Civil Procedure](#) sets forth the requirements for requesting a waiver of service. You should send the waiver of service form to the defendant(s) by first-class mail or other reliable means, along with a copy of the complaint and summons, plus an extra copy of the request to waive service and a self-addressed, stamped envelope with sufficient postage to return the waiver of service to you. The request must indicate the date it was sent. In specifying a due date on the form, you must give the defendant a reasonable amount of time to return the waiver of service to you, which must be at least 30 days from the date the request is sent (or 60 days if the defendant is outside the United States).

If a defendant returns the signed waiver of service to you, service on that defendant is complete. However, you must file the defendant's signed waiver of service with the Clerk's Office. Be sure to also save a copy for your own files.



## **What if I requested a waiver of service and the defendant does not send it back?**

If a defendant does not return the waiver of service to you, you need to serve that defendant in one of the other ways explained in [Rule 4 of the Federal Rules of Civil Procedure](#). But if you and the defendant who declined to accept service by mail are located in the United States, you may file a [motion](#) to ask the judge to order the defendant to refund all the costs you paid to serve the defendant another way. See Federal Rule of Civil Procedure 4(d)(2) for more information.

## **How do I obtain “personal service” on a defendant?**

If you did not file an IFP application, or if your IFP application was denied, you should read [Rule 4 of the Federal Rules of Civil Procedure](#) to determine how to serve copies of the summons and complaint on each defendant. The rules for serving a summons and complaint can be very complicated and must be followed carefully. The summons and complaint must be served before the lawsuit can proceed.

Federal Rule of Civil Procedure 4(c)(2) states that *you may not personally serve the defendant yourself*. You must have someone else who is at least 18 years old serve the defendant(s) with the summons and complaint. The easiest way to serve a complaint is to hire a professional process server. You can find process servers listed in the telephone book or on the Internet. If you do not want to or cannot afford to hire a process server, you can also ask a friend, family member, or any other person over 18 years old to personally serve the summons and complaint for you.



## How do I serve a summons and complaint on individuals?

[Rule 4\(e\) of the Federal Rules of Civil Procedure](#) provides several ways to serve an individual in the United States who is not a minor or an incompetent person:

- Hand delivering the summons and complaint to the defendant;
- Hand delivering the summons and complaint to the defendant's home and leaving the documents with another responsible adult who lives there;
- Hand delivering the summons and complaint to an agent authorized either by the defendant or by law to receive service of process for the defendant (this most often applies in the case of corporations and other businesses).

## How do I serve a summons and complaint on a business?

[Rule 4\(h\) of the Federal Rules of Civil Procedure](#) lists several methods for serving the summons and complaint on a corporation, partnership, or association. You may have the summons and complaint served by:

- Hand delivering the summons and complaint to an officer of the business, a managing agent or general agent for the business, or any other agent authorized by the defendant to accept service of process; or
- Hand delivering the summons and complaint to any other agent authorized by law to receive service of process for the defendant. If the law authorizing the agent to accept service of process requires it, you must also mail a copy of the summons and complaint to the defendant.

If you are trying to serve a business located outside the United States, you may use any method described in [Rule 4\(f\)](#), except personal delivery.

## How do I serve a summons and complaint on the United States, its agencies, corporations, officers, or employees?



The rules for serving the summons and complaint on the United States government or its agencies, corporations, officers, or employees are stated in [Rule 4\(i\) of the Federal Rules of Civil Procedure](#). To serve the summons and complaint on the United States you must have the summons and complaint:

- Hand delivered to the United States Attorney for the District of Minnesota;
- Hand delivered to an assistant United States attorney or clerical employee designated by the United States Attorney in a writing filed with the Clerk's Office; or
- Send a copy of the summons and complaint by registered or certified mail addressed to the Civil Process Clerk at the office of the United States Attorney for the District of Minnesota;

AND

You must also send a copy of the summons and complaint by registered or certified mail to the Attorney General of the United States in Washington, D.C.;

AND

If your lawsuit challenges an order of an officer or agency of the United States but you have not named that officer or agency as a defendant, you must *also* send a copy of the summons and complaint by registered or certified mail to the officer or agency.

To have the summons and complaint served on an agency or corporation of the United States, or an officer or employee of the United States sued only in an *official capacity*, you must have the United States served in the manner described above *and* send a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

To have the summons and complaint served on an officer or employee of the United States sued in an *individual capacity* for acts or omissions occurring in connection



with the performance of duties on behalf of the United States, you must have the United States served in the manner described above *and* serve the employee or officer personally in the manner set forth by Rule 4(e), (f), or (g) of the Federal Rules of Civil Procedure.

### **How do I serve a summons and complaint on a state or local government?**

Under Rule [4\(j\) of the Federal Rules of Civil Procedure](#), to have a state or local government served with the summons and complaint you must have the summons and complaint:

- Hand delivered to the chief executive officer of the government entity you wish to serve; or
- Served according to the law of the state in which the state or local government is located.

### **Is there a time limit for serving the summons and complaint?**

[Rule 4\(m\) of the Federal Rules of Civil Procedure](#) requires you to serve each defendant or obtain a waiver of service within 90 days after the complaint is filed in the Clerk's Office. If you do not meet that deadline and you do not show the presiding judge that you had a good reason for not serving a defendant, the judge may dismiss all claims against any defendant who was not served. The judge may dismiss those claims without prejudice, which means that you may file another complaint later in which you assert the same claims that were dismissed. If you file a new complaint, you will have another 90 days to try to have the summons and complaint served.



## What is a proof of service?

After you complete service of the summons and complaint, you should file a “proof of service” with the Clerk’s Office, which shows when and how the summons and complaint were served on each defendant. There is a [proof of service form](#) on the last page of the summons form, which is available from the Clerk’s office or on the Court’s website. The purpose of the proof of service is to allow the judge to determine whether service of the documents was actually accomplished in accordance with the law. The proof of service must state (1) the date service was completed; (2) the place where service was completed; (3) the method of service used; (4) the names and street address or email address of each person served; and (5) the documents that were served.

The proof of service must be signed and dated by the person who actually served the summons and complaint. If you hired a process server, the proof of service must be signed by the process server. If you asked a friend to serve the summons and complaint, the proof of service must be signed by the friend who actually served the summons and complaint. The person who served the documents must also swear under penalty of perjury that the statements in the proof of service are true.

## HOW DO THE PROCEDURES FOR JUDICIAL REVIEW OF SOCIAL SECURITY CASES DIFFER FROM OTHER CASES?

Social security cases are initially randomly assigned to only a magistrate judge. Under [Local Rule 7.2](#), each party must submit a completed [Social Security Case](#)



[Assignment Form](#) in paper to the Clerk's Office on or before the date on which an answer must be filed. The form asks each party to inform the Court as to whether he or she [consents](#) to disposition of the case by a magistrate judge. If any party does not consent to a magistrate judge handling the case, a district judge will be randomly assigned to the case.

Under [Local Rule 9.1](#), when you serve your summons and complaint for judicial review of a decision of the Commissioner of Social Security, you must provide your social security number on a separate piece of paper attached to the complaint. You should also state in the complaint that the social security number has been attached to the copy of the complaint served on the Commissioner of Social Security.

[Local Rule 7.2](#) governs other procedures in social security cases. The Commissioner must answer the complaint and deliver a certified transcript of the case record within 60 days of service of the complaint upon the United States. If the Commissioner wishes to extend the time to answer, the Commissioner must file a motion before the 60 days expires. Within 60 days after the answer has been served, the plaintiff must serve on the defendant a [motion for summary judgment](#) and a memorandum of law in support of the motion and file these with a certificate of service. Within 45 days of receiving service of the plaintiff's motion, the defendant must file and serve his motion for summary judgment and memorandum of law on the plaintiff. The plaintiff may file and serve a reply memorandum within 14 days from service of the defendant's motion.



## CHAPTER THREE: ANSWERS, COUNTERCLAIMS, MOTIONS, BRIEFS, AND SUPPORTING DOCUMENTS

### AFTER THE COMPLAINT HAS BEEN SERVED ON THE DEFENDANT, WHAT HAPPENS NEXT?

After filing your complaint and paying the filing fee or submitting an [IFP](#) application, the Clerk's Office will assign a magistrate judge and a district judge to your case. The magistrate judge's and district judge's initials will become a part of the case number, which you must include in the [caption](#) of every pleading or motion paper you file.

#### What does a magistrate judge do?

In general, a magistrate judge will handle "nondispositive" matters, such as motions to amend the complaint, discovery issues, and other matters that will not result in the ending of the case or the dismissal of any claims. If you disagree with the magistrate judge's finding in a nondispositive matter, you may appeal the magistrate judge's order to the district judge, but the district judge will reconsider orders on nondispositive matters only if those orders are clearly erroneous or contrary to law.

A district judge will handle dispositive matters, meaning matters that may end the case. Examples of dispositive motions are motions to dismiss or for summary judgment. A district judge may refer dispositive matters to a magistrate judge, who will then issue a Report and Recommendation to the district judge. If you disagree with the magistrate judge's findings in a Report and Recommendation, you may file an



objection to the Report and Recommendation, and the district judge will review the portions of the Report and Recommendation to which you object. More information on dispositive and non-dispositive motions is provided below.

Finally, a magistrate judge may handle your *entire* case if you and the other parties submit the proper [form](#) showing consent to proceed entirely before the magistrate judge. For more information on the duties of magistrate judges, read [Local Rules 72.1](#) and [72.2](#).

### **How much time does a defendant have to respond to a complaint?**

After a defendant is served with the complaint, he has a limited amount of time to file and serve a written response to the complaint, such as an answer, motion to dismiss, or motion to strike. (Each of these types of responses is discussed more fully below.) [Federal Rule of Civil Procedure 12\(a\)\(1\)](#) states that unless a different time is specified in a United States statute, most defendants must *serve* a written response to the complaint on the plaintiff within 21 days after being served with the summons and complaint, although certain types of defendants have an even longer time to serve an answer, as described below. [Local Rule 5.3\(d\)](#) requires a defendant to *file* with the Clerk's Office an answer or other response to the complaint within 14 days after the answer was *served*. Parties, however, typically file *and serve* the answer on the same day, particularly when filing electronically.

Under [Rule 4\(d\)\(3\)](#) and [Rule 12\(a\)\(1\)\(A\)\(ii\) of the Federal Rules of Civil Procedure](#), if the defendant returns a signed waiver of service within the amount of



time specified in the plaintiff's request for a waiver of service, the defendant is allowed extra time to serve the answer to the complaint. If the request for waiver of service was sent to the defendant at an address within the United States, the defendant has 60 days from the date the request was sent to serve a response to the complaint. If the request for waiver of service was sent to the defendant at an address outside the United States, the defendant has 90 days from the date the request was sent to serve a response to the complaint.

Rule 12(a)(2) of the Federal Rules of Civil Procedure states that the United States, an agency of the United States, or an officer or employee of the United States sued only in an official capacity, must serve a written response to the complaint within 60 days after the United States Attorney is served. Rule 12(a)(3) of the Federal Rules of Civil Procedure states that an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States must serve a written response to the complaint within 60 days after he was served, or within 60 days after the United States Attorney is served, whichever is later.

The time limits for responding to an amended complaint are different. According to [Rule 15\(a\)\(3\) of the Federal Rules of Civil Procedure](#), a defendant must serve a response to an amended complaint within the time remaining to respond to the original complaint, or within 14 days after being served with the amended complaint, whichever period is longer, unless the Court orders otherwise.



## **What type of response to the complaint is required?**

Under [Rule 12 of the Federal Rules of Civil Procedure](#), once a defendant has been served with a complaint, he must, within the required amount of time, either file an answer to the complaint or file a motion challenging some aspect of the complaint. If the defendant chooses to file a motion, he does not have to file the answer until after the presiding judge rules on his motion.

## **What are the requirements for preparing an answer to a complaint?**

[Rule 8\(b\)-\(d\)](#) and [Rule 12\(b\) of the Federal Rules of Civil Procedure](#) state the requirements for writing an answer to a complaint. First, Rule 8(b) requires the defendant to state which parts of the complaint he admits are true and which parts he disputes. This requirement shows the parties and the judge where the parties disagree. Second, Rule 8(b) requires the defendant to state in his answer all legal and factual defenses he believes he has to each of the claims against him. This requirement informs the plaintiff what legal and factual issues the defendant will bring up in the lawsuit.

It is customary to write the answer in the same numbered paragraph style as the complaint. For example, paragraph one of the answer should respond only to paragraph one of the complaint, paragraph two of the answer should respond only to paragraph two of the complaint, and so forth.

Rule 8(b) of the Federal Rules of Civil Procedure requires the defendant to admit or deny every statement in the complaint. If the defendant does not have enough information to determine whether the statement is true or false, he must state that he



does not have enough information to admit or deny that statement. If only part of a statement in the complaint is true, the defendant must admit that part and deny the rest. Generally, under Rule 8(b)(6), a defendant is considered to have admitted every statement that he does not specifically deny, except for the amount of damages.

Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure require the defendant to state all legal and factual defenses he may have to the plaintiff's claims. Each defense should be listed in a separate paragraph at the end of the answer. Generally, if a defendant does not state a defense in his answer, he may not rely on that defense or try to present evidence about that defense later in the lawsuit. Because failing to list a defense in an answer could have dramatic consequences, great care should be exercised in preparing an answer.

Each defendant must sign his answer, and the answer must be served upon all other parties in the lawsuit. Defendants may file one joint answer or may each respond to the complaint separately.

### **Can the defendant make claims against the plaintiff in the answer?**

A defendant may not use the answer to state claims against the plaintiff; the answer should only respond to the plaintiff's claims in the complaint. To state claims against the plaintiff, a defendant must file a "counterclaim," which is a complaint brought by the defendant against the plaintiff. A defendant may, however, include a counterclaim at the *end* of the answer and then file the answer and the counterclaim as a single document. In fact, under [Rule 13\(a\) of the Federal Rules of Civil Procedure](#),



certain types of counterclaims *must* be filed *at the same time* the answer is filed, although the answer and counterclaim do not need to be in the same document. If the answer and counterclaim are written in separate sections of the same document, the title of the document should be “Answer and Counterclaim.” There is more detail about counterclaims below.

### **Can the defendant amend the answer after filing it?**

Under [Rule 15\(a\) of the Federal Rules of Civil Procedure](#), a defendant may amend his answer once without permission from the presiding judge or from the plaintiff at any time within 21 days after the answer is served on the plaintiff. Rule 15(a)(2) provides two ways for a defendant to amend his answer later than 21 days after the answer is served on the plaintiff. First, the defendant can file the amended answer if he gets written permission from the plaintiff. At the time the defendant files the amended answer, the defendant must also file the document showing that he had written permission from the plaintiff to amend his answer. Second, if the plaintiff does not agree to let a defendant amend his answer, the defendant must file a motion seeking permission to amend his answer. In that motion, the defendant must explain why he needs to amend his answer. The defendant should include, as an exhibit to the motion, a copy of the amended answer he wants to file. If the Court grants the motion, the defendant can then file his amended answer. The amended answer will replace the original answer. Answers must be amended in accordance with [Local Rule 15.1](#).



## Once the answer is filed, does the plaintiff have to file a response to it?

No, the plaintiff should not file a reply to the defendant's answer, unless directed to do so by the presiding judge. Under [Rule 8\(b\)\(6\) of the Federal Rules of Civil Procedure](#), all statements in an answer are automatically denied by the other parties to the lawsuit. The plaintiff should, however, file an answer to a counterclaim if one is served.

## What are the requirements for counterclaims?

A "counterclaim," as described earlier, is a complaint by the defendant against the plaintiff. [Rule 13 of the Federal Rules of Civil Procedure](#) explains some of the rules for filing counterclaims.

There are two different types of counterclaims under Rule 13: compulsory counterclaims and permissive counterclaims. A compulsory counterclaim is a claim by a defendant against a plaintiff that is based on the same events or transactions as the plaintiff's claim against the defendant. A defendant *must* file a compulsory counterclaim at the same time his answer is filed. If the defendant doesn't file a compulsory counterclaim at the same time he files the answer, he will generally lose the ability to ever sue the plaintiff for that claim. (Some exceptions to that general rule are listed in Rule 13(a)).

A permissive counterclaim is a claim by a defendant against a plaintiff that is *not* based on the same events or transactions as the plaintiff's claim against the defendant. For example, if the plaintiff sues the defendant for breaching a contract, the defendant's



claim that the plaintiff breached the same contract is a compulsory counterclaim. The defendant's claim that the plaintiff owes him money because of a car accident that occurred six months after the alleged breach of contract would be a permissive counterclaim.

If the defendant wants to file a permissive counterclaim, the defendant should file it as early as possible in the lawsuit, but there is no rule requiring that it be filed at the same time as the answer. The decision to file a permissive counterclaim is entirely up to the defendant. By not filing a permissive counterclaim, the defendant does not lose the ability to sue the plaintiff for that claim at another time.

The Court has subject matter jurisdiction over a compulsory counterclaim if there is subject matter jurisdiction over the plaintiff's claim against the defendant. The Court can only decide permissive counterclaims, however, if there is an independent basis for subject matter jurisdiction over the permissive counterclaim. This means that the defendant can bring a permissive counterclaim only if the Court would have subject matter jurisdiction over that claim if it were brought as a separate lawsuit.

Counterclaims should be written using the same format used to write a [complaint](#). All of the rules that apply to writing a complaint also apply to writing a counterclaim.

### **Once a counterclaim is filed, does the plaintiff have to respond to it?**

Because a counterclaim is a complaint against the plaintiff, the plaintiff must file and serve a written response to it. [Rule 12\(a\)\(1\)\(B\) of the Federal Rules of Civil](#)



[Procedure](#) requires the plaintiff to file and serve an answer to a counterclaim within 21 days after being served with the counterclaim. Alternatively, the plaintiff may file and serve a motion challenging some aspect of the counterclaim, such as a motion to dismiss the counterclaim pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

## CAN A DEFENDANT FILE A MOTION TO CHALLENGE THE COMPLAINT (OR A PLAINTIFF TO CHALLENGE A COUNTERCLAIM)?

### What is a motion to dismiss the complaint?

In a [motion](#) to dismiss the complaint (or counterclaim), the moving party argues that there are legal problems with the way the complaint was written, filed, or served.

[Rule 12\(b\) of the Federal Rules of Civil Procedure](#) lists the following defenses that can be raised in a motion to dismiss the complaint (or counterclaim):

- **Motion to dismiss the complaint for lack of subject matter jurisdiction.** In this type of motion, the moving party argues that the Court does not have the legal authority to hear the kind of lawsuit that the claimant filed.
- **Motion to dismiss the complaint for lack of personal jurisdiction over the defendant.** In this type of motion, the defendant argues that he has so little connection with the district in which this case was filed that the Court has no legal authority to hear the plaintiff's case against that defendant.
- **Motion to dismiss the complaint for improper venue.** In this type of motion, the defendant argues that the lawsuit was filed in the wrong place.
- **Motion to dismiss the complaint for insufficiency of service of process.** In this type of motion, the moving party argues either that the claimant did not prepare the summons correctly, or did not properly serve the summons and complaint on the moving party.



- **Motion to dismiss the complaint for failure to state a claim.** In this type of motion, the moving party argues that even if everything stated in the complaint is true, the moving party still did not violate the law. A motion to dismiss for failure to state a claim is not appropriate if the moving party wants to argue that the facts alleged in the complaint are not true. Instead, in a motion to dismiss the complaint for failure to state a claim, the moving party argues that even if the judge assumes the facts alleged in the complaint *are* true, those facts do not constitute a violation of any law.
- **Motion to dismiss the complaint for failure to join an indispensable party under Rule 19.** In this type of motion, the defendant argues that the plaintiff failed to sue someone who must be included in the lawsuit before the Court can decide the issues raised in the complaint.

### What happens after the judge decides the Rule 12 motion?

Under [Rule 12\(a\)\(4\) of the Federal Rules of Civil Procedure](#), if the presiding judge denies a motion to dismiss, the moving party must file and serve an answer within 14 days after receiving notice that the motion was denied. If the presiding judge grants the motion to dismiss, she can grant the motion “with leave to amend” or “with prejudice.” If the presiding judge grants a motion to dismiss with leave to amend, that means that there is a legal problem with the complaint, but the claimant may be able to fix that problem. The judge will give the claimant a certain amount of time to file an amended complaint in which the claimant may try to fix the problems identified in the Court’s order. Once the opposing party is served with the amended complaint, he must file and serve a written response to the amended complaint within the time ordered by the judge. The opposing party may file and serve either an answer or another motion under Rule 12 of the Federal Rules of Civil Procedure.



If the presiding judge grants the motion to dismiss with prejudice, that means there are legal problems with the complaint that cannot be fixed. Any claim that is dismissed with prejudice is eliminated permanently from the lawsuit. If the presiding judge grants a motion to dismiss the entire complaint with prejudice, the case is over. If the presiding judge grants a motion to dismiss some claims with prejudice and denies the motion to dismiss on other claims, the moving party must file and serve an answer to the claims that were not dismissed within 14 days after receiving notice of the Court's order.

### **What is a motion for a more definite statement?**

[Federal Rule of Civil Procedure 12\(e\)](#) permits a defendant to file and serve a motion for a more definite statement before filing an answer to the complaint. In a motion for a more definite statement, the defendant argues that the complaint is so vague, ambiguous, or confusing that the defendant cannot respond to it. The motion must contain an explanation of how the complaint is defective and ask for the details that the defendant needs in order to respond to the complaint.

Under Rule 12(a)(4)(B) of the Federal Rules of Civil Procedure, if the Court grants a motion for a more definite statement, the defendant must file and serve a written response to the complaint within 14 days after the defendant receives the more definite statement from the plaintiff. The defendant's written response may be an answer or another motion under Rule 12 of the Federal Rules of Civil Procedure. If the Court



denies the motion, the defendant must file and serve a written response to the complaint within 14 days after receiving notice of the Court's order.

### **What is a motion to strike?**

[Federal Rule of Civil Procedure 12\(f\)](#) permits the defendant to move to strike from the complaint any redundant, immaterial, impertinent, or scandalous matter. Any matter that is stricken will not be considered by the Court.

### **WHAT DOES IT MEAN TO WIN BY DEFAULT JUDGMENT?**

If the plaintiff has properly served the defendant with the complaint, and the defendant does not file an answer or one of the motions permitted under [Federal Rule of Civil Procedure 12](#) within the required amount of time, the defendant is considered to be in "default." The plaintiff is then entitled to ask the Court for a default judgment against the defendant. A default judgment means the plaintiff has won the case.

[Rule 55 of the Federal Rules of Civil Procedure](#) discusses the rules for obtaining a default judgment. First, you must file a request for entry of default with the Clerk of the Court. The request for entry of default must include proof (usually in the form of a [declaration](#) with a proof of service attached) that the defendant has been served with the complaint. If the request for entry of default shows that the defendant has been served with the summons and complaint and has not filed a written response to the complaint, the Clerk will enter default against the defendant. Under Rule 55(c) of the Federal Rules of Civil Procedure, once the Clerk enters default, the defendant is not



permitted to respond to the complaint without first filing a motion to set aside the default.

After the Clerk has entered default against the defendant, the plaintiff must file a motion for default judgment against the defendant. Rule 55(b) explains how to obtain a default judgment. With the motion, the plaintiff must file an [affidavit](#) proving the amount of damages suffered and requested in the complaint. Under [Rule 54\(c\) of the Federal Rules of Civil Procedure](#), the Court cannot enter a default judgment that awards more money than asked for in the complaint. The Court also cannot give any type of relief other than what was specifically asked for in the complaint.

Once default is entered, the defendant is considered to have admitted every fact stated in the complaint, except for the amount of damages. The defendant can still oppose a motion for default judgment, however, by attacking the complaint. For example, the defendant could argue that the facts stated in the complaint do not constitute a violation of any law. The defendant may also oppose a motion for default judgment by presenting evidence that the plaintiff did not suffer the amount of damages that he asked the Court to award.

Special rules apply if the plaintiff is seeking a default judgment against any of the following parties:

- A minor or incompetent person (see Rule 55(b) of the Federal Rules of Civil Procedure);
- The United States government or its officers or agencies (see Rule 55(d) of the Federal Rules of Civil Procedure);
- A foreign country (see United States Code, 28 U.S.C. § 1608(e)); and



- Servicemen or women (see United States Code, 50 Appendix U.S.C. § 521).

The Court may set aside an entry of default for good cause under Federal Rule of Civil Procedure 55(c), or for any of the grounds for relief from a final judgment provided in [Federal Rule of Civil Procedure 60\(b\)](#).

## HOW DO I FILE MOTIONS, BRIEFS AND SUPPORTING DOCUMENTS WITH THE COURT?

You can file motions, briefs, and supporting documents in three ways: (1) bring the appropriate documents to the Clerk's Office to file in person; (2) mail the documents to the Clerk's Office for filing; or (3) file electronically on ECF. You will find more information on what specific documents you have to file under the heading, "[WHAT IS A MOTION, AND HOW DO I WRITE OR RESPOND TO ONE?](#)"

### Does the Court require a specific format for documents?

[Local Rule 5.2](#) requires a specific format for documents that are filed in this Court. The rule states that all documents filed with the Court must be double spaced (except for quoted material and footnotes) and either typewritten, printed, or prepared by a clearly legible process. All documents filed after the complaint must contain the case number, including the initials of the district judge and magistrate judge assigned to the case, on the front page above the title of the document in the [caption](#). These requirements do not apply to exhibits.



## How do I file electronically?

Once your complaint has been filed, you may seek permission to file future documents electronically. If your application is granted, you may file your court documents (along with a certificate of service) on the Internet using the Court's electronic filing system, CM/ECF. Under [Federal Rule of Civil Procedure 5\(b\), \(d\)](#) and Local Rules [5.1](#) and [5.4](#), when a party has consented to file documents electronically, you may serve motion papers on that party electronically. This may be a good option for you if you own or are able to use a computer with Internet access and feel comfortable using a computer to receive court documents.

To seek permission to file electronically, complete the [Application for Pro Se Litigant to File Electronically](#), which can be obtained from the Clerk's Office or the Court's website, and submit it to the Clerk's Office. Once you have permission and are given a login and password, follow the directions found in the most recent version of the "[Electronic Case Filing Procedures for the District of Minnesota](#)," which may be found on the Court's website. You may call the help desk at 866-325-4975 or 612-664-5155 if you need assistance with CM/ECF.

## What kinds of fees and other costs do I have to pay to the Court?

After the initial complaint is filed, you do not have to pay any additional fees to file most documents with the Court. [Other fees of the Court](#) are listed on the Court's website.



## WHAT IS A MOTION, AND HOW DO I WRITE OR RESPOND TO ONE?

A motion is a formal request made to the presiding judge. [Rule 7\(b\) of the Federal Rules of Civil Procedure](#) requires all motions to be made in writing, except for motions made during a hearing or trial. However, oral motions are highly disfavored during pretrial hearings.

Usually the following things occur when a motion is filed. First, one party files a motion explaining what he wants the presiding judge to do and why the judge should do it. The motion must be filed with a memorandum of law that explains why the judge should grant the motion. The party who files a motion is referred to as the “moving party.”

Next, the party who opposes the motion – referred to as the “responding party” or “opposing party” – must file a response memorandum explaining why he believes the judge should not grant the motion. The responding party does not need to file a motion of his own.

Then, *for dispositive motions only*, the moving party may file, but is not required to file, a reply memorandum in which he replies to the arguments made in the responding party’s memorandum of law. At that point, neither party can file any more documents about the motion without first getting permission from the presiding judge. For *non-dispositive motions*, the moving party may not file a reply memorandum without first getting permission from the presiding judge.



Once all of the papers relating to the motion are filed, the judge can decide the motion based solely on the arguments in the papers, or she can hold a hearing. If the judge holds a hearing, each side will have an opportunity to talk to the judge about the arguments in their papers. The judge then has the option to announce her decision in the courtroom (a ruling from the bench), or to further consider the motion after the hearing (taking the motion under advisement). If the judge takes the order under advisement, the parties will receive a written decision sometime after the hearing.

### **What are the requirements for motion papers?**

Both the Federal Rules of Civil Procedure and the Court's Local Rules provide requirements for filing motion papers. In addition to requiring most motions to be in writing, [Rule 7\(b\)\(2\) of the Federal Rules of Civil Procedure](#) states that all of the Court's rules about captions and the format of documents apply to motions. [Rule 11 of the Federal Rules of Civil Procedure](#) requires parties to sign their motions. Rule 11 requires parties not to file any motions that are based on facts that they know to be false or which they did not fairly investigate, or motions that have no reasonable legal basis. You should read Rule 11 before signing and filing any motion.

[Local Rule 7.1](#) gives a detailed set of requirements for serving, filing and responding to motions. Under Local Rule 7.1, motions are broken into two types: "nondispositive" motions and "dispositive" motions.

A dispositive motion seeks to end the case or dismiss a claim, and is usually heard by the district judge, although a district judge may refer the motion to a



magistrate judge for a Report and Recommendation. Typical dispositive motions include motions to dismiss or motions for summary judgment. Motions for injunctive relief are also considered dispositive motions. In addition, post-trial and post-judgment motions are treated as dispositive motions for purposes of Local Rule 7.1.

A nondispositive motion does not end the case or dismiss any claim. Typical nondispositive motions include motions to amend and motions to compel discovery. If you are not sure whether a motion is dispositive or nondispositive, you may call the district judge's courtroom deputy to ask.

### **What do I have to do before filing a motion?**

Under [Local Rule 7.1](#), the procedures for filing a nondispositive motion and a dispositive motion are somewhat different, but the first steps to file each type of motion are the same.

First, under [Local Rule 7.1\(a\)](#), before filing any motion except a motion for summary judgment or a motion for a temporary restraining order, you must contact the opposing party and make a "good faith effort to resolve the issues raised by the motion." You do not need to meet with the opposing party if the opposing party is not available to meet before you file your motion, but you must then meet with the opposing party as soon as you can after filing the motion. Keep notes about any attempts you make to meet with the opposing party and keep notes about any agreement that you made when you met with the opposing party. You must prepare a meet-and-confer statement with your motion, and these notes will help you prepare that



statement. After you have met and conferred or attempted to meet and confer with the opposing party, you must contact the applicable judge's courtroom deputy. If you are filing a nondispositive motion, you must contact the magistrate judge's courtroom deputy and ask for a hearing date. If you are filing a dispositive motion, you must contact the district judge's courtroom deputy. The district judge's courtroom deputy will either give you a hearing date or will instruct you when to file your motion and supporting documents.

The parties may jointly request that a motion be decided without a hearing. A judge may also cancel a hearing on his or her own and decide the motion on the written papers alone. If the motion will be decided without a hearing, the motion must be filed and served as if the hearing date were still in effect. This means you should calculate the filing deadlines under [Local Rule 7.1](#) based on the hearing date you originally received, even if the hearing is canceled before your motion is filed.

Under [Local Rule 7.3](#), you may request that the hearing be held by telephone by (a) filing and serving a letter requesting a telephone hearing, and (b) contacting the judge's courtroom deputy after the letter is filed to coordinate the request. Generally, the party who requested the telephonic hearing must make the arrangements for the conference call and notify the presiding judge and all parties of the arrangements.

### **How do I file a nondispositive motion?**

The procedures for filing nondispositive motions are found in [Local Rule 7.1\(b\)](#). Nondispositive motions have shorter periods of time in which to respond, so it is important to determine from the beginning whether a motion is dispositive or



nondispositive. For nondispositive motions, the party filing the motion must file and serve the following documents at least 14 days before the hearing: (1) [Notice of Hearing](#); (2) [Motion](#); (3) [Memorandum of Law](#); (4) [Affidavits and Exhibits](#); (5) [Meet-and-Confer Statement](#); and (6) [Proposed Order](#). The party responding to a nondispositive motion must file and serve the following documents within 7 days after the motion is filed: (1) Memorandum of Law; and (2) Affidavits and Exhibits. For nondispositive motions, the party who filed the motion is not permitted to file a reply memorandum of law without first obtaining permission from the magistrate judge. Read the subsections below for information on each type of document that must be filed with a nondispositive motion.

### **How do I file a dispositive motion?**

The procedures for filing dispositive motions are found in [Local Rule 7.1\(c\)](#). The party filing the dispositive motion must file and serve the following documents 42 days before the hearing (if a hearing is scheduled), or when instructed by the courtroom deputy: (1) [Notice of Hearing](#); (2) [Motion](#); (3) [Memorandum of Law](#); (4) [Affidavits and Exhibits](#); (5) [Meet-and-Confer Statement](#); and (6) [Proposed Order](#). The party responding to a dispositive motion must file and serve a Memorandum of Law and any Affidavits or Exhibits within 21 days after the motion is filed. The moving party may file and serve a Reply Memorandum of Law within 14 days after the response is filed. If you decide not to file a reply memorandum of law, then you must file a statement that a reply memorandum will not be filed. Read the following subsections for information on each type of document that must be filed with a dispositive motion.



### **What is a notice of hearing?**

A notice of hearing must be filed and served with every motion, even if no hearing is scheduled when the motion is filed. The notice of hearing informs all parties in the lawsuit what kind of motion is being filed, whether a hearing date is scheduled, and if so, the hearing date and location of the hearing. A [notice of hearing form](#) is available on the Court's website.

### **What is a motion?**

A motion is simply a request for the Court to issue an order for a specific purpose. A [motion form](#) is available on the Court's website.

### **What is a memorandum of law?**

A [memorandum of law](#), sometimes called a brief, is a document where you provide legal support for whatever you are requesting that the Court do. Your memorandum of law should cite laws and cases supporting your position that the judge should grant your motion or deny the other party's motion. A memorandum of law, either in support of or in opposition to a motion, should always apply the particular facts of your case to the laws or cases that you cite.

Parties' memoranda are limited to 12,000 words. If a party files two memoranda for a particular motion (for example, a memorandum in support of the motion and a reply memorandum), the two memoranda may not exceed 12,000 words combined. When any memorandum of law is filed and served, it must be accompanied by a certification of compliance with the word count requirement just described. A [Word Count Certificate form](#) is available on the Court's website.



A party may request additional words by writing a letter to the presiding judge. This letter, and any response to the letter, are limited to two pages, and must be filed and served on the parties. Requests for additional words are generally disfavored.

Pro se litigants may type their memoranda on 8 1/2 x 11 inch paper using double spacing and 13-point font, or may write their memoranda legibly by hand. See [Local Rules 5.2](#) and [7.1\(f\), \(h\)](#) for additional requirements concerning titles, captions, exhibits, footnotes, quotations, page numbering and margins. A memorandum of law form is available on the Court's website.

### **What are affidavits and exhibits?**

Affidavits and exhibits provide support for your motion. [Affidavits](#) are written statements made by a witness who swears to the truth and the statements and whose signature on the document is verified by a notary public. Exhibits are documents or other materials that are relevant to your motion or affidavits and are filed along with those documents. You should cite to any affidavits and exhibits that you file along with your memorandum in that memorandum. Under Local Rule 7.1(l), you cannot attach the affidavits and exhibits you are using to support your motion to the motion itself; instead, such affidavits and exhibits must be filed separately. Exhibits must be accompanied by an index, either with a supporting affidavit or a separate title page that identifies the exhibits.

### **What is a meet-and-confer statement?**

When you file a motion, you must also file and serve a meet-and-confer statement. Under [Local Rule 7.1\(a\)](#), the statement must (1) certify that the moving party



met and conferred with the opposing party; and (2) state whether the parties agree on the resolution of all or part of the motion and, if so, whether the agreed-upon resolution should be included in a court order. A meet-and-confer statement form is available on the Court's website.

### **What is a proposed order?**

A proposed order is an order written by the moving party for a judge to sign if the judge wishes to grant the party's motion in the manner described in the proposed order. Proposed orders should not be filed with the Clerk's Office. Instead, they should be emailed to the judge's chambers in either Microsoft Word or WordPerfect format. Judges chambers email addresses may be found on the [Court's website](#). A copy of the proposed order must also be served on the other parties to the lawsuit.

### **What if I need more time to respond to a motion?**

[Rule 6\(b\) of the Federal Rules of Civil Procedure](#) allows the presiding judge to give a party extra time to respond to a motion if there is good reason. Under Rule 6(b), the presiding judge can grant extra time with or without a motion or notice to the other parties if a party makes the request *before* the original deadline passes. If the party waits until *after* the original deadline passes before asking for extra time, he must file a motion and show that excusable neglect caused the party to miss the deadline. The presiding judge cannot extend the time for taking any action under Federal Rules of Civil Procedure [50\(b\), \(d\)](#), [52\(b\)](#), [59\(b\), \(d\) and \(e\)](#), and [60\(b\)](#), except to the extent and under the conditions stated in each of those rules.



## HOW DO I SERVE MOTIONS, BRIEFS AND SUPPORTING DOCUMENTS?

You must give the other parties to your lawsuit a copy of every document that you file with the Clerk's Office. You must also serve a copy of your disclosures and discovery responses to the other parties. Disclosures and discovery responses are not filed with the Clerk's Office. The rules for serving the original summons and complaint are different from the rules for serving other documents. The rules for serving papers other than the summons and complaint are generally much simpler.

Even if you are a plaintiff whose [IFP](#) application was granted, you need to serve documents, other than the original summons and complaint, on the defendant(s) yourself. [Rule 5 of the Federal Rules of Civil Procedure](#) establishes the rules for serving documents other than the original complaint. If the party you have served has a lawyer, then you must serve that party by serving their lawyer. If the other party does not have a lawyer, then you need to follow the rules for serving an unrepresented party that are described below.

Rule 5 allows you to serve documents on the attorney or party (if not represented) by any of the following methods:

- Handing it to the person (you cannot do this yourself, but may use any person 18 years old or older and not a party to the lawsuit);
- Leaving it at the person's office with a clerk or other person in charge, or if no one is in charge, by leaving it in a conspicuous place in the office (again, you cannot do this yourself);



- If the person has no office, or the office is closed, leaving it at the person's home with someone of suitable age and discretion who lives there (again, you cannot do this yourself);
- Mailing a copy to the person's last known address;
- Delivering a copy by any other method that the person you are serving has consented to in writing; or
- Sending it by electronic means on the Court's electronic case filing system, CM/ECF, if the person has consented to receive electronic service. All attorneys are required to file and receive service by CM/ECF, unless specifically exempted by the Court. You may check with the Clerk's Office to determine whether other unrepresented parties have consented to electronic service.

For all the documents you file and serve on other parties, you need to file and serve a certificate of service, similar to the proof of service you filed for the complaint.

[Certificate of service forms](#) are available from the Clerk's Office or on the Court's website. Please note that under [Local Rule 5.4](#), documents that were filed and served using the Court's electronic filing system (CM/ECF) do not require the filing of a separate certificate of service.

## **HOW CAN I MAKE SURE THAT I KNOW ABOUT EVERYTHING THAT IS HAPPENING IN MY CASE?**

Although every document that is filed in a lawsuit must be served on all of the parties, sometimes mistakes are made or documents get lost in the mail. For this reason, it is a good idea to check the docket every so often to make sure that (1) every document you filed has been entered on the docket; (2) you have received copies of every document that everyone else has filed; and (3) you are aware of every order that the Court has issued. If you have been granted permission to file electronically, you



will receive e-mail notification and electronic access to each new document or entry filed on the docket. To see the docket, however, you must either visit the Clerk's Office and use the public computer terminals, or use PACER, which stands for "Public Access to Court Electronic Records." Anyone can obtain a [PACER](#) login and password, but PACER charges, in most circumstances, \$.10 for every page you download. If you are not filing electronically or do not have a PACER account, you can call or visit the Clerk's Office for information about the docket in your case.

If you have a question about the schedule for a hearing, you should call the specific judge's chambers. Otherwise, calls to the judge's chambers are strongly discouraged, because neither the judge nor the judge's staff is allowed to give you legal advice or to talk with you about the merits of your case outside of the courtroom.

## **CHAPTER FOUR: CASE MANAGEMENT AND DISCOVERY**

### **HOW DOES THE COURT MANAGE THE CASE BEFORE TRIAL AND WHAT IS A CASE MANAGEMENT CONFERENCE?**

The main way the court manages a case before trial is to hold a case management conference. A case management conference is a meeting with the judge (usually the magistrate judge) at which the judge, with the help of the parties, sets a schedule for the case. Not all cases will have an initial case management conference, but if one is scheduled, it will likely be held early in the case. Generally, it is scheduled by the magistrate judge a short time after the answer (or answers, if there are multiple defendants) is filed. At the initial case management conference, the magistrate judge will usually set a schedule for completing discovery (that is, exchanging information



that could be used as evidence), a deadline for filing motions, and a trial ready date. Additional case management conferences may be held to review the progress of the case and change the schedule, as necessary.

The magistrate judge will send out a notice setting the date for the initial case management conference. Pay close attention to the directions in the notice, because it will state what each party must do and send to the judge before the conference. Generally, the parties will be asked to prepare and file a report, sometimes called a Rule 26(f) report. [Rule 26\(f\)](#) may be found in the Federal Rules of Civil Procedure.

If the parties have a Rule 26(f) conference, [Local Rule 26.1\(a\)](#) directs the parties to discuss (1) the matters specified in Federal Rule of Civil Procedure 26(f); (2) the matters specified in the notice of the initial pretrial conference and any other applicable order; and (3) the matters specified in the [Rule 26\(f\) Report and Proposed Scheduling Order](#). Each party may also be asked to submit a letter that will remain confidential between the magistrate judge and that party, describing the party's position on settlement of the case. After the initial pretrial conference, the magistrate judge will issue a Scheduling Order to set the various deadlines for managing your case.

Once the magistrate judge issues a Scheduling Order, the discovery schedule cannot be extended or modified without making a written motion and showing good cause for the extension. This procedure is described in [Local Rule 16.3](#). A motion to extend or modify the discovery schedule must include a statement describing what discovery remains to be completed, what discovery has been completed, why all discovery has not been completed, and how long it will take to complete discovery.



[Local Rule 16.3\(d\)](#) states that the party seeking to modify a deadline must *obtain* a hearing date on the party's motion to modify the scheduling order before the deadline passes; the hearing itself may take place after the deadline, however. For instructions on how to schedule, file, and serve a discovery motion, review the [how to file a motion section](#), above.

## WHAT INFORMATION DO I HAVE TO GIVE TO THE OTHER PARTIES, EVEN IF THEY DO NOT ASK FOR IT?

[Rule 26\(a\) of the Federal Rules of Civil Procedure](#) lists three types of “disclosures” that you must provide to the other parties at different times during the course of the lawsuit, even if the other parties does not request the information. Those disclosures are (1) initial disclosures; (2) expert disclosures; and (3) pretrial disclosures.

### What are initial disclosures?

Initial disclosures must be served on the other parties by the deadline established in the Scheduling Order. Initial disclosures are not filed with the Clerk's Office. Initial disclosures are required in all cases, unless exempted by [Federal Rule of Civil Procedure 26\(a\)\(1\)\(B\)](#) or otherwise ordered by the Court.

**Content:** Unless your case is one of the categories listed in Rule 26(a)(1)(B), you must serve the following information on the other parties in your lawsuit:

- The name and, if known, the address and telephone number of each individual likely to have information that you may use to support your claims and defenses, unless that information will be used solely for impeachment. You also must identify the type of information that each individual has. “Information used solely for impeachment” is information that is used only to attack the



believability or credibility of a witness, rather than information used to prove your position directly.

- A copy, or a description by category and location, of all documents or other things that you have in your possession or control that you may use to support your claims or defenses, unless they will be used solely for impeachment.
- A calculation of any category of damages you claim to have suffered. You also must make available to the other parties, for inspection and copying, all documents and other things that support your calculation, including documents and other things showing the nature and extent of your injuries. You do not, however, have to disclose documents and other things that are privileged or otherwise protected from disclosure.
- You must also make available to the other parties, for inspection and copying, any insurance agreement which may apply to any award of damages in the lawsuit.

**Form:** Under Rule 26(a)(4) and (g) of the Federal Rules of Civil Procedure, the initial disclosures must be made in writing and be served on all of the other parties to the lawsuit. They must be signed by you and must include your address. By signing the disclosure, you are certifying to the Court that the disclosure is complete and correct as of the time it is made, to the best of your knowledge.

**Additional requirements:** Your initial disclosures must be based on the information that is reasonably available to you. You must serve your initial disclosures even if:

- You have not fully completed your investigation of the case;
- You think another party's initial disclosures are inadequate; or
- Another party has not made any initial disclosures.

Rule 26(e)(1) of the Federal Rules of Civil Procedure imposes on you a duty to supplement your initial disclosures if you learn that the information you disclosed is



incomplete or incorrect, if the additional information has not otherwise been made known to the other parties during the discovery process or in writing.

### **What are expert disclosures?**

In an “expert disclosure,” you reveal to the other parties the identity of any expert witness you may use at trial. Expert disclosures are required by [Rule 26\(a\)\(2\) of the Federal Rules of Civil Procedure](#). An “expert witness” is a person who has scientific, technical, or other specialized knowledge that can help the judge or the jury understand the evidence.

If you hired or specially employed the expert witness to give testimony in your case, or if the expert witness is your employee and regularly gives expert testimony as part of his or her job, the disclosure also must be accompanied by a written report prepared by and signed by the expert witness, unless the presiding judge orders otherwise, or the parties stipulate otherwise. This written report is usually referred to as an “expert report.” You do not file your expert disclosures or expert report with the Clerk’s Office; instead, you must provide it to the opposing party or parties.

**Timing:** Expert disclosures must be made by the date identified in the Scheduling Order or other applicable order. If the judge does not set a date for expert disclosures and the parties do not agree to a date for expert disclosures, the disclosures must be made at least 90 days before the trial date. If your expert disclosures are intended solely to contradict or rebut another party’s previously disclosed expert



disclosures, your disclosures must be made no later than 30 days after the disclosure made by the other party.

**Content:** Under Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, the expert report must contain:

- A complete statement of all opinions the expert witness intends to give at trial and the basis and reasons for those opinions;
- The facts or data considered by the expert witness in forming those opinions;
- Any exhibits to be used as a summary of, or in support of, the opinions;
- The qualifications of the expert witness, including a list of all publications authored by the witness within the preceding 10 years;
- A list of any other cases during the previous 4 years in which the witness has testified as an expert at trial or by deposition; and
- The compensation to be paid to the expert witness.

**Form:** Under Rules 26(a)(4) and 26(g) of the Federal Rules of Civil Procedure, expert disclosures must be made in writing and must be served on all of the other parties to the lawsuit. They must be signed by the party and the expert witness, and must include the party's address. By signing the disclosure, you are certifying to the Court that the disclosure is complete and correct as of the time it is made, to the best of your knowledge.

**Additional requirements:** Under Rule 26(e)(1) of the Federal Rules of Civil Procedure, you have a duty to supplement your expert disclosures if you learn that the information you disclosed is incomplete or incorrect, and if the additional information has not otherwise been made known to the other parties during the discovery process



or in writing. If your expert is required to prepare an expert report under Rule 26(a)(2)(B), this duty extends to supplementing both the expert report and any information provided by the expert during a deposition. Any supplement to your expert disclosures must be served no later than the time your pretrial disclosures are due under Rule 26(a)(3).

### **What are pretrial disclosures?**

In a “pretrial disclosure,” each party files with the Clerk’s Office and serves on the other parties certain kinds of information about evidence he may present at trial. Evidence that will be used solely for impeachment is not included. The requirements for pretrial disclosures are governed by [Rule 26\(a\)\(3\) of the Federal Rules of Civil Procedure](#).

**Timing:** Pretrial disclosures must be made at least 30 days before trial, unless otherwise ordered by the Court.

**Content:** The following information about evidence you may use at trial should be included in your pretrial disclosures:

- The name and, if not previously provided, the address and telephone number of each witness. You must identify separately the witnesses you intend to present at trial and those whom you may present at trial if the need arises.
- The identity of those witnesses whose testimony you expect to present at trial by means of a deposition, rather than having the witness testify in person. You must also serve a transcript of the relevant portions of the deposition testimony.
- An appropriate identification of each document or other exhibit, including summaries of other evidence that you may use at trial. You must identify separately the exhibits you intend to use at trial and those you may use if the need arises.



**Form:** Under Rule 26(a)(4) and 26(g) of the Federal Rules of Civil Procedure, pretrial disclosures must be made in writing and must be served on all of the other parties to the lawsuit. They must be signed by the party, and include the party's address. By signing the disclosure, you are certifying to the Court that the disclosure is complete and correct as of the time it is made, to the best of your knowledge.

## **WHAT IS DISCOVERY?**

"Discovery" is the process by which parties exchange information about the issues in their case before trial. The different ways to ask for and get this information are described below. These techniques include depositions, interrogatories, requests for document production, requests for admission, and physical and/or mental examinations.

"Depositions" are question-and-answer sessions held before trial, in which one party to a lawsuit asks another person questions about the issues raised in the lawsuit.

"Interrogatories" are written questions served on another party to a lawsuit, which must be answered in writing and under oath.

"Requests for Document Production" are written descriptions of documents you think another party has that would provide information about the issues in the lawsuit and requests that they provide those documents to you.

"Requests for Admissions" are statements of fact you believe are true and requests that the other party admit that those statements are true or admit the application of any law to any fact.



A mental examination is an examination of a person's mental condition by a mental health expert.

A physical examination is an examination of a person's physical condition.

You may use different methods of discovery in any order or at the same time. The fact that the other party asked you for information first does not affect your right to ask for information from them or mean that you have to wait to make your requests. However, you must make your discovery requests far enough in advance so there is time for the opposing party to respond, and for you to bring a motion to compel, if necessary, before the discovery deadline passes. Consult the Scheduling Order so you are aware of the discovery deadlines. Make sure you ask in advance if you have any questions about the deadlines.

### **Are there any limits to discovery?**

Under [Rule 26\(b\)\(1\) of the Federal Rules of Civil Procedure](#), any party may ask for another party to disclose any non-privileged matter that is relevant to the claim or defense of any party to the lawsuit. In other words, you may get (and, if asked, you must provide) any material that is reasonably likely to lead to the discovery of admissible evidence. A judge can limit the use of any discovery method, however, if the judge finds that:

- The discovery sought unreasonably seeks information that has already been provided or that is already available from some other source which is more convenient, less burdensome, or less expensive;
- The party seeking discovery has already had enough chances to get the information sought; or



- The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount of money the parties are fighting over, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues.

Sometimes you might request information from another party and get a response that says you have asked for privileged information or information you cannot have because it is protected by various confidentiality agreements. A privileged matter is something that the law protects as confidential, and it does not need to be disclosed unless the judge orders otherwise. Typical privileges include the lawyer-client privilege, the work product privilege (generally, material an attorney prepared in anticipation of litigation), or the doctor-patient privilege.

In addition to certain categories of information that may be limited, there are some limits to how many requests for information you can make. These limits are discussed in the more detailed explanation of each method of discovery below.

### **When can discovery begin?**

[Rule 26\(d\) of the Federal Rules of Civil Procedure](#) states that discovery cannot begin until the parties have had their initial pretrial conference, *unless*:

- Earlier discovery is allowed by another part of the Federal Rules of Civil Procedure;
- A judge issues an order that lets you take earlier discovery; or
- All parties agree that discovery can be taken earlier.

All parties can conduct discovery at the same time.



## **What is a deposition and how does it work?**

A deposition is a question-and-answer session done during the discovery process. One party to a lawsuit asks another person, who is under oath, questions about issues raised in the lawsuit. [Rule 30 of the Federal Rules of Civil Procedure](#) explains the procedures for taking a deposition.

When you ask someone questions in a deposition about his or her knowledge of the case, that process is called “deposing the person” or “taking a deposition.” The person who answers the questions in a deposition is the “deponent.” The deponent answers all questions under oath, which means that he swears that all of the answers are true. The deponent can be any person who may have information about the lawsuit, including eyewitnesses, expert witnesses, or another party to the lawsuit.

The questions and answers in a deposition must be recorded. The party taking the deposition (the one asking the questions and seeking information) may choose the method for recording the deposition. The deposition can be recorded in a written record or videotaped. The written record of a deposition is called the “transcript” of the deposition. The person who records what everyone says is usually referred to as a “court reporter.” Rule 30(b) of the Federal Rules of Civil Procedure explains the ways the deposition can be recorded, the role of a court reporter in recording the deposition, and other important details. The person taking the deposition must pay the cost of recording the deposition.

## **Do I need the judge’s permission to take a deposition?**



You usually do not need the judge's permission to take a deposition. However, under [Rule 30\(a\) of the Federal Rules of Civil Procedure](#), you do need the judge's permission to take a deposition under any of the four following situations:

- The deponent is in prison.
- Rule 30(a) allows all of the plaintiffs, or all of the defendants, to take no more than ten depositions without the judge's permission. For example, if you are one of two plaintiffs, and the other plaintiff has taken nine depositions and you have taken one deposition, neither you nor the other plaintiff may take any more depositions without the judge's permission.
- The deponent has already been deposed in the same case, and the other parties have not agreed in writing that the deponent may be deposed again.
- You want to take a deposition before the judge issues a Pretrial Scheduling Order, and the other parties will not agree in writing to let you take the early deposition. However, this exception has its own exception; you may not need to get the judge's permission for an early deposition if your notice of deposition contains a certification with supporting facts that the deponent is expected to leave the United States and therefore will be unavailable for deposition in this country after the Pretrial Scheduling Order is issued.

### **How do I arrange for a deposition?**

First, you should consult with the attorneys for the other parties to choose a convenient time and location for the deposition. Once you have determined the time and location for the deposition, you must give written notice of the deposition to the deponent and to all of the other parties in your lawsuit in a reasonable amount of time before the deposition. This document is referred to as the "notice of deposition." You must serve the notice of deposition on all of the parties and the deponent, even if you have already discussed the deposition with all involved. The notice of deposition may be served by any of the methods listed in [Rule 5\(b\) of the Federal Rules of Civil](#)



[Procedure](#), including service by mail. You should not file the notice of deposition with the Clerk's Office.

## What do I say in a notice of deposition?

Under [Rules 30\(b\)](#) and [26\(g\)](#) of the Federal Rules of Civil Procedure, the notice of deposition must include:

- The time and place where the deposition will be held.
- The name and address of the deponent, if known. If you do not know the name of the deponent, you must describe the person well enough so that the other side can identify the person you wish to depose (for example, you may not know a witness's name, but know that he was "the store manager who was on duty after 6:00 p.m. on June 16, 2014.") If you do not know which person at a business or government agency has the information you need, Rule 30(b)(6) of the Federal Rules of Civil Procedure allows you to name the business or government agency as the deponent and describe the subjects you want to discuss at the deposition. The business or government agency then must tell you the persons who will testify on its behalf and the subjects on which each person will testify.
- The method by which the deposition will be recorded (for example, whether by video deposition or by a court reporter).
- Your address and signature. By signing the notice of deposition, you are certifying to the Court that:
  - The deposition you are requesting is either allowed by the Federal Rules of Civil Procedure and existing law, or you have a good faith argument for extending, modifying, or reversing existing law to allow that deposition;
  - You are not serving the notice of deposition for any improper purpose, such as to harass anyone or to cause unnecessary delay or to needlessly increase the cost of the litigation; *and*
  - Taking this deposition is not unreasonable, unduly burdensome, or unreasonably expensive, in light of the needs of the case, the discovery that has already been taken in the case, the amount in controversy, and the importance of the issues at stake in the litigation.



## **When do I need to get a subpoena for a deposition?**

You do not need a subpoena to depose a party; you can just go through the procedure to file a notice of deposition described above. If the deponent is not a party to the lawsuit (known as a “non-party deponent” or a “non-party witness”), you must serve the deponent with a subpoena. A subpoena is a document issued by the Clerk’s Office that requires a person to appear for a court proceeding at a specific time and place. [Rule 45 of the Federal Rules of Civil Procedure](#) discusses the requirements for subpoenas.

You can get a blank [subpoena form](#) from the Clerk’s Office or on the Court’s website for any deposition relating to a case pending in this Court. Unrepresented parties must have the subpoena signed by a deputy clerk in the Clerk’s Office. A subpoena must be hand-delivered to the deponent, along with the fees and mileage allowance required by law. Under 28 U.S.C. § 1821, a non-party deponent must be paid \$40 per day for deposition testimony. A subpoena may be served on the deponent by any person who is at least 18 years old and not a party to the lawsuit.

If the non-party deponent travels to the deposition by mass transit, such as by bus or by train, you also must pay the deponent’s actual travel expenses, as long as he takes the shortest practical route and travels at the most economical rate reasonably available. You do not have to pay the travel expenses until the deponent provides you with a receipt or other evidence of the actual travel cost.



If the non-party deponent does not travel to the deposition by bus, train, or other common carrier, then you must pay a mileage fee. The mileage fee is set in 28 U.S.C. § 1821 and 41 C.F.R. § 301-10.303 and is available at [www.gsa.gov](http://www.gsa.gov). You must also pay any necessary toll charges and parking fees that were incurred when attending the deposition.

### **What does it mean if the deponent files a motion to quash the subpoena?**

After being served with a subpoena, a person can ask that the judge “quash” the subpoena. If the judge quashes the subpoena, the deponent does not have to appear for the deposition at the time and place identified on the subpoena.

Under [Rule 45\(d\)\(1\) of the Federal Rules of Civil Procedure](#), you are required to take reasonable steps to avoid imposing an undue burden or expense on any person that you subpoena for a deposition. If the deponent thinks there is something improper in your subpoena, he can try to get the judge to quash it for that reason. In addition, under Rule 45(d)(3)(A)(ii), if your deposition subpoena requires a non-party deponent to travel beyond the geographical limits outlined in Rule 45(c) (that is, within 100 miles of the non-party deponent’s home or business address) and the deponent objects, the judge *must* quash the subpoena.

### **Can I ask a deponent to bring documents to a deposition?**

If the deponent is a party to the lawsuit, you may ask the deponent to bring documents to a deposition. [Rule 30\(b\)\(2\) of the Federal Rules of Civil Procedure](#) allows you to serve a request for document production along with the notice of deposition.



The rules for requests for document production are found in [Rule 34 of the Federal Rules of Civil Procedure](#). Those rules are discussed in a separate section below, entitled "[Requests for Document Production](#)."

### **What is a subpoena duces tecum and why would I need one?**

A "subpoena duces tecum" (or subpoena for the production of evidence) is a document issued by the Clerk's Office that requires the person served to turn over copies of papers, books, or other things. It is a discovery tool you may use either along with a deposition, or by itself. If the deponent is not a party to the lawsuit, you must serve the deponent with a subpoena duces tecum if you want the deponent to bring documents to the deposition.

Under [Federal Rule of Civil Procedure 30\(b\)\(2\)](#), you must list the documents you want the deponent to bring to the deposition in both the notice of deposition *and* the subpoena duces tecum. [Rule 45 of the Federal Rules of Civil Procedure](#) discusses the requirements for a subpoena duces tecum. Those requirements are discussed in a separate section below, entitled "[Requests for Document Production](#)."

### **How long can a deposition last?**

Under [Rule 30\(d\)\(1\) of the Federal Rules of Civil Procedure](#), a deposition may last no longer than one day for seven hours. If a party thinks the deposition should go more than seven hours, he must get authorization from the judge. This is done by filing a motion, or, if all parties agree to a longer deposition, by filing a stipulation (agreement) for the judge's approval.



## Does the deponent have to answer all questions?

In general, a deponent has to answer all questions, even if there is an objection to the question. Under [Rule 26\(b\)\(1\) of the Federal Rules of Civil Procedure](#), you may ask questions about any non-privileged matter that is relevant to the claim or defense of any party. A question is relevant if it appears reasonably calculated to lead to the discovery of admissible evidence.

Under [Federal Rule of Civil Procedure 30\(c\)\(2\)](#), the deponent (usually through his or her attorney) is entitled to state any legal objections he has to any question. You may, for example, object to the form of a question (such as, the question is vague, or the question is really several questions strung together, or the question is argumentative), or you may object that the question asks for information that you are not obliged by law to give. In most cases, the deponent still must answer the question. Under Rule 30(c)(2), the deponent may refuse to answer a question *only* in the following three situations:

- When answering would violate a confidentiality privilege, such as the attorney-client or doctor-patient privilege;
- When the judge has already ordered that the question does not have to be answered; or
- To allow the objecting party to file a motion under Rule 30(d)(3).

[Federal Rule of Civil Procedure 30\(d\)\(3\)](#) allows a deponent or a party to file a motion arguing that the deposition should be stopped, that certain questions should not be answered, or that some other limitation should be placed on the way in which the deposition is being taken. The deponent or the party making the motion must show



that the deposition is being conducted in bad faith or in an unreasonable manner to annoy, embarrass, or oppress the deponent or party.

### **Who is allowed to ask the deponent questions?**

Under [Rule 30\(c\) of the Federal Rules of Civil Procedure](#), any party may ask questions of the deponent at the deposition in the order that they would at trial. In general, this means that the party who noticed the deposition asks all of their questions first. Then, any other party may ask questions, including the attorney for the person being deposed.

### **Can the deponent change his or her deposition testimony after the deposition?**

Under [Rule 30\(e\) of the Federal Rules of Civil Procedure](#), once the court reporter notifies the deponent that the deposition transcript is complete, the deponent then has 30 days to review the deposition transcript and to make changes. To make changes to the deposition, the deponent must sign a statement listing the changes and the reasons for making them. The original transcript is not actually changed, but the court reporter must attach the list of changes to the official deposition transcript. That way the judge can see where any changes were made.

### **What are interrogatories?**

An interrogatory is another way to gather information about the facts in your case. Interrogatories are written questions sent by one party to any other party to the lawsuit, and these questions must be answered under oath. Unlike depositions, which



can be taken of any person with knowledge about a case, interrogatories can only be served on parties to the lawsuit. [Rule 33 of the Federal Rules of Civil Procedure](#) provides the rules for serving interrogatories. Interrogatories may be served by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including service by mail.

### **Do I need the Court's permission to serve interrogatories?**

Under [Rule 33\(a\)\(1\) of the Federal Rules of Civil Procedure](#), you do not need the judge's permission to serve interrogatories unless you have already served 25 or more interrogatories on the same party. If you want to serve more than 25 interrogatories on a party, you must file a motion asking for the judge's permission. Note that you can serve different interrogatories on different parties. In addition, parties cannot get around the 25 interrogatories limit by putting several questions all together. Each question is one interrogatory. If your questions have separate subparts, then each subpart is counted as a separate interrogatory.

### **What kind of questions can I ask in interrogatories?**

Under [Rule 26\(b\)\(1\) of the Federal Rules of Civil Procedure](#), you may ask questions about any non-privileged matter that is relevant to the claim or defense of any party. A question is relevant if it appears reasonably calculated to lead to the discovery of admissible evidence.



## **Are there any requirements for the form of interrogatories?**

There are requirements for the form of interrogatories. You should write out each interrogatory in a separately numbered paragraph. Under [Rule 26\(g\)\(1\) of the Federal Rules of Civil Procedure](#), you must sign the interrogatories and state your address, e-mail address, and telephone number. By signing the interrogatories, you are certifying to the Court that:

- The questions seek information that is allowed by the Federal Rules of Civil Procedure and existing law, or that you have a good faith argument for extending, modifying, or reversing existing law to allow you to get this information; and
- You are not serving the interrogatories for any improper purpose, such as to harass anyone, to cause unnecessary delay or to needlessly increase the cost of the litigation; and
- The interrogatories are not unreasonable or unduly burdensome or expensive, in light of the needs of the case, the discovery that has already been taken in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

## **How do I answer interrogatories served on me?**

A responding party can answer the question or object to the question (or both). The party answering interrogatories must respond to interrogatories within 30 days. If a party needs more than 30 days to respond, she can ask the other party to agree to give her more than the 30 days provided for under [Rule 33\(b\)\(2\) of the Federal Rules of Civil Procedure](#). Often, parties will agree to a reasonable extension of time. If the party that served the interrogatories will not agree to give the answering party more time, then



the party that received the interrogatories must file a motion requesting additional time. Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to. Any objections also must be stated in writing and must include the reasons for the objection. If you object to only part of a question, you must answer the rest of the question.

Under Federal Rule of Civil Procedure 33(d), if the answer to an interrogatory can be found in your personal or business records or some other place that is available to you, then you must look for the answer. If the burden of finding the answer in those records would be about the same for you or for the party who served the interrogatories, you may simply answer the interrogatory by telling the other party about the records in which the answer can be found and then allow that party to look through those records. You must identify the records in sufficient detail to permit the party who served the interrogatories to locate and identify the records in which the answer can be found. You must also give the party who served the interrogatories a reasonable opportunity to review and copy those records. If a party responds to interrogatories with any objections, the party making the objections must sign the response with the objections. If the responding party does not have a lawyer, the party should sign. If a party responds to interrogatories with the substantive answer, the party must sign the answers whether or not the party has a lawyer.



## **Do I have to supplement my answers to interrogatories if I remember or learn something new?**

If you have already answered an interrogatory, but later you learn something that changes your answer, you must let the other parties know by supplementing (adding to) your original answer. You can do this by sending a letter to the other parties that states which interrogatory you are supplementing and what new or different information you have. [Rule 26\(e\)\(1\) of the Federal Rules of Civil Procedure](#) imposes a duty on all parties to supplement their answers to interrogatories if they learn that the response is incomplete or incorrect.

## **What is a request for document production?**

In a request for document production, you write out descriptions of documents you think another person has. These should be documents that you have reason to believe would have information about the issues in the lawsuit. You then ask that person to provide you with copies of any of their documents that satisfy your descriptions. Document requests can be served on any person, not just parties to the lawsuit. Document requests should not be filed with the Clerk's Office. Different types of requests must be used, however, depending upon whether you are trying to get documents from a party or from someone who is not a party to the lawsuit.



## How do I get documents from the other parties?

If the person who has the documents you want is a party to the lawsuit, you must follow [Rule 34\(a\)-\(b\) of the Federal Rules of Civil Procedure](#). Under Rule 34(a), any party can serve on another party:

- A request for production of documents or electronically stored information, which can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form, seeking to inspect and copy, test, or sample anything which is in that party's possession, custody or control;
- A request for production of tangible things (for example, physical things that are not documents), seeking to inspect and copy, test, or sample anything which is in that party's possession, custody, or control; or
- A request for inspection of property, seeking entry onto property controlled or possessed by that party for the purposes of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object on that property.

The request must list the items that you want to inspect and describe each item in enough detail that it is reasonably easy for the party to figure out what you want. The request also must specify a reasonable time, place, and manner for making the inspection and performing any related acts such as photocopying the materials. Frequently, the parties will agree to send each other copies of the requested documents, rather than providing a time for inspection and copying.

### Form

You should number each single document request, or request for particular categories of documents, separately. Under [Rule 26\(g\)\(1\) of the Federal Rules of Civil](#)



[Procedure](#), you must sign the requests for document production and provide your address, e-mail address, and telephone number. By signing the requests for document production, you are certifying to the Court that:

- They are either permitted by the Federal Rules of Civil Procedure and existing law or you have a good faith argument for extending, modifying, or reversing existing law to allow you to request these documents;
- You are not serving them for any improper purpose, such as to harass anyone, to cause unnecessary delay, or to needlessly increase in the cost of the litigation; and
- The requests for document production are not unreasonable or unduly burdensome or expensive, in light of the needs of the case, the discovery that has already been taken in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

A request for document production from a party to the lawsuit may be served by any of the methods listed in [Rule 5\(b\) of the Federal Rules of Civil Procedure](#), including service by mail.

### **How do I answer a request for document production served on me?**

Under [Federal Rule of Civil Procedure 34\(b\)\(2\)](#), the party who has been served with the request must provide a written response within 30 days after the request is served, unless the Court has set a shorter or longer time for responding.

The response must state, with respect to each item requested, that you will allow inspection of the requested documents or will send copies of those documents, unless you make an objection to the request. If there is an objection, you must state the reasons for the objection. If you object to only part of the request, you must state your objection to that part and permit inspection or send copies of the rest. A response may state an



objection to a form of producing electronically stored information, and the party must state the form he intends to use.

A party who produces documents for inspection or produces electronically stored information must either:

- Produce the documents as they are kept in the usual course of business;
- Organize and label the documents to correspond with the categories in the request;
- If the request did not contain a specific form for producing electronically stored information, produce the information in the form in which it is ordinarily maintained or in a reasonably usable form (although a party need not produce the same electronically stored information in more than one form).

If, after you have responded to a document request, you discover more documents (or create more documents) that respond to the request, you need to provide those documents as well. [Rule 26\(e\)\(1\) of the Federal Rules of Civil Procedure](#) requires parties to supplement their responses to a request for document production if they learn that the response is incomplete or incorrect.

### **How do I get documents from persons who are not parties?**

If the person or business that you want documents from is *not* a party to the lawsuit, you need to follow Rules [34\(c\)](#) and [45](#) of the Federal Rules of Civil Procedure. Under Rule 34(c), a nonparty may be compelled to produce documents and tangible things by following the procedures set forth in Rule 45 of the Federal Rules of Civil Procedure. Rule 45 sets out the rules for issuing, serving, protesting, and responding to subpoenas, including subpoenas duces tecum. As discussed above, a subpoena duces



tecum is a document issued by the Clerk's Office that requires a person to produce documents or submit to an inspection at a specific time and place.

### **Form**

The same form is used for regular subpoenas and for deposition subpoenas. If you want a non-party to produce documents, electronically stored information, or tangible things at their deposition, or to permit inspection of premises, you only need to fill out one subpoena form directing that person to appear at the deposition and to bring certain items with them. You may also serve a deposition subpoena and a subpoena duces tecum separately, so that the person will appear for a deposition at a certain time and produce documents at a different time. You may also choose to serve only a deposition subpoena, or only a subpoena duces tecum, depending on what information you need for your lawsuit.

You can obtain a [subpoena](#) from the Clerk's Office for any production of documents or inspection for a case that is pending in this Court. If the subpoena will be issued by a non-attorney, the Clerk must sign it.

Federal Rule of Civil Procedure 45(c) explains where the subpoena may command a person to either appear or produce other discovery. A subpoena may command a person to attend a trial, hearing, or deposition when:

- the trial, hearing, or deposition will take place within 100 miles of where the person resides, is employed, or regularly transacts business in person;
- the trial, hearing, or deposition will take place within the state where the person resides, is employed or regularly transacts business in person *and* the person is a party or a party's officer; or



- the trial, hearing, or deposition will take place within the state where the person resides, is employed, or regularly transacts business in person *and* the person is commanded to attend a trial and would not incur substantial expense.

A subpoena may command the production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person. A subpoena may also command the inspection of premises at the premises to be inspected.

### **How do I serve a subpoena?**

Under [Rule 45\(b\)\(1\) of the Federal Rules of Civil Procedure](#), a subpoena may be served by any person who is at least 18 years old and not a party to the lawsuit. Service requires delivering a copy to the named person, and if that person's attendance is required, paying the fees for one day's attendance and the mileage allowed by the law. If the subpoena commands the production of documents, electronically stored information, tangible things, or inspection of premises before trial, a notice must be served on each party before the subpoena is served.

### **What kind of response can I expect if I serve a subpoena duces tecum?**

Under [Federal Rule of Civil Procedure 45\(d\)\(2\)\(A\)](#), a person who has received a subpoena duces tecum does not have to appear in person at the time and place for the production of documents or inspection, unless he also has been subpoenaed to appear for a deposition, hearing, or trial at the same time and place. He can, for example, simply send documents instead of having you show up to inspect them.



Under Rule 45(d)(2)(B), a person who has been served with a subpoena duces tecum has 14 days to serve any written objections. The time is shorter if the time for production or inspection is less than 14 days after service. The party who served the subpoena must then get a court order before he can inspect or copy any of the materials to which an objection has been made.

Under Rule 45(e)(1), a person who is producing documents that have been subpoenaed must either:

- Produce the documents as they are kept in the usual course of business; or
- Organize and label them to match the categories of documents asked for in the subpoena.

A person who is producing electronically stored information:

- Must produce it in the form in which it is ordinarily maintained or in a reasonably usable form, if the subpoena does not specify a form for producing the information;
- Need not produce it in more than one form; and
- Need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost; but the requesting party may seek a motion to compel production, which may be granted if the requesting party shows good cause.

### **What is a request for admission?**

A request for admission is a request to another party to agree to a fact that you believe to be true. To write a request for admission, write out a statement of fact you believe to be true, and ask the other party to admit that the statement is true. Or, write out the application of any law to any fact and ask the other party to admit that the law



applies to the fact as you stated. Requests for admission can only be used with other parties to the lawsuit. If the other party admits to anything you requested under this procedure, the judge will treat that fact as having been proved.

### **Form**

[Rule 36 of the Federal Rules of Civil Procedure](#) establishes the requirements for requests for admission. Requests for admission may be served by any of the methods listed in [Rule 5\(b\) of the Federal Rules of Civil Procedure](#), including service by mail.

Each request for admission must be stated separately and should be numbered. Under [Rule 26\(g\)\(1\) of the Federal Rules of Civil Procedure](#), you must sign the requests for admission and state your address, e-mail address, and telephone number. By signing the requests for admission, you are certifying to the Court that:

- The requests are permitted by the Federal Rules of Civil Procedure and existing law or you have a good faith argument for extending, modifying, or reversing existing law to allow the requests to be made;
- You are not serving the requests for any improper purpose, such as to harass anyone, to cause unnecessary delay, or to needlessly increase in the cost of the litigation; and
- The requests for admission are not unreasonable or unduly burdensome or expensive, in light of the needs of the case, the discovery that has already been taken in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

### **How many requests for admission can I serve?**

There is no limit to the number of requests for admission that you may serve, as long as they are not unreasonable, unduly burdensome, or expensive.



### **What happens if I do not respond to a request for admission in time?**

The party who receives a request for admission has 30 days to respond under [Rule 36\(a\)\(3\) of the Federal Rules of Civil Procedure](#). That time can be increased or decreased by agreement of the parties or if the presiding judge orders a different time for responding. If no response is served within 30 days (or the time otherwise set by the judge or by agreement), all of the requests for admission are automatically considered to be admitted.

### **How do I respond to a request for admission served on me?**

In general, when you answer a request for admission, you should write out each request for admission followed by your answer. An answer to a request for admission must either admit or deny the request, or explain in detail the reasons why the answering party cannot truthfully admit or deny it. If you are unable to simply admit or deny a particular request, then you must admit the part that is true and deny (or explain why you cannot admit) the rest. In some cases, you may not know the answer. In those cases, you may answer that you do not have enough information or knowledge to admit or deny the request, and that, after a reasonable search for the information, you still do not have enough information to admit or deny the request.

Any matter that is admitted is treated as if it has been proved for the purpose of the rest of the lawsuit, unless the judge allows the answering party to withdraw or change the admission. An admission is only for the purposes of the present lawsuit and



is not an admission for any other purpose. In other words, an admission in one lawsuit cannot be used against that party in any other lawsuit.

### **What if I do not want to admit to the truth of a request for admission?**

Under [Rule 37\(c\)\(2\) of the Federal Rules of Civil Procedure](#), if a party fails to admit a fact in a request for admission and the other party later proves that the fact is true, the requesting party may file a motion requesting the judge to order the answering party to pay the reasonable expenses incurred in making that proof, including attorney's fees. The judge will grant the motion unless she finds that:

- The request was objectionable under Rule 36(a);
- The admissions were not important;
- The party who did not admit the matter had reasonable ground to believe that he might prevail on that matter; or
- There was other good reason for the failure to admit.

After a party has responded to a request for admission, that party is under an ongoing duty to correct any omission or mistake in that response. If a party later obtains information that changes their response, [Rule 26\(e\)\(1\) of the Federal Rules of Civil Procedure](#) requires them to supplement that earlier response if it is incomplete or incorrect.

### **Can I be required to submit to a physical or mental examination?**

When the mental or physical condition of a party (or a person under the custody or legal control of a party) is at issue in a lawsuit, [Rule 35 of the Federal Rules of Civil](#)



[Procedure](#) allows the judge to order that person to submit to a physical or mental examination. The examination must be done by a suitably licensed or certified examiner, such as a physician or psychiatrist. The party who requested the examination must pay for it.

### **Is a Court order required for a mental or physical examination?**

A Court order is required for a mental or physical examination unless the other party agrees to the examination without an order. Unlike other discovery procedures, mental or physical examinations can be obtained only by filing a motion with the Court, or by agreement of the parties. If a motion is filed, all of the ordinary [rules for filing motions](#) apply. The motion must contain:

- An explanation why there is a need for the examination;
- The time, place, manner, conditions, and scope of the proposed examination; and
- Identity of the person or persons who will conduct the examination.

### **What happens to the results of the examination?**

If the Court orders a mental or physical examination, the party or other person who is to be examined has the right to request a detailed written report from the examiner explaining the examiner's findings, including the results of all tests made, diagnoses, and conclusions, together with similar reports of all earlier examinations of the same condition.

Because a medical or physical examination may raise new issues that the parties did not think of earlier, a party who has obtained an examination may also ask for



related information. After the party who asked for the examination delivers reports to the party that opposed the examination, he may ask for any similar report of any examination that party has about the same condition. If the person who was examined is not the party, the party need not produce any report that the party shows he is unable to obtain. If an examiner does not produce a report, the judge can exclude the examiner's testimony at trial. These requirements for examiner's reports also apply to mental or physical examinations that are agreed to by the parties, unless their agreement specifically states otherwise.

## **WHAT CAN I DO IF THERE ARE PROBLEMS WITH DISCLOSURES OR DISCOVERY?**

It is not uncommon for the parties to have disagreements about disclosures or discovery. There are several ways to get help from the presiding judge (usually the magistrate judge) when these disputes arise.

### **What is the first step in resolving a discovery dispute?**

First, you must try to resolve the dispute on your own. Under [Local Rule 7.1\(a\)](#), before filing a motion, you must meet and confer with the opposing party "in a good-faith effort to resolve" the discovery dispute.

### **What if the parties cannot resolve the problem, but discovery is still due?**

If you receive a discovery request and believe the discovery sought is inappropriate or you need more time to respond, you may file a motion for a protective order. Likewise, if you make a discovery request that the other party believes is too



broad or asks for trade secrets or other confidential information, your opponent may file a motion for a protective order. A protective order is a Court order that protects a person or party from having to produce evidence that he shouldn't have to turn over. For example, a protective order may say that you do not have to respond to a discovery request that is overbroad or burdensome. The Federal Rules of Civil Procedure provide for protective orders under [Rule 26\(c\)](#).

A motion for a protective order must be filed in either the court where the lawsuit is being heard or, if the motion involves a deposition, in the federal district court in the district where the deposition is to be taken.

A motion for a protective order must include:

- A certification that you have tried to confer in good faith with the other parties to resolve the dispute without help from the judge, or that you met together but were still unable to resolve it;
- An explanation of the dispute and what you want the judge to do; and
- An explanation of the facts and/or law that make it appropriate for the judge to grant your motion.

### **What do I do if the other party does not respond to my discovery request, or the response is inadequate?**

When a dispute arises over disclosures, or over a response or a failure to respond to a discovery request, there are two types of motions that may be appropriate: a motion to compel, or a motion for sanctions. Before filing either type of motion, you must confer with the party (through the party's attorney) if you think he is refusing to cooperate and try to resolve the dispute on your own.



## What is a motion to compel?

A motion to compel is a motion asking the judge to order a person to make disclosures, respond to a discovery request, or provide more detailed disclosures or a more detailed response to a discovery request. [Rule 37 of the Federal Rules of Civil Procedure](#) explains the requirements for motions to compel.

## How do I file a motion to compel?

Under [Federal Rule of Civil Procedure 37\(a\)\(2\)](#), a motion to compel a party to make disclosures or to respond to discovery must be filed in the court where the lawsuit is pending. A motion to compel a non-party to respond to discovery must be filed in the court in the district where the discovery is being taken. A party may move for discovery sanctions when the opposing party fails to respond to or supplement discovery requests.

**Content:** In addition to the filing requirements listed in LR 7.1(a)-(b), a motion to compel must include:

- An explanation of the dispute and what you want the judge to do;
- If the dispute involves discovery requests, the complete text of each disputed discovery request immediately followed by the complete text of the objections or disputed responses to that request; and
- An explanation of the facts and/or law that make it appropriate for the judge to grant your motion.



## What kinds of things will a judge do as a discovery sanction?

If the judge grants a motion for sanctions, she may issue an order that is appropriate to address the problem. [Federal Rule of Civil Procedure 37\(b\)\(2\)\(A\)](#) lists some of the types of orders that may be appropriate:

- An order resolving certain issues or facts in favor of the party who made the motion;
- An order refusing to allow the disobedient person to support certain claims or defenses or prohibiting that party from introducing certain evidence;
- An order striking certain documents or parts of documents from the case, staying the lawsuit until the order is obeyed, dismissing the lawsuit or any part of the lawsuit, or rendering a default judgment against the disobedient party; or
- An order holding the disobedient party in contempt of court for failing to obey an order, except an order to submit to a physical or mental examination.

In addition, if a party fails to make required disclosures under [Federal Rule of Civil Procedure 26\(a\)](#) or fails to supplement a prior response under Rule 26(e), that party cannot use such as evidence at the trial, hearing, or on any motion unless the failure to disclose was harmless. The judge may also order payment of reasonable expenses caused by the failure, inform the jury of the party's failure, or impose other sanctions.



## CHAPTER FIVE: HEARINGS AND MOTIONS FOR SUMMARY JUDGMENT

### WHAT HAPPENS AT A COURT HEARING?

At a court hearing, you appear before a judge who will be deciding issues that arise in your case. Therefore, it is important to be well prepared for a court hearing.

#### **What is a hearing?**

A hearing is a formal court proceeding where the parties discuss issues with the judge and have their arguments on the important issues heard by the judge. Sometimes witnesses can be presented, but that depends on the legal issues the judge is covering at the particular hearing.

#### **What do I do before a hearing?**

Before the hearing, take time to review all the papers that have been filed for the hearing. The judge will expect you to be able to answer questions about the issues that are being addressed at the hearing and about anything else that has been happening in the lawsuit. Bring with you to court any papers that you might need to answer the judge's questions.

#### **What does a courtroom look like?**

Although each courtroom is slightly different, the courtroom is generally arranged as follows.

- In the front of the courtroom is a large desk area where the judge sits. This area is called "the bench."



- In front of the judge and over to one side is a chair where witnesses sit when they testify. This area is called the “witness box.”
- In front of the judge, there will usually be a person seated in front of a small machine. This person is the court reporter. The court reporter uses the machine to create a record of everything that is said at the hearing. The judge may also use a digital recorder instead of a court reporter to record the hearing.
- There will often be another person seated in front of the judge. This person is the courtroom deputy, who assists the judge. If you need to show a document to the judge during a hearing, you should hand the document to the courtroom deputy, who will then hand it to the judge.
- There may be other court staff members seated off to the side.
- In the center of the courtroom in front of the bench is a stand with a microphone. This area is where lawyers, and parties who do not have lawyers, must stand when they speak to the judge.
- At one side of the courtroom, against the wall, there are two rows of chairs. This area is called the “jury box,” where jurors sit during a trial. During a hearing, court staff members may be sitting in the jury box.
- In the center of the courtroom, there will be several long tables with a number of chairs around them. This area is where lawyers and the parties sit during a hearing and during trial. The plaintiffs sit at the table that is closest to the jury box. The defendants sit at the table next to the plaintiffs.
- In the back of the courtroom are several rows of benches where anyone can sit and watch the hearing or trial.

### **How should I behave at a hearing?**

- When attending a hearing, it is customary to show respect for the court by dressing nicely and conservatively, as if you were going to a job interview.
- The judge will expect you to be on time. It is much better to arrive at the hearing a few minutes early than to arrive a few minutes late. Allow yourself plenty of extra time to get through security and find the correct courtroom.



- Often the judge has several short hearings scheduled around the same time. When you enter the courtroom, you should sit in the benches in the back of the courtroom until your case is announced. If your hearing is the only one, you may sit at the plaintiffs' or defendants' table in the center of the courtroom, instead of sitting in the benches at the back of the courtroom.
- When the judge enters the courtroom, you must stand and remain standing until the judge gives you permission to sit down, which usually happens when the judge sits down.
- When you hear your case announced, the judge will likely invite you to present your argument. Go to the stand with the microphone in front of the bench. You can bring with you any papers that you may need to refer to during the hearing. When you get to the stand, state your name and indicate whether you are the plaintiff or the defendant. For example, "Good [morning or afternoon] Your Honor, my name is [your name] and I am the plaintiff in this case."
- When you speak to the judge, it is customary to refer to the judge as "Your Honor" instead of using the judge's name.
- When the judge asks questions, answer the questions completely and never interrupt the judge when she is speaking.

### **How does a motion hearing work?**

If the judge is hearing a motion, the hearing usually goes through the following sequence of events. First, the party who filed the motion will argue why the motion should be granted. Then, the opposing party will argue why the motion should be denied. Finally, the party who filed the motion has an opportunity to explain why he believes the opposing party's argument is wrong.

You should try not to repeat all the arguments that you made in your motion or opposition papers but instead simply highlight the most important parts.



It is not appropriate to make new arguments that are not in the papers you filed with the Court, unless you have a very good reason why you could not have included the argument in your papers.

You can refer to notes during your argument if you need to, but it is usually more effective to speak to the judge rather than read an argument that you have written ahead of time.

When one party is speaking, the other party should sit at the table. Never interrupt the other party. Instead, always wait your turn to speak. While waiting for your turn to speak, you may take notes to help you respond to what the other party says.

The judge may ask questions before you begin your argument and may also ask questions throughout your argument. If the judge asks a question, always stop your argument and answer the judge's question completely. When you are finished answering the question, you can go back and finish the other points you wanted to make.

### **General advice for hearings**

Be sure to have a pen and paper with you, so that you can take notes about anything that the judge asks you to do. When the hearing is over, you should immediately leave the courtroom, or, if you want, you can return to one of the benches in the back of the courtroom and watch the rest of the hearings. If you need to discuss anything with opposing counsel, you must leave the courtroom and discuss the matter in the hall so that you do not disturb the other people who are in the courtroom.



## **How do I get a copy of the court reporter's transcript of a hearing?**

If a court reporter was present at the hearing, then you may obtain a copy of the transcript by contacting the court reporter directly. You may contact the Clerk's Office or look at the minute entry of the hearing (the Court's summary of the hearing) on the case docket to determine which court reporter attended the hearing and his or her contact information. If there was not a court reporter at the hearing, which is typical for hearings before magistrate judges, you may contact the magistrate judge's chambers and request that the recording of the hearing be transcribed. The Court will arrange for the transcription of the hearing, but you are responsible to pay for that service. The rates for purchasing transcripts are established by the Judicial Conference.

Once a transcript is prepared by a court reporter, the court reporter must file it with Clerk's Office. Most transcripts are filed on the Court's electronic case filing system, but access to that transcript from PACER is restricted for a period of 90 days under [Local Rule 80.1](#) unless you purchase a copy of the transcript from the court reporter. During those 90 days, you may view the transcript for free at the public terminals in the Clerk's Office.

## **DO I HAVE TO ATTEND A SETTLEMENT CONFERENCE?**

Under [Local Rule 16.5](#), the Court may set a Mediated Settlement Conference before a magistrate judge. A Mediated Settlement Conference is a meeting between the parties and a magistrate judge, where the magistrate judge assists the parties in attempting to settle the case before trial. If you are notified of a settlement conference,



you *must* attend. Anything you say to the magistrate judge during the settlement conference that you request to remain confidential will not be communicated to any other party at the settlement conference. Additionally, no communications that occur during the settlement conference can be disclosed to anyone outside the settlement conference without the consent of the party who made the statement or other communication. The magistrate judge who holds the settlement conference will not be the same judge who tries the case, if it goes to trial.

## **WHAT IS A MOTION FOR SUMMARY JUDGMENT?**

Ordinarily, a case must go to trial because the parties do not agree about the facts. A motion for summary judgment asks the Court to decide a lawsuit without having a trial because, based on all of the evidence, there is no real dispute about the key facts. The Court does not need to have a trial if the parties agree about the facts, or if one side does not have any evidence to support his version of what actually happened. In that case, the judge can decide the issue based on the papers that are filed by the parties.

When plaintiffs file a motion for summary judgment, they are trying to show that the undisputed facts prove that the defendant violated the law. When defendants file a motion for summary judgment, they are trying to show the opposite: that the undisputed facts prove they *did not* violate the law.

Summary judgment will be granted only if the evidence is so one-sided that a jury could not reasonably find in favor of the opposing party. In deciding a motion for



summary judgment, the judge must consider all of the admissible evidence from both parties. Because summary judgment means that there is no chance to hear live witnesses and decide who is credible, the judge has to consider evidence in the light most favorable to the party that does not want summary judgment. That means that if evidence could be interpreted in many ways, the judge must interpret it in the way that favors the party who opposes summary judgment.

If a judge grants a motion for summary judgment, the lawsuit is over. If the judge denies a motion for summary judgment, the case will go to trial, unless the parties decide to settle and end the case themselves. By denying summary judgment, a judge does not decide that she believes one side over the other. Rather, denying summary judgment means that there is a real dispute about the facts that will have to be decided in a trial.

[Rule 56 of the Federal Rules of Civil Procedure](#) explains the requirements for filing motions for summary judgment. A motion for summary judgment may be directed at ending the whole lawsuit, or only at dismissing one or more individual claims. A motion for summary judgment may also be brought to decide if the defendant is liable (that is, violated the law), even if there is still a dispute over the amount of money or other kinds of damages that the plaintiff should get.

### **When can a motion for summary judgment be filed?**

Under [Federal Rule of Civil Procedure 56\(b\)](#), unless the judge sets a different deadline in a scheduling order or other order, any party may file a motion for summary



judgment at any time until 30 days after the close of all discovery. The rules for filing dispositive motions in [Local Rule 7.1\(c\)](#) apply to motions for summary judgment. As a practical matter, parties rarely file a motion for summary judgment until they have taken all discovery. Most motions for summary judgment rely heavily on evidence obtained in discovery.

### **What if my opponent files a motion for summary judgment before I complete my discovery?**

If the opposing party files a motion for summary judgment before you have finished discovery, and you need more discovery in order to show why summary judgment should not be granted, under [Rule 56\(d\) of the Federal Rules of Civil Procedure](#), you may respond to the summary judgment motion by filing an affidavit or declaration that you are unable to present facts essential to justify your opposition to the summary judgment motion. After filing your affidavit or declaration under Rule 56(d), the court may: (1) defer considering your motion or deny it; (2) allow you time to conduct discovery or obtain affidavits or declarations; or (3) issue any other appropriate order. In order for the court to allow you to conduct additional discovery, you must show what specific facts you need, why those facts will defeat summary judgment, and why you need discovery to get those facts.

### **Under what circumstances is a motion for summary judgment granted?**

Under [Federal Rule of Civil Procedure 56\(a\)](#), the judge will grant a motion for summary judgment if the evidence presented by the parties in their papers shows that



there is no real dispute about any material fact (in other words, the evidence that actually matters all leads to the same conclusion).

### **How does each side argue a motion for summary judgment?**

If a plaintiff files a motion for summary judgment, the plaintiff must do two things to win the summary judgment motion:

- The plaintiff must provide acceptable evidence showing the judge that the parties agree on the facts that establish each part of the claim. Evidence includes things like sworn statements, medical records, and physical things. Evidence is acceptable if the [Federal Rules of Evidence](#) (or other federal law) allows that evidence to be considered for the purpose for which it was offered; and
- The plaintiff must also show that the defendant does not have any acceptable evidence that proves any of the defendant's defenses. Usually, this is done by showing that the defendant has admitted that he does not have any other evidence.

To counter the plaintiff's motion for summary judgment, the defendant must either:

- Submit acceptable evidence that shows there is truly a dispute about one or more parts of the plaintiff's claims or the defendant's defenses; or
- Show that the plaintiff has not submitted sufficient acceptable evidence to prove one or more parts of the plaintiff's claims.

If the defendant files a motion for summary judgment, the defendant may win

summary judgment in one of two ways:

- A defendant may win summary judgment if he can show that the plaintiff simply does not have the evidence necessary to prove one of the parts of the plaintiff's claims. For example, in a claim about a contract, one part of the claim a plaintiff must prove is that the parties reached an agreement. If the plaintiff cannot prove that part, the claim for breach of contract may be dismissed; or



- A defendant may win summary judgment by submitting acceptable evidence that there is no disagreement between the parties over the important facts of the defenses against the plaintiff's claims. A defense (sometimes called an "affirmative defense") is a complete excuse for doing what the defendant is accused of doing. For example, in a breach of contract case, evidence that it would have been illegal to perform the contract may be a complete defense.

To defeat the defendant's motion for summary judgment, plaintiffs must:

- Submit acceptable evidence to prove every part of their claims or evidence that there is a factual dispute about one or more elements of their claims; and
- If the defendant has moved for summary judgment on his defenses, the plaintiff must submit acceptable evidence showing that there is a factual dispute about one or more parts of those defenses. The plaintiff can simply point out that the defendant has not put forward acceptable evidence to prove at least one part of his defenses.

If a party does nothing in response to a motion for summary judgment, the party risks losing the motion and the case.

### **What evidence does the judge consider for summary judgment?**

The presiding judge must consider the admissible evidence cited by the parties for or against the motion for summary judgment but may also consider other materials in the record. The judge does not have to search for other evidence that may have been provided by you at some other point in the case. The judge also does not have to look at any evidence that is not mentioned in your briefs (also called memoranda of law). Therefore, you should file copies of all evidence that you want the judge to consider and refer to that evidence in your papers. Even if you have already filed the same evidence with the judge in another matter, you must file it with your summary judgment motion (or opposition to summary judgment) as well. In addition, when you



cite to a document, you should point out the exact page and line of the document where the judge will find the information that you think is important. You should remember that by making it easier for the judge to find this material, you are ensuring that this material receives the fullest consideration possible.

Every fact that you rely upon must be supported by evidence. It is not enough to repeat your opinion that a fact is true or to point to arguments you have written about in other papers you filed earlier; you need to show the judge the admissible evidence that supports what you have said.

**Affidavits or declarations as evidence on summary judgment.**

Affidavits are written statements of fact. They are written by an actual witness to those facts and are signed under oath. An affidavit must be signed before a notary public. A declaration is also a written statement of fact and is signed under penalty of perjury. Penalty of perjury means that a person could be prosecuted for lying under oath. (See 18 U.S.C. § 1623 for more information on perjury.) Either affidavits or declarations may be used as evidence in supporting or opposing a motion for summary judgment. In a general sense, they are written versions of what a person would testify to if they were in court on the witness stand. [Rule 56\(c\) of the Federal Rules of Civil Procedure](#) explains how affidavits and declarations are used for summary judgment. According to Rule 56(c)(4), any affidavits or declarations submitted by the parties on summary judgment must:

- be made by someone who has personal knowledge of the facts contained in the written statement;



- state facts that are admissible in evidence; and
- show that the person making the statement is competent to testify to the facts contained in the statement.

All documents referred to in an affidavit or declaration must be attached to it as exhibits.

### **Hearsay and summary judgment.**

Generally, portions of a declaration or affidavit that are based on hearsay may not be used for summary judgment and will be disregarded by the judge. Hearsay is the report of another person's words or certain actions by a witness to those words or actions, offered to prove the truth of the words or actions. For example, a person swearing that they were told by someone else that the plaintiff hit the defendant first would be hearsay. Similarly, a person stating in an e-mail that they heard from someone else that the plaintiff hit the defendant first would also be hearsay.

However, there are many exceptions to this prohibition on hearsay. The rules on the use of hearsay statements can be found in [Rules 801 through 807 of the Federal Rules of Evidence](#). Remember, if the hearsay would not be admissible in a trial, then you cannot use the hearsay evidence for summary judgment.

### **Authentication and summary judgment**

Some of your evidence may be in the form of documents such as letters, records, emails, and contracts. Those documents are "exhibits" to your motion for summary judgment. Attaching a document to your papers does not make it admissible. Again, documents can be hearsay too, so the hearsay rules in [Rules 801-807 of the Federal](#)



[Rules of Evidence](#) apply. In addition, even if a document is admissible under the hearsay rules, a document may not be admissible for other reasons. For example, any exhibits that are submitted as evidence must be authenticated before they can be considered by the jury.

[Rules 901 and 902 of the Federal Rules of Evidence](#) discuss the requirements for authentication. Generally, a document is authenticated either by:

- Submitting a statement under oath from someone who can testify from personal knowledge that the document is authentic (that is, it is a real, genuine document); or
- Demonstrating that the document is self-authenticating, as described in Rule 902 of the Federal Rules of Evidence.

## **WHAT HAPPENS AT A FINAL PRETRIAL CONFERENCE?**

Under [Local Rule 16.6](#), a final pretrial conference will be held no earlier than 45 days before trial. At the conference, the parties and the judge (usually the district judge) will discuss which facts in the case are undisputed, the issues to be tried, and anything else the judge believes may expedite the trial. The parties will also be expected to discuss (1) disclosure of all witnesses; (2) the listing and exchange all exhibits; (3) motions in limine and objections to evidence; (4) all outstanding motions; (5) an itemized statement of damages; (6) their estimates of the length of the trial; and (7) jury selection. The judge will then issue a Final Pretrial Order setting any deadlines for proceedings necessary before trial.



## CHAPTER SIX: TRIAL

### WHAT HAPPENS AT A TRIAL?

The last stage of a lawsuit in court is a trial. If the judge does not dismiss the case or grant a motion for summary judgment, and if the parties do not agree to a settlement, then the case will go to trial. Trial is a hard process that requires a good deal of preparation, skill, and dedication by all parties involved in order to assure its fairness.

### What is the difference between a jury trial and a bench trial?

There are two types of trials: jury trials and bench trials.

At a jury trial, a jury reviews the evidence presented by the parties, figures out which evidence to believe, and decides what it thinks actually happened. The judge will instruct the jury about the law, and the jury will then apply the law to the facts that they have found to be true and determine who wins the lawsuit.

For a jury trial to occur:

- The lawsuit must be a type of case that the law allows to be decided by a jury; and
- At least one of the parties must request a jury trial within the right timeframe. This timeframe is set forth in [Federal Rule of Civil Procedure 38](#). A party that does not make a jury trial demand on time forfeits that right.

At a bench trial, there is no jury. The judge will determine the law, the facts, and the winner of the lawsuit. A bench trial is held when:

- None of the parties requested a jury trial (or did not ask at the right time);
- The lawsuit is a type of case that the law does not allow a jury to decide; or



- The parties have agreed that they do not want a jury trial.

### **When does the trial start?**

Under [Local Rule 39.1](#), the judge who will conduct your trial will notify you of your trial date at least 21 days before trial. Under [Local Rule 6.1](#), you can file a motion to continue the case, but it will only be granted if you show good cause for the continuance. A motion to continue the trial date must be in writing and filed with the Clerk's Office. The judge who will conduct the trial will decide whether to grant the motion to continue.

### **What do I have to do to prepare for trial?**

There is a lot of work to do when preparing for trial and a lot of documents to be filed. This Guidebook is not intended to guide you through all the details and complicated issues that come up as you go to trial. If you find yourself preparing for a trial, you should look for additional resources at a law library. This Court's website has a list of [libraries for legal research](#) on the Legal Resources page that you may find helpful.

Preparing for trial is very time consuming, so be sure to read the Court's case-management order or any other order that sets a schedule for pretrial events carefully. When the judge sets a trial date, she usually sends out an order setting pretrial deadlines for filing or submitting various documents associated with the trial. For example, the judge will probably set dates for submitting copies of exhibits, objections to exhibits, and proposed jury instructions, among other things. Usually, the judge also



will set a date for a pretrial conference shortly before trial. During the pretrial conference, the judge will discuss his or her requirements for conducting trials, and resolve any final issues that have arisen before trial. Give yourself enough time to file all of the necessary documents on or before the deadlines.

Under [Local Rule 39.1](#), unless otherwise ordered by the judge, you must file and serve the following documents at least 14 days before the trial date:

- Trial brief;
- [Exhibit list](#) on a form provided by the Clerk of Court;
- [Witness list](#);
- List of deposition testimony;
- Motions in limine; and
- For jury trials: (1) proposed voir dire questions; (2) proposed jury instructions; and (3) proposed verdict form; and
- For non-jury trials: proposed findings of fact and conclusions of law.

In both jury and nonjury trials, all exhibits must be marked as described under Local Rule 39.1 and made available for examination and copying at least 14 days before trial.

Besides submitting documents, you also need to arrange for all of your witnesses to be in court at the trial. If a witness does not want to come to trial, you can make them attend by serving them with a subpoena. A subpoena to appear and testify at a hearing or trial in a civil action is a document issued by the Clerk's Office that requires a person to show up at trial on a particular date. Generally, the same rules that apply to subpoenaing a witness to show up at a [deposition](#) also apply to trial subpoenas.



## **What is a motion in limine?**

A motion in limine asks the judge to decide whether specific evidence can be used at trial. You could find yourself opposing the other side's motions in limine or wanting to file your own. Either way, [Rule 103 and other Federal Rules of Evidence](#) help explain, in part, how to present admissible evidence questions to the Court. The judge's ruling on evidence may have a big impact on how a party's case looks at trial, so researching, filing, and opposing motions in limine can be an important part of preparing for trial. A court order may set a last date (or "cut-off date") for filing motions in limine. The judge may also limit the number of motions in limine you may file.

## **What happens during trial?**

On the first day of trial, the judge will usually meet with the parties briefly to resolve any last minute problems. [Local Rule 39.2](#) describes some of the procedures you must follow during trial. First, you must stand when you speak to the judge, either from counsel's table or from the stand with the microphone in front of the bench. Speak clearly and loudly enough to be heard. Second, stay at the stand with the microphone when you examine witnesses, unless you need to show a witness an exhibit.

## **What is jury selection?**

The purpose of jury selection is to pick a jury that can be completely fair to both parties. This is accomplished by a process called voir dire, during which each potential juror is asked a series of questions. Under [Local Rule 39.2\(b\)](#), the judge will ask the



jurors questions, unless she states otherwise. The questions are designed to show any biases that a juror may have that would prevent him or her from being fair and impartial. Some of the questions are taken from lists of questions that the parties give the judge before trial.

Once the questioning is complete, the judge will excuse (that is, send home) any jurors who the judge thinks are too biased to be fair. The judge will also excuse any other jurors whom she believes will not be able to perform their duties as jurors for other reasons. The parties also will have an opportunity to convince the judge that other additional jurors should be excused because they are too biased to be fair and impartial or cannot perform their duties as jurors for other reasons. This is called challenging for cause.

After all of the jurors that have been challenged for cause have been excused, the parties have an opportunity to use peremptory challenges to request that additional jurors be excused. A peremptory challenge is used to excuse a juror without having to give any reason. The judge will give each party a certain number of peremptory challenges to eliminate jurors who may not be clearly biased but who the party still does not want to have on the jury.

After the jury is chosen, the judge will read some instructions to the jury. These initial instructions tell the jurors about their duties as jurors, explain to them how to deal with evidence, and give some explanation of the law that applies to the lawsuit that they are about to hear.



## **What are opening statements?**

After the jury is chosen, each party may present an opening statement. The opening statement is a speech made by each party. The purpose of the opening statement is for each party to describe the issues in the case and state what they expect to prove during the trial. An opening statement is neither evidence nor a legal argument. It is simply a roadmap of the evidence the party believes will come out at trial. The purpose of the opening statement is to help the jury understand what to expect and what the party considers important.

## **In the trial, which party presents witnesses first?**

After the opening statements, the plaintiff presents his or her side of the case. The plaintiff begins by asking a witness all of his or her questions. This is called direct examination. Then, the opposing party has the opportunity to cross-examine the witness by asking additional questions about the topics covered during the direct examination. Then, the plaintiff can ask questions about the topics covered in cross-examination. This is called redirect examination. Usually, a judge will allow this process to continue until both sides state that they have no further questions for the witness. The plaintiff will present all of his or her evidence before the defendant has a turn to present his or her own case. The defendant is still involved, however, by making objections and cross-examining the plaintiff's witnesses.



## What if the other party wants to put on improper evidence?

All the evidence that is presented by any party during trial must be admissible. The [Federal Rules of Evidence](#) are a very detailed set of rules for the admissibility of evidence.

If one party tries to present evidence that is not allowed under the Federal Rules of Evidence or tries to ask improper questions of a witness, the opposing party may object. It is the opposing party's duty to object to evidence that he thinks should not be admitted. If the opposing party does not object, the judge may allow the improper evidence to be presented. At that point, the other party will not be able to protest that decision on appeal. It is important to remember that it is the parties' job to bring errors to the trial judge's attention and give the judge an opportunity to fix the problem through objections.

The way to object is to stand and briefly state your objection to the judge. Objections should be brief but must contain the basis for the objection. For example, a proper objection might be: "Objection, your honor, inadmissible hearsay." It is not appropriate to give long arguments, unless the judge specifically asks you to explain your objection. If the judge wants to discuss the objection with you, she may ask you to come up to the bench where the judge sits, away from the jury's view, to talk to you quietly. This is called a discussion at side bar. The judge will either sustain or overrule the objection. If the judge sustains the objection, the evidence will not be admitted or the question may not be asked. If the judge overrules the objection, the evidence will be



admitted or the question may be asked, unless the judge later sustains a different objection.

### **What is a motion for judgment as a matter of law, and why do some parties make that motion right after the plaintiff's case in the middle of the trial?**

In a jury trial, after the plaintiff has presented all of his or her evidence, the defendant has an opportunity to make a motion for judgment as a matter of law. [Rule 50\(a\) of the Federal Rules of Civil Procedure](#) explains the procedures for making a motion for judgment as a matter of law.

A motion for judgment as a matter of law is a request to the judge to decide the outcome of the case. A motion for judgment as a matter of law brought by the defendant after the close of the plaintiff's evidence is granted if the plaintiff failed to provide enough evidence so that any reasonable jury could decide the matter in the plaintiff's favor. If the motion for judgment as a matter of law is granted, the case is over.

### **When does the defendant get to present his or her case?**

Sometimes, parties do not file motions for judgment as a matter of law. Or if they do file motions for judgment as a matter of law, sometimes they lose, or the judge puts off ruling until later. If any of these things happen, the case moves forward. In that case, after the plaintiff has completed examining each of his or her witnesses, the defendant then presents all of the witnesses that support his or her defenses to the plaintiff's case. The same procedure of direct examination, cross-examination, and re-



direct examination that was used during presentation of the plaintiff's evidence also applies here.

### **What is rebuttal?**

Rebuttal is the final stage of presenting evidence in a trial. It begins only after both sides have had a chance to present their case. In the rebuttal stage, the party who has the burden of proof (usually the plaintiff) tries to undermine or explain the opposing party's evidence. This evidence is called rebuttal evidence. Rebuttal is limited to countering only what the other party argued as evidence; the plaintiff cannot just present his or her case over again. For example, a rebuttal witness might testify that the other party's witness could not have seen the events he testified to. So, after the defendant has finished examining each of his or her witnesses, the plaintiff may call a new witness solely to show that one of the defendant's witnesses was not telling the truth. Not all cases have a rebuttal; it depends on what the party with the burden of proof wants to do and what the judge allows.

### **What happens after all parties have finished presenting their evidence?**

After all witnesses have finished testifying, the judge will instruct the jury about the law that applies to the case. Sometimes, the judge will wait until after closing arguments to instruct the jury about the law.

Each party may present a closing argument. The purpose of the closing argument is to summarize the evidence and argue how the jury (or, in a bench trial, the



judge) should decide the case based on that evidence. Under [Local Rule 39.2](#), closing argument is limited to one hour, unless the judge orders otherwise.

## **CHAPTER SEVEN: POST-TRIAL MOTIONS AND APPEALS**

### **WHAT CAN I DO IF I THINK THE JUDGE OR JURY MADE A MISTAKE?**

At the conclusion of your lawsuit, the clerk will enter a judgment explaining how the judge or the jury decided your case. There are a number of different procedures that you can use if you believe the judge or jury made a serious mistake in your lawsuit. These include motions for reconsideration, motions for judgment as a matter of law, and motions for a new trial.

#### **What is a motion for reconsideration?**

Under [Local Rule 7.1\(j\)](#), you must present compelling circumstances before you are permitted to file a motion for reconsideration of an order entered by the judge. A request to make such a motion must be in a letter, no more than two pages long, directed to the judge. You must send a copy of the letter to the other parties.

#### **What procedures must I follow to make a post-trial or post-judgment motion?**

First, you must file your post-trial or post-judgment motions within the timelines set forth in the Federal Rules. Local Rule 7.1(e) directs you to file your timely post-trial or post-judgment motion and then contact the judge's courtroom deputy to obtain a briefing schedule. What this means is that you do not need to file a notice of hearing,



memorandum of law, affidavits and exhibits, or a meet-and-confer statement when you file your post-trial or post-judgment motions. Instead, those documents must be filed when you are directed to file them. Under [Federal Rule of Civil Procedure 50\(b\)](#), if you made a motion for judgment as a matter of law and it was not granted during the jury trial, you may renew the motion, no later than 28 days after entry of judgment. You may also include an alternative or a joint request for a new trial under [Federal Rule of Civil Procedure 59](#).

If judgment as a matter of law was entered against you, you may file a motion for a new trial, under Federal Rule of Civil Procedure 59, no more than 28 days after judgment is entered. When a motion for a new trial is based on affidavits, the affidavits must be filed with the motion. The opposing counsel has 14 days to file opposing affidavits, and the judge may permit reply affidavits. The judge may also order a new trial on his or her own initiative no later than 28 days after entry of judgment.

A motion to alter or amend a judgment must also be filed no more than 28 days after judgment is entered.

You may seek relief from a final judgment or order under Federal Rule of Civil Procedure 60(b) for the following reasons:

- Mistake, inadvertence, surprise, or excusable neglect;
- Newly discovered evidence that could not have been discovered with reasonable diligence in time to move for a new trial under Rule 59(b);
- Fraud, misrepresentation, or misconduct by an opposing party;
- The judgment is void;



- The judgment has been satisfied, released, or discharged;
- Any other reason that justifies relief.

A motion for relief under Federal Rule of Civil Procedure 60(b) must be made within a reasonable time, which in most circumstances means no more than a year after entry of the judgment, order, or date of the proceeding that is being challenged.

Finally, you may also appeal the final judgment to the Eighth Circuit Court of Appeals.

### **How do I begin an appeal?**

You may appeal a judgment or final order of this Court to the Eighth Circuit Court of Appeals. To start the process, file a Notice of Appeal in this Court's Clerk's Office. Notice of Appeal forms are available from the Clerk's Office or on this Court's website. [Federal Rule of Appellate Procedure 3](#) governs how to appeal. When you file the Notice of Appeal, you must pay the filing fee to this Court in the amount of \$505.00. However, if you have been granted IFP status in this Court, you do not have to pay the appellate filing fee, unless otherwise ordered by the presiding judge in your case. If you were not granted IFP status when you filed your case in this Court, but you cannot afford the appellate filing fee, you may file a motion to proceed IFP on appeal with this Court (the District Court) under Federal Rule of Appellate Procedure 24(a). To file a motion to proceed IFP on appeal, complete the "Motion and Affidavit for Permission to Appeal In Forma Pauperis" form, which is available on the Court's website.



Under Federal Rule of Appellate Procedure 24(a)(5), if the district court denies your motion to proceed IFP on appeal, you may file a motion to proceed IFP in the Eighth Circuit Court of Appeals within 30 days after service of this Court's notice that it denied your application to proceed IFP on appeal.

If you intend to file a motion for appointment of counsel on appeal, the motion should be filed in the Eighth Circuit Court of Appeals, not in this Court.

### **When do I have to begin my appeal?**

Unless the United States or its officer or agency is a party, you must file your notice of appeal in this Court within 30 days after the judgment or order appealed from is entered. If the United States, its officer or agency is a party, the notice of appeal must be filed within 60 days after the judgment or order appealed from is entered. For additional issues regarding the time for filing a notice of appeal, see [Federal Rule of Appellate Procedure 4\(a\)](#). There are many other steps to beginning and proceeding with your appeal, but they are governed by the Eighth Circuit Court of Appeals Local Rules and the Federal Rules of Appellate Procedure, which are beyond the subject of this Guidebook. For more information, visit the Eighth Circuit Court of Appeals website at <http://www.ca8.uscourts.gov/>.