FEDERAL CIVIL PRACTICE IN THE EASTERN AND SOUTHERN DISTRICTS OF NEW YORK

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I. SUBJECT MATTER JURISDICTION

Federal courts are courts of limited jurisdiction. (28 U.S.C. §§1330-1369). Moreover, a federal court's ability to fashion federal common law is "severely limited". *See Boyle v. United Technologies*, 487 U.S. 500 (1988). *See also Homburger v. Venture Minerals, Inc*., 1985 WL 549 (S.D.N.Y.).

Essentially, for a federal court to have jurisdiction, the matter in controversy must involve either the "Constitution, laws, or treaties of the United States" (regardless of monetary limit) (28 U.S.C. §1331) or there must be a complete diversity of citizenship between the parties and the amount in controversy must exceed $75,000.00 (28 U.S.C. §1332).

A federal court has broad powers to retain jurisdiction over a state claim :

A. Supplemental Jurisdiction: The federal case law doctrines of pendent claim jurisdiction and ancillary jurisdiction have been codified under supplemental jurisdiction. (28 U.S.C. §1367). Essentially, if the state law claim is so closely related to the federal claim that it is considered an integral "part of the same case or controversy", the federal court is required to exercise jurisdiction over it, thereby combining the federal and related state claims under one action. 28 U.S.C. §1367(a). *See also, Nowack v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2nd Cir. 1996)). However, the federal court has discretion to "decline to exercise supplemental jurisdiction" under certain circumstances set forth in 28 U.S.C. §1367(c).[1] Furthermore, in diversity cases, the federal court is not permitted to exercise supplemental jurisdiction over state claims if doing so would be "inconsistent with the jurisdiction requirements of the diversity" statute. 28 U.S.C. 1367(b).[2]

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[1] Court has discretion to decline supplemental jurisdiction if state "claim raises a novel or complex issue of State law . . . the claim substantially predominates over the [federal claim] . . . the district court has dismissed all [federal] claims over which it has original jurisdiction, or . . . there are other compelling reasons for declining jurisdiction." 28 U.S.C. §1367(c)(1)-(4).

[2] This includes state claims in third-party practice (Rule 14, Fed.R.Civ. Proc. (hereinafter referred to as "FRCP")), or claims by plaintiffs against persons joined as parties (Rules 19 and 20, FRCP) or against those parties who have intervened in the action (Rule 24, FRCP). 28 U.S.C. §1367(b).

Therefore, it is permissible, when supplemental jurisdiction will not be invoked, to proceed in federal court on diversity against one defendant and in state court against a non-diverse defendant, even though both involve the same case and/or controversy. Before supplemental jurisdiction can be invoked over a state claim, the federal court must have original jurisdiction over one of the federal claims in the action. *Nowack*, 81 F.3d at 1187.

(i) The statute of limitations on the state action is tolled while the federal court exercises supplemental jurisdiction. Once the state action is dismissed, the state statute of limitations is extended for 30 days, or if state law so provides, a longer tolling period. 28 U.S.C. §1367(d).

II. VENUE

It is critical to commence your action in the proper judicial district. 28 U.S.C. §1391 is the venue statute. Venue is determined based upon (1) where a defendant resides, (2) where the claim arose or property that is the subject of the action is situated, or (3) if there is no other district under (1) and (2), above, then venue is based in any district in which the defendant is subject to personal jurisdiction. 28 U.S.C. §1391(a).

III. COMMENCEMENT OF ACTION

An action is commenced by filing a complaint with the clerk of the court.[3] Rule 3, FRCP. Effective February 3, 2014, the complaint, civil cover sheet as an attachment to the complaint and a proposed summons also as an attachment to the complaint can be filed on-line (.pdf format) through the PACER Electronic Case Filing system. (CM/ECF Electronic New Civil Case Opening Manual). The one-time fee associated with filing is $400.00 and can be paid via credit card (if paying by check, then file the complaint and civil cover sheet in person at the clerk's office and a stamped copy of the summons will be issued to you at that time). Once the complaint has been filed electronically, a docket number will be automatically assigned. One to two days after filing, the Clerk's Office will assign a district court judge and magistrate judge to the action and a notice of electronic filing will be sent to your email address on file with PACER with an official summons that you can download and serve with the complaint.

A. PLEADINGS

The only pleadings allowed by the FRCP are as follows: complaint and answer; answer to counterclaim denominated as such in the answer; answer to a crossclaim; third-party complaint and third-party answer. Rule 7, FRCP.

a. **Summons** is presented to the clerk of the court at the time you file complaint if paying in person by check . The summons, however, is

[3] You must be admitted to the bar of the Eastern District federal courts to practice there. *See* E.D.N.Y. court web site: http://www.nyed.uscourts.gov/. Click on "Local Documents", then click on "Court Forms", then scroll down to "Attorney Forms" and click on "On-Line Attorney Admissions" and "On-Line CM/ECF Attorney Registration".

not filed at this time. The clerk will sign and place the court's seal on the original summons and return it to you. If filing electronically, you attached as an attachment to your complaint along with the civil cover sheet a proposed summons. Within 1 to 2 days of electronic filing, you will receive a notice of electronic filing with the official summons to download and serve. You in turn will photocopy the official signed summons, attach it to your complaint and serve it, along with the Civil Cover Sheet (*see* Section III(A)(d), *infra*) upon the defendant.

i. **Service of Summons and Complaint:** Service must be made within 120-days of filing of the complaint with the court. Otherwise, action could be dismissed. Rule 4(m), FRCP.

ii. Once service upon the defendant has been made, pursuant to any means allowed by Rule 4 of the FRCP, you then must electronically file the summons, along with the affidavit of service with the court.[4]

b. **Complaint** filed with the clerk of the court to commence action.

i. Complaint, counterclaim, cross-claim or third-party claim must contain the following:

1. Jurisdictional statement. FRCP Rule 8(a);

a. In addition to stating the court's subject matter jurisdiction, either by federal statute or diversity, the pleader must set forth the factual basis for such statement such as the parties' domicile in a diversity case[5] or the factual basis for alleging a federal question[6].

i. If a diversity case, the amount in controversy must exceed $75,000.00 and be between citizens of different states.[7]

ii. If a diversity case involves a corporate party[8], set forth the state of incorporation and principal place of business. *See* 28 U.S.C. §1332(c)(1)— "a corporation shall be deemed to be a

[4] Please note that effective August 2, 2004, electronic case filing (hereinafter referred to as "ECF") is mandatory for all federal civil and criminal actions. Administrative Order 2004-08. *See* Section XI, *infra*.

[5] 28 U.S.C. §1332.

[6] 28 U.S.C. §1331.

[7] An alien who has permanent residency is deemed a citizen of the state in which the alien is domiciled. 28 U.S.C. §1332(a).

[8] All corporate parties, whether plaintiff or defendant, must file a Rule 7.1, FRCP, disclosure statement identifying parent corporation and any publicly held corporation that owns 10% of more of its stock. Rule 7.1, FRCP. *See also*, Local Civil Rule 7.1.1, which mandates that such disclosure statement be made within 14 days.

citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ." *Id*.

2. Although not required by Rule 8, FRCP, it is a good idea to state basis for venue after your jurisdictional statement. *See* Section II, *supra*.
3. Must have a "short and plain statement of the claim showing that the pleader is entitled to relief". Rule 8(a)(2), FRCP. "Each allegation must be simple, concise, and direct." Rule 8(d)(1), FRCP. Under recent Supreme Court decisions, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 s. Ct. 1955 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937 (2009), to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, the plaintiff must state enough facts to make its claim "plausible on its face" to entitle it to the presumption of truth. Cannot simply recite elements of the cause of action or state labels and conclusions—must provide facts to make to make the claim go beyond the speculative level. In essence, the federal courts are making it next to impossible to plead a civil RICO, Section 1983 or antitrust causes of action. *See* Ferri v. Berkowitz, 2009 WL 2731339 (EDNY August 2009) (civil RICO did not plead facts to make claim facially plausible)
    a. "A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading." Rule 10(b), FRCP.
4. Demand for judgment. Rule 8(a)(3), FRCP.
5. If fraud or mistake is alleged, must plead specifics. Rule 9(b), FRCP.
6. If special damage is alleged, must plead specifics. Rule 9(g), FRCP.
7. Jury demand. Rule 38, FRCP. Although not required to be endorsed upon the pleadings (ie., "Complaint and Demand for Jury Trial"), it may be. Otherwise if not so endorsed, demand for jury trial must be made "no later than 14 days after the last pleading directed to the issue is served" and the same must be filed, electronically, with the court. *Id*.[9]

[9] In actions removed from state court to federal court under 28 U.S.C. §§1441, *et seq*., you are not required to make a demand for a jury trial unless the federal court orders you to do so. Rule

8. Caption must contain, in addition to the names of the court and parties, Rule 10, FRCP, the docket number and the initials of the judge and magistrate judge assigned to the case. Rule 11.1, Local Civil Rule.
9. Redacted filings Rule 5.2, FRCP--Essentially, if a social security number, taxpayer identification number, birth date, financial account number, or a minor's name is included in any court filing, it must be truncated (i.e., last 4 digits of social security, taxpayer identification and/or financial account number, year of birth only and minor's initials). Rule 5.2, FRCP.

c. **Signing of Pleadings, Motions and Other Papers Under Rule 11, FRCP**
   i. Attorney must sign his/her name (not law firm name) individually to all court papers (i.e., summons, complaint, answer, motions, etc.) and list office address, e-mail address and telephone number. Rule 11, FRCP. Local Civil Rule 11.1 requires, *inter alia*, that every pleading, written motion and other paper must not only be signed by the individual attorney, but the attorney's name must be typed below the signature. Rule 11.1, Local Civil Rule. No longer do attorneys have to list their first and last initial and last four (4) digits of that attorney's Social Security number (ie., Dan Engstrand (DE1234)) alongside their typed name.
   ii. By signing, the attorney represents to the court that the pleading or position advocated in whatever paper is filed with the court is not frivolous. Rule 11(b), FRCP.
      1. If found to be frivolous, opposing party may move for Rule 11 sanctions to be imposed or court may, *sua sponte,* issue a show cause order why sanctions should not be imposed. Rule 11(c), F.R.C.P.

d. **Civil Cover Sheet** must accompany the complaint and be filed at the same time with the clerk either electronically via PACER or in-person if paying the $400 fee by check. Download the current form JS-44 at the Eastern District website: http://www.nyed.uscourts.gov/.[10]

81(c), FRCP, takes into account that in state practice, New York does not require a jury demand to be made until a Note of Issue is filed. Therefore, if case is removed prior to the filing of a Note of Issue in state court, you will not waive your right to a jury trial if you don't make it within 14-days from removal. (Rule 81(c)(3), FRCP; *see also* Section IV(A)(e), *infra*).

[10] Once on the EDNY web site, click on "Forms and Instructions" at the top and then scroll down and click on "Attorney Forms" to access the Civil Cover Sheet form JS-44. Contained within the Civil Cover Sheet is an Arbitration Certification. If, in good faith, your case exceeds the value of $150,000.00, exclusive of interest and costs, fill out the ineligibility for Arbitration Certification. The court will send any case whose value does not exceed $150,000.00 to arbitration. *See* Arbitration rules for E.D.N.Y. on the court's web site: http://www.nyed.uscourts.gov/. Click on "ADR" and follow prompts. *See also*, Local Civil Rule 83.7 applicable to the EDNY only.

e. **Answer** must be served within 21-days of service of summons and complaint upon defendant. Rule 12, FRCP. Parties may stipulate to a longer period or statute may so provide.[11] *Id.*

i. Must state "in short and plain terms its defenses to each claim asserted against it; and . . . admit or deny the allegations asserted against it by an opposing party." Rule 8(b)(1)(A) and (B), FRCP.

1. Failure to deny, when a response is required, is deemed an admission. Rule 8(b)(6), FRCP.

ii. Pursuant to Rule 8(c), FRCP, the following **affirmative defenses** must be pleaded in the answer:

1. accord and satisfaction
2. arbitration and award
3. assumption of risk
4. contributory negligence
5. duress
6. estoppel
7. failure of consideration
8. fraud (and/or mistake)[12]
9. illegality
10. injury by fellow servant
11. laches
12. license
13. payment
14. release
15. *res judicata*
16. statute of frauds
17. statute of limitations
18. waiver
19. and any other matter constituting an avoidance or affirmative defense.

iii. **Additional affirmative defenses**: Although not required to plead these defenses, failure to do so is deemed a waiver of the following, if not included in a Rule 12 motion:

1. lack of jurisdiction over the person
2. improper venue
3. insufficient process
4. insufficient service of process

Rule 12(h)(1), FRCP. *See* Section VII(e)(3)(d)(i), *infra*. A claim of lack of subject matter jurisdiction may be raised at any time without fear of waiver. Rule 12(h)(3), FRCP. *See also*, Section VII(e)(3)(d)(iii), *infra*.

[11] United States, as a defendant, has 60 days in which to serve an answer. Rule 12(a)(2), FRCP.
[12] Fraud must be pleaded with particularity. Rule 9(b), FRCP. So too must the affirmative defense of mistake be particularized. Rule 9(b), FRCP; *see also* Section III(A)(b)(i)(5), *supra*.

iv. **Compulsory counterclaim**[13] is any claim which the defendant has against the plaintiff which "arises out of the transaction or occurrence that is the subject matter" of the plaintiff's complaint and "does not require adding another party over whom the court cannot acquire jurisdiction." Rule 13(a), FRCP. Compulsory counterclaims must be included in the answer, unless they are the subject of another pending action. *Id*.

v. **Permissive Counterclaims** are all other claims that a defendant may have against a plaintiff that does not arise "out of the transaction or occurrence that is the subject matter" of the complaint. Rule 13(b), FRCP. Permissive counterclaims are not required to be included in the answer. *Id*.

vi. **Crossclaim** is any claim by one party against a "coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim. . . ." Rule 13(g), FRCP. A "crossclaim may include a claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." *Id*.

f. **Third-Party Practice** may be brought by the defendant at any time after commencement of an action. Rule 14, FRCP. Defendant may bring third-party action, as of right, within 14 days after serving original answer. Beyond 14 days, need leave of court. *Id*. Defendant who commences third-party action is called the third-party plaintiff and the responding party is called the third-party defendant. *Id*. Keep in mind Rule 16 Scheduling Orders which will set the outside date in which to commence a third-party proceeding. Rule 16(b)(1), FRCP.

IV. REMOVAL OF PENDING STATE COURT ACTION TO FEDERAL COURT

If the district court has original jurisdiction of an action brought in state court (*see* Section I, *supra*), then that action can be removed by the defendant to federal court. 28 U.S.C. §1441.

1) In removal under diversity jurisdiction, none of the defendants can be a citizen of the state in which the state court action was originally brought. 28 U.S.C. §1441(b).
2) In removal under federal question jurisdiction based upon a cause of action arising under the Constitution or federal law or treaty, the entire case, including non-removable causes of action, may be removed. 28 U.S.C. §1441(c).

[13] Whether compulsory or permissive, a counterclaim may exceed the amount sought in the complaint. (Rule 13(c), FRCP). Plaintiff must serve and file, electronically, an "answer" to a counterclaim "designated as a counterclaim". Rule 7(a)(3), FRCP.

A. PROCEDURE FOR REMOVAL

a. Defendant has 30 days from service of the state court pleadings in which to file a notice of removal with the federal district court.[14] 28 U.S.C. §1446. No court order or any permission from any party is required to remove a proper case to federal court. Removal takes place immediately upon the electronic filing the notice of removal with the federal court. Electronically file the notice of removal along with a Civil Cover Sheet and pay the $400.00 filing fee. 28 U.S.C. §1446 states, in pertinent part, the following:
    i. Notice of Removal must contain a "short and plain statement of the grounds for removal" 28 U.S.C. §1446(a)(i.e., diversity—*see* Section III(A)(b)(i)(1)(a), *supra*).
    ii. Copies of all pleadings and orders served upon defendant in state court action must be attached to the notice. 28 U.S.C. §1446(a).
    iii. Defendant must sign notice of removal, pursuant to Rule 11, FRCP, and 28 U.S.C. §1446(a).

b. After notice of removal is filed with the federal district court and a docket number purchased, defendant simply files the notice of removal with the state court and serves all other parties with a copy. Once that is done, the state court is powerless to do anything further on the removed action, unless it is subsequently remanded back to state court. 28 U.S.C. §1446(d).

c. If removal jurisdiction based on diversity, the notice of removal must state the following:
    i. States of citizenship, residence and address of each party, whether or not yet served;
    ii. State of incorporation of a corporate party and of its principal place of business; and
    iii. Date upon which each party was served with process.

    Local Civil Rule 81.1.

d. If at the time of removal, the defendant has not answered, defendant has the longer of 21 days from date of service of the original pleadings or 7 days from removal to answer or move against the complaint. Rule 81(c), FRCP.

e. Unless the court orders a party to do so, you need no longer file a demand for a jury trial in a removed action. Rule 81 (c)(3), FRCP. However, you guarantee yourself the right to

[14] Similar to the electronic filing of the Summons, Complaint and Civil Docket Sheet, the Notice of Removal may also be electronically filed with the Clerk of the U.S. District Court via the PACER system.

a jury trial if you file a Rule 38, FRCP, demand for a jury trial within 14 days from service of notice of removal. *See also* fn 9, *supra*.

V. **INITIAL SCHEDULING CONFERENCE**, This Conference sets the dates for depositions, service of requests for interrogatories, provides for disclosure or discovery of electronically stored information, service of requests for document production, impleader, amendment of pleadings, motion practice (usually dispositive motions such as Rule 56 summary judgment motions), discovery cut-off date (both fact and expert) and sets the date for the final pretrial conference, etc. Rule 16(b), FRCP. Once a Scheduling Order has been entered, it "may be modified only for good cause and with the judge's consent." Rule 16(b)(4), FRCP.

i. Scheduling Conferences are held within 90 days of a defendant's appearance and within 120 days after the complaint has been served, whichever is earlier. Rule 16(b)(2).

ii. 21-days prior to this conference, the parties are required to confer to discuss settlement, "agree on a proposed discovery plan", including electronic discovery and work out the accelerated disclosure that each party is required to disclose under Rule 26. It also includes discussing issues relating to preserving discoverable information (electronic or otherwise), issues relating to disclosure/discovery of electronic information and the form in which it should be produced and issues relating to claims of privilege. Rule 26(f), FRCP.

1. "If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan . . . , the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure." Rule 37(f), FRCP.

iii. 14 days after this informal, non-judicial conference, the parties must submit to the court, a written report outlining their discovery plan. Rule 26(f), FRCP. More often than not, the court will draft a discovery/scheduling order at the initial scheduling conference. *See also,* Form 52 (Report of Parties' Planning Meeting) in Appendix of Forms to the FRCP.

VI. Federal Discovery: General Rule—"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Rule 26 (b)(1). "Relevant information need not be admissible at

the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Moreover, all parties are under a duty to amend or update discovery responses "in a timely manner" as and when information becomes available. Rule 26(e), FRCP. No requests for discovery can be made "before the parties have conferred as required by Rule 26(f)". Rule 26(d), FRCP. Therefore, once the parties have had their Rule 26(f) informal conference in preparation for the Scheduling Conference, they are free to begin serving discovery requests upon each other.

A. Privileges: Any claim of privilege must be "expressly" made and must "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Rule 26(b)(5)(A)(ii), FRCP. However, if privileged information has accidentally been disclosed, Rule 26(b)(5)(B), FRCP, allows the party claiming the privilege to notify the party who received the information of the privilege and the basis for it. "After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved." Rule 26(b)(5)(B), FRCP. *See also* footnote 15, *infra*, concerning Privilege Logs, and Local Civil Rule 26.2.

B. Discovery Devices:

a) **Accelerated Discovery**: Rule 26(a), FRCP—Without any request having been made by any party, all parties must, either at or within 14 days after the Rule 26(f) Scheduling Conference (or 30 days if you were joined as a party after the initial Scheduling Conference), provide the following disclosure: (1) identity of witnesses (name, address and telephone number), (2) copies or a description and location of all documents as well as all electronically stored information, that may be used to support a party's claim or defense (unless solely for impeachment), (3) damage computation, including documents "bearing on the nature and extent of injuries suffered" (i.e, medical records and reports), and (4) insurance agreements. Rule 26(a)(1), FRCP.

b) **Discovery Requests Allowable After the Parties' Informal Meeting in Preparation for the Scheduling Conference**:

1) **<u>Deposition Requests</u>**:

i. There is no priority of depositions under the Federal Rules. Therefore, a defendant noticed for deposition prior to a plaintiff, would have to testify prior to the plaintiff.

ii. Rule 30, FRCP. Limited to no more than 10 depositions per party. Rule 30(a)(2)(A)(i). If you feel that more than

10 depositions will be required, you should discuss this prior to the Scheduling Conference with your adversaries. In any event, you still must obtain Court leave; therefore, it will be easier to discuss your anticipated need for additional depositions at the court conference and to seek to get it included in the Initial Scheduling Order. Otherwise, make a motion (follow Local Rules and Judge's Individual Rules).

a. "Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours." Rule 30(d)(1), FRCP.
b. Cannot instruct witness not to answer, unless a privilege objection or "to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)(examination conducted in bad faith "that unreasonably annoys, embarrasses, or oppresses the deponent or party"). Rule 30(c)(2), FRCP.
    i. If a privilege objection is claimed, the party claiming the privilege must state the privilege claimed and "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Rule 26 (b)(5), FRCP.[15] *See also*, Local Civil Rule 26.2, in which information concerning the following must be provided either at the deposition orally, if "readily available to the witness being deposed" or "in writing within fourteen (14) days after the deposition": Local Civil Rule 26.2.
    ii. For privileged documents: must state the type of document (i.e., a letter), the subject matter of the document, date of the document, other information to identify the

[15] It is an excellent idea to serve a Privilege Log, listing all relevant documents which you deem to be privileged, upon your adversary. Otherwise, if you later claim that a certain document is privileged, you opponent will argue either that the document was never included in the Privilege Log or that no such log was ever served; hence, the privilege has been waived.

document for a subpoena *duces tecum,* including, the document's author, the addressees of the document, any other recipients of the document and the relationship of the author, addressees and recipients to each other. Local Civil Rule 26.2(a)(2)(A).

iii. For oral privileged communications: must identify the person making the communication, provide names of persons present and their relationship to the communicator, the date and place of communication and the general subject matter of the communication. Local Civil Rule 26.2(a)(2)(B).

c. Only valid objection, other than privilege or to prevent harassment, is an objection to form. *See* Rule 32(d)(3)(B), FRCP. Failure to raise an objection to the form of a question at a deposition constitutes waiver of such objection. *Id.* However, failure to object at the time of the deposition "to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time." Rule 32(d)(3)(A), FRCP.

iii. Deposition of corporate, partnership or municipal entity where identification of witness is unknown—Rule 30(b)(6) allows a party to notice such an entity for deposition by describing "with reasonable particularity the matters for examination." Rule 30(b)(6), FRCP. That noticed entity is then required to designate a person to testify on its behalf concerning the designated matters. This is also true for non-party entities who have been subpoenaed to testify at deposition. The power behind a Rule 30(b)(6) notice is that your adversary will be precluded from surprising you later at trial with a witness knowledgeable on the subject set forth in the notice if such a witness was not so produced in response to your notice.

iv. Depositions are normally oral depositions, transcribed by a court reporter. However, the parties may stipulate to

have the depositions conducted by telephone "or other remote means." Rule 30(b)(4), FRCP. Under the Local Rules, "[t]he motion of a party to take the deposition of an **adverse** party by telephone will presumptively be granted." Local Civil Rule 30.2 (emphasis added).

a. You cannot exclude a non-party witness from attending the deposition of a party or another witness absent a court order. Local Civil Rule 30.3.
b. Once a deposition has begun, the witness cannot confer with his or her counsel, unless it is for the purpose of determining whether a privilege should be asserted. Local Civil Rule 30.4.
c. The deposition notice can also request that documents be produced at a deposition. Rule 30(b)(2).
d. Deposition notice must state "the method for recording the testimony (i.e, audio, audiovisual or stenographic transcription). Rule 30(b)(3)(A), FRCP. However, any other party "may designate another method for recording the testimony in addition to that specified in the original notice." Rule 30(b)(3)(B), FRCP.
e. Review by witness of deposition transcript or recording—deponent or party must request the right to review the transcript and/or recording "**before the deposition is completed**". . . ." Rule 30(e)(1) (emphasis added). Once such a request has been made prior to the completion of the deposition testimony, the deponent has 30 days after being notified that the transcript or recording is available for review to review the transcript (or the recording) and make "changes in **form or substance**, to sign a statement listing the changes and the reasons for making them." Rule 30(e)(1)(B) (emphasis added). In effect, the witness can completely change his or her answer. This does not mean that the original answer is erased. The jury can still hear the original answer, since it is an admission of a party. *See* Rule 32, FRCP.

i. Make certain that your court reporter follows Rule 30(e)(2) and Rule 30(f), FRCP. Rule 30(e)(2), FRCP, requires that the court reporter note in its certificate whether the deponent or party requested to review the transcript and if so, attach any changes the deponent makes during the 30-day period. Rule 30(f) focuses on how the court reporter mails the transcript to the attorney who ordered the deposition, the attachment of exhibits used at the deposition, and storage of the deposition transcript or recording.

f. Any deposition can be used to contradict or impeach the testimony of a witness. Rule 32(a)(2). A party's deposition testimony (including that of an officer, director, etc., **or that of a Rule 30(b)(6) witness**, may be used by an adverse party for any purpose under the Federal Rules of Evidence (i.e., admission). Rule 32(a)(3), FRCP. Also, the deposition testimony of any witness, whether or not a party, may be used if the witness is dead, is further away than 100 miles or outside of the U.S., is too ill to testify or is imprisoned, or cannot be subpoenaed, or "exceptional circumstances exist". Rule 32(a)(4)(A)-(E), FRCP.

i. "If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts." Rule 32(a)(6), FRCP.

ii. Depositions from a related state court proceeding involving the same parties may be used in the federal action. Rule 32(a)(8), FRCP. (i.e., federal court diversity action involving products liability and pendant state court action for personal injury in which the federal

defendants are also the third-party defendants in the state court action and defendants in the state court action are also the third-party defendants in the federal action—depositions from state court action may be used in federal court action. Rule 32 (a)(8), FRCP.

iii. "On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available . . . ." Rule 32(c), FRCP. Therefore, if a videotaped deposition was taken, but only the typed transcript was used at trial, any party could request that the videotape be used.

2) **Requests for Interrogatories**[16]

Interrogatories are questions that you ask of your adversary which seek to elicit information relevant to your case. Interrogatories cannot exceed 25, including subparts. Rule 33(a), FRCP. Therefore, if you serve a request for interrogatories with 23 questions and thereafter, serve a second request with five questions, you have exceeded the permissible amount by three. Thus, you need leave of Court to serve your second request. Rule 33(a), FRCP.

(i) Contention interrogatories are not objectionable—"An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated

[16] **CAVEAT when practicing in the Southern District of New York**: Local Civil Rule 33.3 is applicable only to the Southern District of New York. This SDNY rule limits interrogatories "to those seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature." Local Civ. R. 33.3(a). Thereafter, interrogatories seeking any other information may only be served if the information cannot be obtained by deposing a witness or serving a request for document production. Local Civ. R. 33.3(b). The Southern District allows contention interrogatories to be served 30 days prior to discovery cut-off as set forth in Initial Scheduling Order. Local Civ. R. 33.3(c).

discovery is complete, or until a pretrial conference or some other time." Rule 33(a)(2).

(ii) The party answering an interrogatory has 30 days in which to do so. Rule 33(b)(2).

(iii) Each question/interrogatory must "to the extent it is not objected to, be answered **separately and fully in writing under oath.**" Rule 33 (b)(3), FRCP (emphasis added). The person answering the interrogatory must sign it and, if there are any objections, it must also be signed by the attorney making them. Rule 33(b)(5), FRCP. Objections must be "stated with specificity" or they will be deemed waived. Rule 33(b)(4), FRCP.

(iv) The answering party has the option to produce or make available for copying business records as well as electronically stored information, if the answer to the interrogatory "may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records . . . ." Rule 33(d), FRCP.

3) **Requests for Production of Documents**

Rule 34, FRCP, allows a party to request documents described with "reasonable particularity" and/or access to property for purposes of inspection. A party "may specify the form or forms in which electronically stored information is to be produced (i.e., Word, .pdf, .jpeg, etc). Rule 34(b)(1)(C), FRCP. Documents, including electronically stored information, must be produced in response to such a request within 30 days. Documents can be produced "as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request. . . ." Rule 34(b)(2)(E)(i), FRCP.

A. Electronically Stored Information: A "request [for electronically stored information] may specify the form or forms in which electronically stored information is to be produced." Rule 34(b)(1)(C), FRCP. If the requesting party failed to specify the form in which to produce the electronically stored information, the responding party "must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms . . . ." Rule 34(b)(2)(E)(ii), FRCP. Moreover, the responding party "need not produce the same electronically stored information in more than one form." Rule 34(b)(2)(E)(iii), FRCP.

(i) If the responding party deems the source from which the electronic information is stored as being "not reasonably accessible because

of undue burden or cost", then the responding party need not produce it. Burden is upon the responding party to show that the electronic information is "not reasonably accessible because of undue burden or cost". Court may then shift the cost of production upon the party requesting such electronic information. Rule 26(b)(2), FRCP.

(ii) Destruction/Spoliation of Electronically Stored Information: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Rule 37(e), FRCP.

B. Discovery from Non-Parties:

(i) Non-parties can be subpoenaed, pursuant to Rule 45, FRCP, to produce documents.[17] If a discovery subpoena (not a trial subpoena) is issued, "then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party." Rule 45(a)(4), FRCP. Therefore, for any discovery subpoena to be valid, you must also provide your adversary with notice of the same by serving him or her with a copy prior to serving the non-party witness or entity. This prior notice is not true for trial subpoenas, which are made returnable to the courthouse and not to an attorney's office.

a. Subpoenas can be served anywhere within the United States. Rule 45(b)(2), FRCP. So long as the attorney is admitted to practice in the issuing court (court where action is pending, i.e., EDNY), the attorney may issue and sign the subpoena. Therefore, an attorney who is admitted in the EDNY can always issue a subpoena from the EDNY and make it returnable in a foreign district (i.e., California) to obtain documents that are located hundreds of miles away. Rule 45(a)(3) and Rule 45(b)(2), FRCP. It is important that the subpoena be returnable within the out-of-

[17] Rule 45 expressly requires that every subpoena include the full and unredacted "text of Rule 45(d) and (e)". Rule 45(a)(iv). Rule 45(d) and (e) essentially inform the person subject to the subpoena of his/her (i) duties in responding to the subpoena, such as how to produce documents and electronically stored information, (ii) protections that the person is entitled to, (iii) right not to have to personally appear if the subpoena is for the production of documents only, (iv) the right to move to quash the subpoena, (iv) rights if claiming that the subpoenaed information is privileged or protected. The court's website includes form subpoenas with the required language that must be included in every subpoena. See www.nyed.courts.gov under the "Forms and Instructions" tab. Once there, click on "National Forms" and scroll down to civil subpoenas.

state district to comply with the 100-mile radius rule. "A subpoena may command a person to attend a trial, hearing, or deposition only . . . within 100 miles of where the person resides, is employed, or regularly transacts business in person. . . ." Rule 45(c)(1)(A). However, if the person is "a party or a party's officer" that person can be compelled to attend anywhere "within the state where the person resides, is employed, or regularly transacts business in person. . . ." Rule 45(c)(1)(B)(i). Also, a "subpoena may command . . . 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…." Rule 45(c)(2). Thus, if a witness is located in California and action is pending in EDNY, an EDNY attorney can serve an EDNY issued subpoena on the witness located in California provided it specifies where within 100 miles of the witness' residence/business in California it is to be returnable.

b. Subpoenas may now command, in addition to testimony, "[a] command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises. . . . Rule 45(a)(1)(C), FRCP. The subpoena may specify the form in which to produce the electronically stored information. Rule 45(a)(1)(C), FRCP.
c. If commanded to produce documents or electronically stored information, you need not personally appear, unless so commanded in the subpoena. Rule 45(d)(2)(A), FRCP.
d. 14-days after service of a subpoena or before the time specified for compliance, whichever is earlier, a person commanded to produce documents, electronically stored information or allow a physical inspection may serve written objection on

the attorney for the commanding party. Rule 45(d)(2)(B), FRCP.

e. Responding party need not produce electronically stored information if "not reasonably accessible because of undue burden or cost." Rule 45(c)(1)(D), FRCP. Court order must then be obtained. *Id.*

f. If information, including electronically stored information, is produced and it turns out later to be privileged, the producing party may notify the receiving party of the privilege claim and the basis for it. "After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified . . . ." Rule 45(c)(2)(B), FRCP. The receiving party, if it wants to challenge the privilege claim, may "promptly present the information under seal to the court for the district where compliance is required [the foreign state, i.e., California] for a determination of the claim." *Id.* *See also*, Rule 26(b)(5)(B), FRCP and this section at Part VI(B)(b)(1)(ii)(b)(i), *supra*. *See also* footnote 15, *supra*, concerning Privilege Logs.

C. Uniform Definitions in Discovery Requests—*See* Local Civil Rule 26.3.

a. E-mails and documents stored electronically are discoverable.

b. Attorneys are expected to cooperate with each other in all phases of discovery. Local Civil Rule 26.4.

4) **Physical and Mental Examinations Under Rule 35**

Rule 35 goes hand in hand with Rule 26's requirement of expert disclosure. When an expert's report is exchanged, Rule 26 requires that the expert's qualifications be disclosed, a listing of all publications authored by the expert for the past 10 years, the expert's compensation, four years worth of cases that the expert has testified in either at trial or at

deposition. Rule 26(a)(2), FRCP. Expert disclosure is done through interrogatory responses. Experts may be deposed by the adverse party, provided the expert's reasonable fee is paid in advance.

With respect to physical and mental examinations, if you want to get a report of this examination, you must request it. Rule 35(b)(1), FRCP. "The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests." Rule 35(b)(2), FRCP. However, once the examiner's report has been delivered to you, the other party "may request—and is entitled to receive [from you] . . . reports of all earlier or later examinations of the same condition." Rule 35(b)(3), FRCP.

5) **Requests to Admit Under Rule 36**

The answering party has 30 days to respond. Can request an admission about "facts, the application of law to fact, or opinions about either; and . . . the genuineness of any described documents. Rule 36(a)(1)(A) and (B), FRCP.

VII. Motion Practice

a) **Local Civil Rules**: In the Eastern District, the attorneys for the parties must confer in good faith prior to commencing motion practice on discovery proceedings or any other non-dispositive pretrial dispute. Local Civil Rule 37.3(a). Telephone the Magistrate Judge (check first with the Magistrate's Individual Rules) if a dispute arises during a deposition. Local Civil Rule 37.3(b). If the dispute cannot be resolved or if the court cannot be reached by telephone for a ruling, the affected party can arrange for a teleconference with the court and all parties on line or the affected party can send the court a letter with copies to all parties, not exceeding three pages in length, and exhibits may be included. Local Civil Rule 37.3(c). Thereafter, opposing counsel, within 4 days of receiving such a letter, may respond in kind with a three page letter in opposition. *Id.* The Court may issue a letter ruling, by writing its decision in the margin of the letter motion. Local Civil Rule 37.3(e). In the Southern District, follow Local Civil Rule 37.2 and request "an informal conference with the Court by letter-motion for a pre-motion discovery conference . . . ." Thereafter, if the request for a pre-motion conference was denied or the dispute was not resolved at the conference, you may then make your discovery motion under Rules 26 through 37, FRCP. When making your discovery motion under Rules 26 through 37, FRCP, Local Civil Rule 5.1 requires that you "shall quote or attach only those portions of the depositions, interrogatories, requests for documents, requests for admissions . . . , together with the responses and objections thereto. . . ."

b) **Time Periods for Motion Service Under the Federal Rules**:

A motion served on 14 days notice (Rule 6(c), FRCP), plus 3 days for mailing (Rule 6(d), FRCP). Opposing affidavits are served no later than 7 days prior to hearing. Rule 6(c)(2), FRCP. See also Local Civil Rule 6.1(a),

c) **Select Local Rules: Time Periods for Motion Service**:

Local Civ. R. 5.2-- Service via electronic filing under PACER is proper service, but always check first with the assigned judge's individual rules.

Local Civ. R. 5.3-- Overnight Delivery is deemed service by mail; no service by fax unless agreed to by all parties or a court order to that effect—otherwise such service is considered void.

Local Civil Rule 6.1(a)-- On discovery motions pursuant to Rules 26 through 37, movant selects arbitrary return date. Then answering papers must be served within 7 days thereafter and reply papers 2 days after that.

Local Civil Rule 6.1(b)-- Dispositive Motions (i.e., summary judgment under Rule 56)[18], movant again selects an arbitrary return date. This time, however, you have until 14 days in which to serve answering papers in opposition. Reply papers, if any, are then served within 7 days after that.

Local Civil Rule 6.1(d)—No ex parte orders to show cause are permitted unless a good faith showing can be made why a notice of motion will not suffice.

Local Civil Rule 6.2: Orders on Motions—A signed memorandum decision or an oral decision on a motion shall constitute the order of the court, unless a settle order is directed.

The federal rules do not contemplate service of an order with notice of entry as in state practice. Therefore, appeals begin to rule from the entry date. *See* Rule 4(a)(1)(A), Rules of Appellate Procedure—"In a civil case . . . the notice of appeal . . . must be filed with the district clerk within **30 days after entry** of the judgment or order appealed from."(emphasis added).[19] Since the notice of appeal must now be filed electronically, the 30-day time period is stopped at that point. Beware—if you fail to check the docket on PACER, an adverse decision could have been entered without your even knowing about it and thus, your time in which to file an appeal could be jeopardized.

[18] Dispositive motions are any motions which can effectively dispose of a case. Hence, these motions are not just limited to Rule 56, FRCP, summary judgment motions. They can also include a motion to preclude an expert for failure to properly disclose, pursuant to Rule 26(a)(2), FRCP.

[19] With limited exceptions such as interlocutory appeals on an issue of qualified immunity, appeals are only from final orders (i.e., summary judgment dismissing an action) or from a judgment.

d) **Judge's Individual Rules**: Once a case is filed in the Clerk's office, it is immediately assigned to both a District Judge and a Magistrate Judge. Immediately obtain a copy of the Judge's rules from the court's website (i.e., www.nyed.uscourts.gov then go to "Our Judges" on the top of the screen and select "Individual Motion Practices and Rules"). Many judges require that before a motion is served, a briefing schedule is worked out with the parties either beforehand or at a conference before the Court. *See also*, Section V, *supra*.

e) **Examples of Various Types of Motions** (Always consult Local Rules and Judge's Individual Rules):

1) Rule 11 Motions: Make and serve motion, but allow 21 days after service before filing with court. This 21-day time period allows other party to withdraw or reconsider its position concerning the challenged issue.
2) Rule 56 Summary Judgment Motions. Make certain that a Local Civil Rule 56.1 Statement of undisputed facts is filed with your motion or it could be a ground for automatic dismissal. In opposition to summary judgment, make certain that a Local Civil Rule 56.1 Statement of contested facts is filed and that it tracks the movant's 56.1 Statement, paragraph by paragraph.
3) (a) Rule 12 Motions Generally: Motion made prior to responding to pleadings. If motion denied, you have 14 days to serve a responsive pleading. Rule 12(a)(4)(A), FRCP. These motions deal with "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficient process, (5) insufficient service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join [an indispensable party]." Rule 12(b), FRCP.

   (b) Motion for judgment on the pleadings: Self explanatory. If additional matters outside the pleading are allowed, then the motion is treated as one for summary judgment under Rule 56 (if that happens, do not omit a Local Civil Rule 56.1 Statement). Rule 12(d), FRCP. The same is true if a motion is made under Rule 12(b)(6) for failure to state a claim—it can also be treated as a Rule 56 summary judgment motion if matters outside the pleadings are presented. Rule 12(d), FRCP.

   (c) Rule 12(e) motion for more definite statement in the pleadings: Movant must point out the defects in the pleading. If motion granted and not complied with within 14 days, pleading may be stricken.

   (d) Rule 12 Motion to Strike—Motion made prior to responding to pleading or, if no response is permitted (i.e., an Answer), within 21 days after service of the objectionable pleading. Rule 12(f)(2), FRCP. This is a motion to strike from any pleading "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Rule 12(f), FRCP.

(i) **CAVEAT**: If you make a motion under Rule 12, you waive any claim that you may have for "lack of jurisdiction over the person, improper venue, insufficient process, or insufficient service of process, unless you include it as part of your motion. If you do not make a Rule 12 motion, you still waive the above defenses, unless you include it as a defense in your answer or amended answer. Rule 12(h)(1), FRCP.

(ii) Motion for failure to state a claim, failure to join an indispensable party or failure to state a legal defense to a claim can be raised at any time, whether by motion, in the pleadings or at the time of trial. Rule 12(h)(2), FRCP. *See also*, Section III(A)(e)(iii), *supra*.

(iii) Lack of subject matter jurisdiction (i.e., diversity) can be raised at any time. Rule 12(h)(3), FRCP.

4) Amended Pleadings under Rule 15. Party may amend as of right within 21 days after serving it, or, within 21 days after service of a responsive pleading (i.e., Answer) or a Rule 12(b) motion, whichever comes first. Other than that, to amend a pleading, must make a motion or get a signed stipulation from your adversary. "The court should freely give leave when justice so requires." Rule 15(a)(2), FRCP.

(i) Relation back doctrine: "An amendment to a pleading relates back to the date of the original pleading when . . ." statute so provides or if it "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading. . . ." Rule 15(c)(1)(B), FRCP. This is important if you name a "John Doe" as a defendant and thereafter, after the statute of limitations runs, you learn John Doe's true identity. It is also useful if you had named the wrong, but similar sounding corporate entity and thereafter, learned the name of the proper entity to be charged. You may change the name of the defendant and get the benefit of "relation back" if the new defendant had notice of the lawsuit, would not be prejudiced and "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule 15 (c)(1)(C), FRCP.

5) Discovery Motions Under Rule 37 and Local Civil Rules 37.1 and 37.3—If your adversary does not respond to your discovery requests or is evasive in his or her response to your requests (i.e., interrogatories, document production, requests to admit or fails to designate a Rule 30(b)(6) witness or a witness refuses to answer a question at a deposition), before you may seek sanctions, with two

exceptions, you must first move to compel under Rule 37, FRCP. The exceptions are if there is non-compliance with a Rule 16 Scheduling Order or failure to provide Rule 26(a) accelerated disclosure. In those two instances, you may, at the same time, move to compel and for an award of sanctions. For non-compliance with a Rule 16 Scheduling Order, Rule 16, FRCP, itself provides for sanctions and the award of attorney's fees. Rule 16(f), FRCP.

Before making any such Rule 37 motion, you must certify that you, in good faith, attempted to resolve these issues with your adversary in an attempt to avoid judicial intervention. Rule 37(a)(1), FRCP.

CAVEAT: The losing party on a Rule 37 motion to compel will be ordered to pay the prevailing party's attorney's fees in making/defending against the motion. Rule 37(a)(5)(A) and (B). "If the [Rule 37] motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must . . . require the party . . . whose conduct necessitated the motion . . . to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Rule 37(a)(5)(A). "If the motion is denied, the court . . . must . . . require the movant, the attorney filing the motion, or both to pay the party . . . who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees." Rule 37(a)(5)(B).

Once the court has ordered a discovery response by granting the Rule 37(a), FRCP, motion to compel and your adversary continues to fail to comply, then such "failure may be treated as contempt of court." Rule 37(b), FRCP. Rule 11 sanctions are not applicable to discovery motions, Rule 11(d), FRCP. Rule 37 provides for sanctions in discovery motions.

(i) Before making a discovery motion, Local Civil Rule 37.3(a) requires you to "attempt to confer in good faith in person or by telephone in an effort to resolve the dispute." Rule 37, FRCP, requires a certification that you attempted to confer in good faith with your adversary accompany your motion. Rule 37(a)(1), FRCP. Remember, Local Rule 37.3 is applicable only in the Eastern District (*See* Section VII(a)(Motion Practice), *supra*).

(ii) The court should be notified by telephone of any dispute that cannot be resolved during a deposition, and an oral ruling, on the record, will be made. Local Civil Rule 37.3(b).

(iii) If unable to resolve discovery dispute or if you cannot reach court by telephone during deposition, Local Civil Rule 37.3(c) allows you the option of doing one of the following:

A. arranging a teleconference with the court and all parties at a later date; or

B. write the court by letter not exceeding 3 pages in length. Adversary has 4 days to respond after receiving such letter with a letter in opposition which cannot exceed 3 pages in length.

Local Civil Rule 37.3(c). *See also*, Section VII, *supra*.

6) <u>Motions to Preclude Expert</u>

Depending upon the ultimate outcome of the case if an expert is precluded, such a motion could be deemed dispositive. Hence, the time to make such a motion should be within the time frame set for dispositive motions in the Initial Scheduling Conference.

Not only must a narrative report of your expert be provided, but also, a listing of publications that your expert has authored for the past 10 years, a listing of cases in which the expert testified (both deposition and trial) for the past 4 years, compensation paid for the study and testimony, and the qualifications of the witness. Rule 26(a)(2)(B), FRCP. Failure to adhere to this expert disclosure rule could result in the expert being precluded.

7) **<u>Motions for Reconsideration Under Local Civil Rule 6.3</u>**

You have 14 days from the date of entry to bring a notice of motion for reconsideration. Affidavits are not permitted with this motion. Only a notice of motion and accompanying memorandum of law which sets "forth concisely the matters or controlling decisions which counsel believes the court has overlooked." Local Civil Rule 6.3.

f) **Substitutes for Affidavits—28 U.S.C. §1746 and Local Civil Rule 1.9**: "a statement subscribed under penalty of perjury as prescribed in 28 U.S.C. §1746" is an acceptable substitute for an affidavit or verified statement. Local Civil Rule 1.9.

VIII. Joint Civil Pre-Trial Orders

At the initial Scheduling Conference, a date is usually set for the final pre-trial conference. Rule 16, Fed. R. Civ. Proc. Prior to that conference, many district court judges require that a joint civil pre-trial order be submitted in advance. Plaintiff has the burden of making the initial draft of this document. It is a good idea to circulate the same to your adversary by e-mail in Word format. Request that your adversary track any changes, additions and/or inclusions that

he or she may make to this document. Because this is a "joint" order, the parties must come to a meeting of the minds as to how this document should be drafted. Consult the judge's Individual Rules for each judge's specific requirements. Essentially, this joint civil pre-trial order lists counsel for each party, jurisdictional statement, all witnesses including experts, each party's contention, stipulations of uncontested fact, listing of exhibits and estimation of length of trial.

With respect to your listing of exhibits, it is always a good idea to include the pre-marked exhibits in an exhibit binder, a copy of which is furnished to the court.

IX. Electronic Case Filing

Effective August 2, 2004, electronic filing is mandatory in all civil cases filed in the Eastern District.

Electronic filing means that, once registered, you can file all documents in a civil action via the internet without having to leave your office.[20] You can also retrieve any document listed on the court's docket sheet via the internet (must register with PACER). In addition, by registering to file electronically, the Court will automatically notify you via e-mail of any activity (filings, entry of orders, etc.) on cases in which you are designated as the attorney of record. Finally, because electronic filing is mandatory, service upon your adversary can be via e-mail, because your adversary is also required to be registered. Therefore, upon filing your submission, PACER will automatically send an email with your pdf-formatted papers attached thereto to your adversary; hence, service of the same is complete upon court filing with PACER.

You must separately register with both the EDNY and the SDNY. Once registered, you will be issued a user name and password, which will be your electronic signature for Rule 11 purposes. Therefore, each attorney in your office must register. To file electronically, it is necessary that you have Adobe Acrobat Exchange software to convert your documents to a PDF format. Once the document has been converted, you can then download them to the court via the internet.

The EDNY has a 2 hour training program conducted once a month which will instruct you on how to up and down load documents electronically, including the initial filing documents (Complaint and Civil Cover Sheet). It will also review the procedure for filing of motions, whether it be piecemeal or fully briefed. Contact Ms. Cynthia Mann (631.712.6011) at the EDNY in Central Islip for a listing of dates for ECF training.

[20] Even though documents have been filed electronically, check the judge's individual rules. Some judges require a courtesy hard copy of the same also to be filed with chambers.