GUIDE FOR

LITIGANTS WITHOUT A LAWYER

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF WISCONSIN

This Guide has been edited for use by persons in civil litigation in the Western District of Wisconsin who are not represented by counsel. Use of the Guide is free of charge. The Guide is not intended for commercial purposes.

Table of Contents

GUIDE FOR PRO SE LITIGANTS FILING SUIT IN THE WESTERN DISTRICT OF WISCONSIN

INTRODUCTION

This guide is intended to help people who want, or need, to participate in a civil lawsuit in this court without having the help of a lawyer. It is **not** intended for use by people who want to defend themselves in a criminal case without a lawyer or by incarcerated persons who want to file a petition for a writ of habeas corpus.

This guide is not intended for companies or similar entities, because those types of organizations may appear in federal court only through licensed counsel. Rowland v. California Men's Colony, 506 U.S. 194, 201-02 (1993); Muzikowski v. Paramount Pictures Corp., 322 F.3d 918, 924 (7th Cir. 2003). If you are suing on behalf of a company, you will have to find a lawyer to represent you and your company.

As an individual thinking about representing yourself in a civil lawsuit, you will want to think carefully before you file such a suit. Lawsuits can be costly, time-consuming and stressful. Consider the following questions.

Are you sure you have been wronged?

Things are not always what they seem at first. Acts that appear to have been done on purpose may have been done unintentionally. For example, you may think you were fired unfairly because of your age until you find out that younger workers with similar jobs at your workplace were also let go. Better information may help you decide whether a lawsuit is advisable.

Can you work things out with the persons you think are responsible for your injury?

Consider talking directly to the people you think might be responsible for causing the problem. People may respond in a positive way if they are approached respectfully and given a real opportunity to talk. They are certain to be less likely to respond positively after being served with a formal complaint.

Could a governmental or private agency assist you in resolving your dispute?

Consider whether there are other processes you could use or agencies you could enlist to address your problem. Sometimes there is a governmental or private agency set up to deal with the problem you have or to lend assistance. Examples of such agencies include the Equal Employment Opportunity Commission (or an equivalent state or local agency) to address employment discrimination, the local police review board or office of citizens' complaint to hear complaints about police misconduct, a consumer protection agency or the local district attorney's office to investigate consumer fraud, and the Better Business Bureau or private professional associations (such as associations of contractors, accountants, securities dealers, architects and engineers, etc.) to hear business-related complaints. (Sometimes the law requires you to take your problem to one of these agencies before you may bring a lawsuit. For example, if you want to sue your employer for what you think is race discrimination, you would have to start by filing a complaint with the EEOC. If you are a prisoner who wants to sue about conditions at a prison or jail or for alleged violations of any federal law, you are required under the 1996 Prison Litigation Reform Act to exhaust all grievance procedures available to you first.)

Could you bring your dispute to the small claims court?

In some cases you may have the option of filing a case in small claims court, which is designed to be used directly by people who do not have formal training in the law. These courts are part of the Wisconsin state (not federal) court system.

Would mediation help you to reach a solution?

Dispute resolution services such as mediation or arbitration may be faster and less expensive than taking a case to court. Mediation encourages parties to communicate clearly and constructively to find common ground or to identify solutions that can serve the parties' real interests.

The point of this explanation is not to discourage you from using a court if you need to. You are entitled to seek relief from the court if your legal rights have been violated. Moreover, you should not delay too long before deciding whether to file a lawsuit. There are time limits that require you to bring a lawsuit within a certain amount of time. Nonetheless, you should consider all your options before going forward with a lawsuit.

If you decide that your injury is best remedied through a lawsuit, you should consider next whether you are prepared to prosecute your case on your own without the help of a lawyer. Chapter 1 of this guide provides information about how you might find a lawyer on your own and in what rare circumstances lawyers may be appointed by the court in civil cases. If you have tried to hire a lawyer and have not been able to do so, or if the court has denied your motion for appointed counsel, the information provided here

will help you through some of the procedures involved in participating in a civil lawsuit. To use this guide, look first at the table of contents located at the beginning of the guide. You can find specific topics covered in this handbook there.

Many terms used in this guide may seem unfamiliar, so please use the glossary at the end of this guide to look up explanations for words you do not understand. You can also look up unfamiliar words in a legal dictionary. One that is often used is *Black's Law Dictionary*, which can be found in most libraries. If you have access to the Internet, you might use one of the free Internet legal dictionaries. One such dictionary is available at http://dictionary.law.com.

This guide will help you understand the legal process, but it will not teach you about the law. For that, you will need to do your own research at a law library.

The staff of the clerk's office can also help you with court procedures, but they are forbidden by federal law from giving you any legal advice. For example, they cannot help you decide how to litigate your lawsuit, suggest legal strategies that may help you win your lawsuit, give you "inside information" about judges or other court personnel or interpret the law for you. If you have questions or need to know more about the law, you will have to research the answers yourself. **Do not call the judge or the judge's staff to ask for legal advice on how to pursue your case or to argue your position.**

Besides researching the law and gathering evidence in your case, you must also learn and obey detailed procedural rules that may seem confusing or overly particular,

although they are written to give all persons notice of the requirements and to insure that all litigants (persons bringing suit) are treated in the same manner. Those rules are important. Failing to follow them can affect your case. In some instances, a mistake may even cause you to lose your case. Litigation is difficult for the people involved. It is even more difficult for people who are trying to be their own lawyer. As you read this guide, remember that deciding to act without a lawyer is a major step, and that not presenting your arguments effectively can have a dramatic effect on your case and, in turn, your life. If you are able to obtain a lawyer on your own, you are well advised to do so.

This guide is only a summary of legal procedure. It does not try to cover all of the procedures that may apply to your case. You should not rely entirely on these materials. It is your responsibility to review the law that applies to any action you are taking in your lawsuit. If you have questions or want to know more about the law, it is up to you to find the answers you need. Representing yourself means that you are responsible for following the law. Not knowing the law will not excuse you from the requirements.

CHAPTER 1
HOW CAN I FIND A LAWYER?

Often, people filing lawsuits would prefer to have a lawyer help them with their lawsuits. Some organizations specialize in helping people in particular cases. The State Bar of Wisconsin may be able to help you through its Lawyer Referral and Information Service. When you call 1-800-362-9082, you can talk to a legal assistant who is experienced in analyzing potential legal problems and helping to locate the best source of help. If the assistant decides you really need to speak to a lawyer, he or she may be able to refer you to a lawyer who has indicated an interest in dealing with your type of legal situation. When you tell the lawyer that you were referred by the Lawyer Referral and Information Service, it will cost you no more than $20 for the first half-hour consultation. In some cases, you might receive an answer to your problem at the first meeting. If your problem requires work beyond the first half-hour, the lawyer will explain that to you and offer you an opportunity to hire him or her at the regular rates the lawyer charges.

If you have already filed your lawsuit and the court has allowed you to proceed with your case as an indigent litigant, that is, a person who cannot afford to prepay the full costs of filing a lawsuit, you may ask the court to appoint counsel for you under 28 U.S.C. § 1915(e). However, because there are not enough lawyers to appoint counsel in every case involving pro se litigants, the court grants these requests only rarely, and only when the record shows that the case is too complicated for the particular person's ability to prosecute it. Moreover, before you may ask the court to appoint a lawyer for you, you

must try to find a lawyer on your own. Ordinarily, the court will not consider a request for appointed counsel unless the person making the request files a statement listing the names and addresses of at least three lawyers the litigant has asked to represent him and who turned him down.

CHAPTER 2
HOW CAN I RESEARCH THE LAW ON MY OWN?

To bring a case in this court, you need to know the procedural law or "steps" of a lawsuit. You also need to know the "substantive law," that is, what your case is about. For example, your case may concern an employment issue, discrimination or social security benefits. Each of these subjects has a different set of laws.

Before you bring a lawsuit, you should look through the rules that explain the court's procedures. They can be found in several places.

First, you need to know the **Federal Rules of Civil Procedure**. These rules apply in every federal court in the country, including this court. These rules include information such as what you need to say in your complaint, the ways in which you might obtain evidence from the opposing party, and how to serve your complaint on the opposing party. You can review the rules in any law library or find them on the Internet at http://www.law.cornell.edu/rules/frcp/. The court does not have copies of the Federal Rules of Civil Procedure to distribute to litigants.

Second, you should consult the **Federal Rules of Evidence**. These rules tell you what types of evidence can be made part of the court record. Obviously, a case can turn dramatically on what information can and cannot be shown to the court, so you should learn these rules early in your case. You can review these rules in any law library or find them on the Internet at http://www.law.cornell.edu/rules/fre/. The court does not have copies of the Federal Rules of Evidence to distribute to litigants.

Third, this court has what are known as "Local Rules" that every person must know. The **Local Rules of the United States District Court for the Western District of Wisconsin** are in addition to the Federal Rules of Civil Procedure; and they apply **only to this court**. You can obtain a copy of these rules free of charge in three different ways: (a) If you have a computer, you can download a copy of the rules to your computer from this court's website, http://www.wiwd.uscourts.gov.; (b) you may pick up a copy by visiting the office of the clerk of the court during office hours; or (c) you may obtain a copy by mail by sending a written request to the Clerk of Court at P.O. Box 432, Madison, Wisconsin, 53701.

Fourth, each judge has rules or procedures it requires litigants in its court to follow. In the Western District of Wisconsin, the judges require the parties to follow special rules when filing motions for emergency injunctive relief or for summary judgment. The procedures relating to motions for summary judgment are sent to the parties as a matter of course early on in the lawsuit. The procedures relating to motions for emergency injunctive relief are provided to the parties only if such a motion is filed in the case. If you have a computer, you can find a copy of either of these rules on this court's website, http://www.wiwd.uscourts.gov.

NOTE WELL: THE RULES AND PROCEDURES ATTACHED TO THE END OF THIS GUIDE ARE CURRENT AS OF DECEMBER 1, 2009. IT IS UP TO YOU TO RESEARCH ANY CHANGES IN THE LAW AFTER THAT DATE.

In order to find the substantive law that applies to your lawsuit (for example, the law of employment discrimination or housing claims or social security benefits), you will have to visit a law library and read the statutes that apply to your case, which are set out in the United States Code (U.S.C.) and the regulations that apply, which are set out in the Code of Federal Regulations (C.F.R.). You may also want to read the decisions courts have made in other cases like yours. These may be found in the law library. You should seek help from a law librarian, who can show you where to find the specific law that you want.

CHAPTER 3
I WANT TO FILE A LAWSUIT, BUT WHERE DO I START?

Generally, the first official step in filing a lawsuit is to file a complaint with the court. The complaint is a legal document in which you tell the court and the defendant or defendants how and why you believe the defendant 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.

What information needs to be in a complaint?

The complaint must contain all of the following information:

- The name, address and telephone number of the plaintiff, and the names of all of the defendants. The plaintiff is you --- the person who files the complaint and who claims to be injured by a violation of the law. The defendants are the people you believe injured you in violation of the law. The plaintiff and the defendant together are referred to as "the parties" or "the litigants" to the lawsuit.

- A statement explaining why you believe *this* court has the power to decide this particular case (that is, why it has "subject matter jurisdiction" over your lawsuit). Congress decides what legal questions federal courts can decide. (For example, federal courts cannot decide whether you or your spouse should have custody of your children or hear other similar family law disputes.) You need to explain briefly what *federal law* you believe allows the court to decide this dispute.

- A statement explaining what you believe each defendant did to you that violated the law and how it injured you, for example, that you lost wages, lost benefits, etc.

- A statement explaining what you want the court to do. (For example, do you want the court to stop the defendant from repeating his conduct or do you want the court to require the defendant to pay you for your injuries or both?)

- The signatures of each of the plaintiffs.

Each of these items is explained in greater detail below.

What does a complaint look like?

You may obtain civil complaint forms from the clerk's office if you are suing about violations of your constitutional or civil rights. (In addition, the clerk's office has forms for use by persons who wish to file a petition for a writ of habeas corpus under 28 U.S.C. §§ 2241, 2254 and 2255.) You can also find these forms on the court's website, http://www.wiwd.uscourts.gov. If your lawsuit comes within one of these two categories, using the forms will probably make it easier for you to write your complaint.

You can also find form complaints for many other areas of the law in nearly any law library. The following books are examples of large multi-volume encyclopedias of the law that contain form complaints for many areas of the law:

West's Federal Forms;

Federal Procedural Forms, Lawyer's Edition; and

American Jurisprudence Pleading and Practice Forms.

Other books may contain additional helpful forms. Any law librarian can help you find these books or other books that may help you when you write your complaint.

Even if there is a form complaint, you may choose to write your own complaint. If you cannot find a form complaint that applies to your lawsuit, you **must** write your own complaint.

What is included in a complaint?

The first page of any document you file with the court is sometimes called 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. Basically, you name the plaintiff (you and any other persons bringing the suit) and the defendants (the persons you believe have injured you). The last page of this chapter shows what a typical caption page should look like. When you file your complaint, leave the case number blank. The clerk will assign a case number when you file the complaint and will stamp that number on the complaint.

After the caption, you can begin writing the text of your complaint. Rule 10(b) of the Federal Rules of Civil Procedure requires you to write your complaint using a specific format. Each paragraph must be numbered, and each paragraph must relate to only a single set of circumstances. Do not combine different ideas in a single paragraph. Rule 10(b) requires you to state each claim separately, as long as it helps make the complaint

easier to read. A claim is a statement in which you explain the specific way in which you think that the defendant violated the law.

Ordinarily, complaints begin with a paragraph explaining why you think this court has jurisdiction over your case, that is, what law allows a federal court to decide this case. In the next paragraph, you should explain why you think *this* federal court is the right one to hear your case rather than a court in another district or another state. The concepts of subject matter jurisdiction and venue will be explained below.

The next paragraphs of the complaint should identify the plaintiff and defendant(s).

After you have identified the plaintiff and defendant(s), you should explain in the next paragraphs what happened and how you were injured.

Next, you should explain how you believe the defendant's actions violated the law. If you know the specific law that you believe the defendant violated, you may state it. It may make it easier for the court and the defendant to understand your complaint if you explain the specific law that you think was violated. You are not required to name the specific law. If you believe the defendant violated the law, but are not sure which law was violated, you still may file a complaint.

The last part of the complaint should be a section entitled "Prayer for Relief." This is where you state what you want the court to do. For example, you can ask the court to order the defendant to pay you money or do something or stop doing something.

If you are not sure what is appropriate, you can also ask the court to award "all additional relief to which to the plaintiff is entitled."

At the very end of the complaint, the plaintiff must sign his or her name. **Note** that if there is more than one plaintiff, every plaintiff must sign the complaint.

Why do I have to include my name and address and telephone number in the complaint? Why do I have to sign the complaint?

Rule 10(a) of the Federal Rules of Civil Procedure requires the complaint to include the names of all of the parties to the lawsuit. Rule 11(a) of the Federal Rules of Civil Procedure requires that every document filed in the lawsuit be signed by the plaintiff if the plaintiff is not represented by a lawyer. Rule 11(a) also requires that every document filed with the court must state the address and telephone number of the person who signed it.

The purpose of including your address and telephone number is to insure that the court and the defendants have a way to contact you. If the court sends you mail and it is returned as undeliverable, the court may dismiss your case for your failure to prosecute it. Keep this in mind and remember that if your address or telephone number changes while your lawsuit is pending, you must notify the court and the defendants of that change.

Under Rule 11(b) of the Federal Rules of Civil Procedure, when you sign the complaint you are telling 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 have a good faith argument for extending or changing the 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 court later finds that one of these things was not true–for instance, that you filed the complaint to make life difficult for the defendant, or you had no evidence to support the facts you alleged in the complaint–the court can impose sanctions on you. Sanctions are penalties. The court might order you to pay a fine or to pay the defendant's attorney fees. It can also dismiss your complaint or impose any other sanction that it believes is necessary to prevent you or other persons like you from violating Rule 11 again. See Rule 11(c) of the Federal Rules of Civil Procedure for more information about sanctions.

NOTE: Given the risk of Rule 11 sanctions, it is very important that you investigate the facts and the law **before** you file your complaint.

What is subject matter jurisdiction?

The court system in the United States is made up of state courts and federal courts, which are completely separate from each other. State courts have the authority to hear almost any type of case, but Congress has authorized federal courts to hear only certain types of cases. If the law permits a federal court to hear a certain type of lawsuit,

the court is said to have subject matter jurisdiction over that type of lawsuit. This court, the United States District Court for the Western District of Wisconsin, is a federal court.

The two most common types of lawsuits that federal courts are authorized to hear are the following:

(1) Lawsuits in which the plaintiff's claims arise under the Constitution, laws, or treaties of the United States (see 28 U.S.C. § 1331 (the federal statute)). This is often referred to as "federal question jurisdiction."

(2) Lawsuits in which the plaintiff does not live in the same state as any of the defendants, and the amount in controversy (or dispute) is more than $75,000 (see 28 U.S.C. § 1332). This is often referred to as "diversity jurisdiction." "Amount in controversy" refers to the dollar value of what you want the court to do.

There are also other types of lawsuits that federal courts are authorized to hear. You can find more information in the United States Code beginning at 28 U.S.C. § 1330.

As a general rule, if a federal court does not have subject matter jurisdiction to hear your lawsuit, you will have to file your lawsuit in state court.

What is venue?

"Venue" means the place where the lawsuit is filed. The law does not allow you to file your lawsuit just anywhere in the United States. Generally, you must file your lawsuit in a district that is convenient for the defendant.

Although the rules on venue are somewhat complicated, it is generally appropriate to file your lawsuit in:

A district in which any of the defendants reside, if they all reside in the same state, or

A district in which the defendants did a substantial part of the things that you believe violated the law.

This court is in the Western District of Wisconsin, which includes all of the following counties: Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Douglas, Dunn, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, St. Croix, Sauk, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn and Wood.

The United States Code contains much more detailed information about venue beginning at 28 U.S.C. § 1391.

How much detail should I include in the complaint?

Rule 8(a) of the Federal Rules of Civil Procedure states that a complaint needs only "a short and plain statement of the claim showing that the pleader is entitled to relief." Therefore, you should include enough detail so that the court and the defendant can clearly understand what happened, how you were injured, who you believe was

responsible for your injury and why you believe you are entitled to a remedy from the court. You do not need to state every detail you can remember.

It is often easiest for the court and the defendants 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 about any claim that the defendant engaged in fraud than you would for other types of claims. The circumstances constituting fraud must be stated with "particularity," which means that 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.

If you have documents that you discuss in your complaint, you may attach copies of them to the complaint as exhibits. However, in the usual case, you should save exhibits or evidentiary materials until a party in the case files a motion requiring the submission of evidence, such as a motion for summary judgment.

What do I have to put in the complaint if I want a jury trial?

Under the law, not all lawsuits must be tried to a jury. If you want the trial of your lawsuit to be heard by a jury, it is a good idea to include a "demand for jury trial" in your complaint. To ask for a jury trial in your complaint, all you need to do is include a line at the end of the complaint that says, "Plaintiff demands a jury trial on all issues." If you do not tell the court and the defendants in writing that you want a jury trial within

14 days after filing the complaint, the court may decide later that you have given up any right you might have had to a jury trial. See Rule 38 of the Federal Rules of Civil Procedure for more information. If you give up your right to a jury trial, the judge will hear your case without a jury.

How quickly do I need to file a complaint?

Every claim has a time limit associated with it. This time period is referred to as the "statute of limitations." The statute of limitations is 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, the claim is considered to be too old to be the basis of 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 just another way of saying that it is too late. The statute of limitations has expired on such a claim.

The statute of limitations is different for every claim. The only way to find out the statute of limitations for a particular claim is to do research at a law library.

What do I do after I file the complaint?

After you file the complaint, you should wait to receive instructions from the court about the next step to take. You should not serve your complaint on the defendants unless the court tells you to do so. The requirements for serving the complaint are explained in Chapter 5 of this guide.

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. Rule 15(a) of the Federal Rules of Civil Procedure, says that a plaintiff may file an amended complaint without first getting permission from the court if the plaintiff does so no later than 21 days after the defendant files an answer or other responsive pleading. After this time, the plaintiff must get permission to file an amended complaint by filing a motion to amend along with the proposed amended complaint. If you must file a motion, you must explain in the motion why you need to amend the complaint. Keep in mind that an amended complaint is not a mere attachment to the original complaint. The amended complaint stands on its own. Therefore, you must be sure to include in the amended complaint all of the claims you still wish to pursue. If you do not do this, the court will ask you to revise the proposed amended complaint to make it a pleading that can stand on its own in place of the original complaint.

Anytime you file an amended complaint, the court will review it before it will accept it as your statement of the issues to be decided in the case. This review is necessary for a number of reasons.

First, the court always has an obligation under Rule 12(h)(3) of the Federal Rules of Civil Procedure to determine whether it has subject matter jurisdiction over the issues raised in a pleading. If it does not, it must dismiss the complaint immediately on its own motion. In addition, district courts are permitted to deny a plaintiff leave to amend if

the proposed amendment does not cure fatal flaws in the original pleading or if the amended complaint could not survive a motion to dismiss.

Second, if you are filing a complaint as a prisoner or a person who is proceeding under the *in forma pauperis* statute, the court is required under 28 U.S.C. §§ 1915(e)(2) and 1915A to screen the allegations and dismiss any claim that is "legally frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief."

In an effort to make it more efficient for the court and the defendant to understand what changes you are making to the original complaint, and to insure that you have filed an amended complaint that is a suitable substitute for the original complaint, you must put your amended complaint in a special format. It should look just like the original except that:

The caption of the amended complaint should say: "FIRST AMENDED COMPLAINT." If you amend the complaint a second time, the caption should say: "SECOND AMENDED COMPLAINT."

You should point out additions to the original complaint by underlining or highlighting the names of any new defendants in the caption of the amended complaint and all of the new or modified facts you are alleging in the body of the complaint or in the request for relief.

If you want to delete certain allegations from the original complaint, you should draw a line through those allegations in the proposed amended complaint.

If you do these things, the court will be able to review the changes quickly and determine more readily whether the amended complaint should become the working pleading in the case.

Example of a caption page

Below is an example of a caption page for a complaint where the plaintiff is Jane Jones, the defendants are John Smith and Smith Construction Company, and the plaintiff is asking for a jury trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JANE JONES,	)	
Plaintiff,	)	Case No. _____
vs.	)	COMPLAINT
JOHN SMITH and SMITH CONSTRUCTION CO.,	)	DEMAND FOR JURY TRIAL
Defendants.	)	

1. **Jurisdiction.** This court has jurisdiction over this complaint because the case arises under the laws of the United States.

2. **Venue.** Venue is appropriate in this court because both of the defendants reside in this district and a substantial amount of the acts and omissions giving rise to this lawsuit occurred in this district.

3. Plaintiff Jane Jones is a construction worker residing in Eau Claire, Wisconsin, who was employed by defendant Smith Construction Co. from January 7, 2006 until March 12, 2008.

4. Defendant John Smith is the president of defendant Smith Construction Co.

5. Defendant Smith Construction Co. is a home manufacturing company organized under the laws of the State of Wisconsin with its principal place of business in Eau Claire, Wisconsin.

CHAPTER 4
HOW DO I FILE PAPERS WITH THE COURT?

To start a lawsuit in federal court, you must file your complaint with the court. This chapter describes how you file documents with the court, including your complaint. The next chapter explains how to serve papers other parties to your lawsuit with copies of papers that you submit to this court.

Although the rules about filing and serving may seem difficult, they exist for very good reasons. The court's rules about filing insure that the court receives the papers you want it to receive and that your papers will not be lost. In every lawsuit, the court must keep track of everything that the parties want the judge to receive. Filing your papers with the clerk allows the judges to be sure that they have all the papers and it allows you a way to check and make sure that the judges actually have your papers to read.

Following the filing rules is important, because most of what happens in your case will be based on the papers that you file. All of your communications with the court will be in writing, except when the judge has a hearing in your lawsuit. (A hearing is a formal meeting that occurs in the courtroom at a date and a time agreed to by the judge.) You may talk to the judge at the hearing to explain the position that you wrote about in your papers to the court. Because most of your contact with the court is based on what you write and file, pay close attention to the filing rules.

Do I need a caption page?

Every document you file must begin with a caption page. As discussed earlier in Chapter 3, a caption page is a cover page that includes: (1) the names of the parties; and (2) the name of this court, the name of the case, the case number, and a title describing the document. You may wish to look at captions filed in other cases to get a sense of what the caption should look like. (One sample caption can be found at the end of Chapter 3.)

How do I file documents?

You can file documents in three different ways:

- You can bring the documents to the clerk's office to file them in person;
- You can mail the documents to the court for filing; or
- You can file your documents electronically.

Each of these methods is explained in detail below.

Whichever method you use, certain rules apply in every case. You need to file all documents in the clerk's office of the correct courthouse. The address for the Western District of Wisconsin courthouse is 120 N. Henry St., Madison, Wisconsin, 53703.

You do not need to file multiple copies of your documents. In this court, you must give the clerk the original copy of the documents (that is, the documents that you

actually signed). Be sure to keep an extra copy of every document you file for your own records.

The original document that you give the court will be scanned electronically into a permanent electronic file for your lawsuit. Filing means that the document is kept by the court and becomes one of the documents that are formally available to be used by the parties and the judge. Documents that are not accepted for filing may not be sent to the judge or considered by the judge.

With every document you file, you should also file a "certificate of service" or mark clearly on the document you give the court that you gave a copy of the document to all of the other persons (including organizations) who are named as parties to the lawsuit or, if those parties are represented by a lawyer, to the lawyer. The methods for serving documents on other parties must be strictly followed. They are described elsewhere in this guide. If it is not clear to the court from your submission that you served your documents on the opposing parties as you are required to do, the clerk will not refuse to file your documents. However, the judge may decide not to give any consideration to the document. For this reason, you should be sure to follow all of the rules for serving documents and include confirmation with your submissions that you have served a copy of the submission on the opposing party.

Filing in Person During Normal Business Hours

The clerk's office is open from 8:00 a.m. to 4:30 p.m., Monday through Friday, except for federal holidays. The clerk's office is located on the third floor at 120 N.

Henry St. in Madison, Wisconsin. To file documents in person, bring the completed documents to the clerk's office during business hours.

When the document is filed, clerk's office personnel will stamp the document with the date you filed the document. If you want to have a stamped copy for your own files, you must bring another copy for the clerk to stamp. The clerk will stamp that copy and hand it back to you.

Filing in Person After Hours

If you want to file your documents in person but are unable to go to the clerk's office between 8:00 a.m. and 4:30 p.m., the clerk's office will accept submissions left with the security officer in the court's lobby. The security officer will place a note on the submission showing the date and time you gave the officer your papers for filing.

If you would like a file-stamped copy of each document you leave with a court security officer, you must provide an extra copy of each document. If you would like the clerk's office to mail the file-stamped copies back to you, you also must include an appropriately sized self-addressed stamped envelope with adequate return postage. If you do not mind coming back to the courthouse to pick up your file-stamped copies, you may mark your return envelope "FOR MESSENGER PICKUP BY: (NAME)." Your copies will be available for pick-up at the clerk's office on the next business day following the date you left your submissions at the court.

If you want to file a *formal complaint* after normal business hours, you must include with your complaint a check or money order for the amount of the applicable filing fee or an application to proceed *in forma pauperis*, which means you cannot afford to prepay the filing fee and want the court to waive that requirement. (More on proceeding *in forma pauperis* is discussed below in this chapter.) If you are paying the filing fee, the check or money order should be made payable to "Clerk, United States District Court." Do not pay with cash.

Filing by Mail

You can also file documents by mailing them to the court. The mailing address for this court is: Clerk's Office, United States District Court for the Western District of Wisconsin, P.O. Box 433, Madison, WI, 53701.

If you would like a copy of your submission with a date stamp showing when it was filed, you must provide an extra copy of your submission. If you want the clerk's office to mail the file-stamped copies back to you, you also must enclose an appropriately sized self-addressed stamped envelope with adequate return postage.

Filing Electronically

If you have regular access to a computer and the Internet, you may ask the clerk of court for permission to file documents electronically. If permission is granted, the clerk will provide you a user name and password that allows you instant access to your case file 24 hours a day, seven days a week. With electronic filing, filings are served on both parties by email (assuming the opposing party has agreed to receive documents

electronically), your documents are stored securely in electronic format and you have the ability to file documents outside normal business hours. Permission to utilize the court's electronic filing system may be withdrawn for cause. Additional information about electronic filing may be found on the court's website at www.wiwd.uscourts.gov at the button titled "CM/ECF."

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

The fee for filing a complaint is $350.00. After the initial complaint is filed, you do not have to pay any additional fees to file most documents with the court.

The following chart shows some of the fees that a party must pay for filing certain types of documents. These fees are set by the United States Congress and the Judicial Conference of the United States.

The Clerk's Office can accept payment only by exact change, check or money order made payable to "Clerk, U.S. District Court."

DISTRICT COURT FEE SCHEDULE

(28 USC §1914)

(Effective April 9, 2006)

Following are fees to be charged for services performed by clerks of the district courts. No fees are to be charged for services rendered on behalf of the United States, with the exception of those specifically prescribed in items 5, 6, and 15. No fees under this schedule shall be charged to federal agencies or programs which are funded from judiciary appropriations, including, but not limited to, agencies, organizations, and individuals providing services authorized by the Criminal Justice Act, 18 U.S.C. §3006A, and Bankruptcy Administrator programs.

1. Fees for any civil action, suit or proceeding whether by original process, removal or otherwise (also under this fee are Writs of Mandamus and Motions to Quash Administrative Subpoena) $350.00
   [A miscellaneous fee of $4,180 (in addition to the filing fee for a civil action) for cases under the Cuban Liberty and Democratic Solidarity Act (LIBERTAD); effective 2/1/97]

2. Fee for filing a Habeas Petition ..... $ 5.00

3. Fee for filing or indexing any paper not in a case or proceeding for which a case filing fee has been paid. This fee is applicable to the filing of a petition to perpetuate testimony, Rule 27(a), Federal Rules of Civil Procedure, the filing of papers by trustees under 28 U.S.C. §754, the filing of letters rogatory or letters of request, and registering of a judgment from another district pursuant to 28 U.S.C. §1963; foreign deposition subpoena ..... $ 39.00

4. Fee for certifying of any document or paper whether the certification is made directly on the document, or by separate instrument ..... $ 9.00

5. Fee for exemplification of any document or paper ..... $ 18.00

6. Fee for transcript of judgment or every search of the records of the district court conducted by the clerk of the district court per name or item searched. This fee shall apply to services rendered on behalf of the United States if the information requested is available through electronic access (see Search Fee Guideline, District Court Fee Schedule) ..... $ 26.00

7. Fee for reproducing any record or paper (fee charged per page). This fee shall apply to paper copies made from either: (1) original documents; or (2) microfiche or microfilm reproductions of the original record. This fee shall apply to services rendered on behalf of the United States if the record or paper requested is available through electronic access ..... $ .50

8. Fee for retrieval of a record from a Federal Records Center, National Archives or other storage location $45.00

9. Fee for docketing an appeal to the Seventh Circuit Court of Appeals (includes $5.00 District filing fee) $455.00

10. Fee for an appeal to a district court judge from judgment of conviction by a magistrate judge in a misdemeanor case ..... $ 32.00

11. Fee for each microfiche sheet of film or microfilm jacket copy of any court record ..... $ 5.00

12. Fee for reproduction of magnetic tape recording, either cassette or reel-to-reel, including the cost of materials ..... $ 26.00

13. Fee for a check paid into the court which is returned for lack of funds ..... $ 45.00

14. Fee for Admission of Attorneys to practice, $150 each, including a certificate of admission ..... $ 150.00

15. Fee for duplicate certificate of admission or for certificate of good standing ..... $ 15.00

16. Fee for usage of electronic access to court data (provided the court may, for good cause, exempt persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information). This fee shall apply to the United States. ..... $.60 per minute

17. Fee for public users obtaining information through a federal judiciary internet site ..... $ .08 per page

What is a court transcript and how much does it cost?

Most, but not all, court hearings are recorded by a court stenographer (also known as a court reporter) who types everything that is said in court as it is being said, or by a tape recorder operated by a deputy clerk. To find out whether a court proceeding was reported or recorded, you should look at the docket entry of the hearing. Docket information is available on-line from PACER or by calling the clerk's office. (See Chapter 8 of this guide for more details on accessing docket information and the PACER system.) Immediately after the docket entry "MINUTES," you will see another entry such as: "(C/R: John Smith)." In this example, John Smith would have been the court reporter. If "None" is listed, the proceeding was not taken down by a court reporter and so no transcript is available. If the proceeding was tape recorded by a deputy clerk, the entry after "MINUTES" will be a tape recording number.

If a reporter's name is listed, you may obtain a transcript by contacting that court reporter directly. The telephone number for this court's court reporters is (608) 255-3821. The court reporter's address is 120 N. Henry St., Madison, WI, 53703. If the docket entry indicates that a tape recording of the proceeding was made, you may obtain a copy by contacting the clerk's office. As noted above, the fee for obtaining a copy of the tape recording is $26.

As for typed transcripts of proceedings recorded by a court reporter, the faster you want to see the transcript, the more it will cost. There are many different types of transcription.

The fastest is real-time transcription. Real-time transcripts are available immediately; they are draft, uncorrected transcripts produced by a certified real-time reporter. Real-time transcripts can be delivered electronically during the proceedings, so you can actually see the transcript being written as the court reporter types it into his or her computer, or it can be delivered immediately after court adjourns.

The next fastest type of transcription is hourly, which can be delivered within two hours.

Then there's daily transcription, where the transcript will be delivered to you after the court adjourns on that day, but before the next normal opening hour of court.

Expedited transcripts will be delivered within 7 calendar days after the reporter receives your request.

Fourteen-Day Transcripts, as their name suggests, will be delivered within 14 calendar days after receipt of an order.

Finally, ordinary transcripts are delivered within 30 calendar days after the reporter receives your request.

The following is the fee schedule for court reporter transcripts. These rates apply to **each page** of the transcript:

	Original per page	1st Copy to Each Party per page	Each Addit'l Copy to Same Party per page
Ordinary Rate	$3.65	$.90	$.60
14-Day Rate	$4.25	$.90	$.60
Expedited Rate	$4.85	$.90	$.60
Daily Rate	$6.05	$1.20	$.90
Hourly Rate	$7.25	$1.20	$.90
Real-Time	$3.05	$1.20	

What if I can't afford the $350 fee for filing a new complaint?

If you cannot afford the $350 filing fee, you must file an application to proceed *in forma pauperis*. *In forma pauperis* is a Latin phrase that means "as an indigent person," that is, as a person who cannot afford to prepay the filing fee. 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. If you have obtained complaint forms from the court, the application for *in forma pauperis* status is included with the form. If you do not have the form, you can get it either from the clerk's office or the court's website, http://www.wiwd.uscourts.gov at the link marked "Forms" and then the link titled "Petition and Affidavit for Leave to Proceed In Forma Pauperis."

There are special rules that apply to **prisoners** and **other institutionalized persons** such as civilly committed patients under Wis. Stat. Chapter 980 who want to proceed *in forma pauperis*. In addition to filing an application for *in forma pauperis* status on the form described immediately above, a prisoner or civilly committed patient must

give the court a certified copy of his institution trust fund account statement for the six-month period immediately preceding the date he sends his complaint to the court.

When you file an application to proceed *in forma pauperis* with your complaint, the complaint and application will be assigned to a particular judge. That judge will decide whether you should be allowed to proceed with your complaint without prepaying the filing fee or whether you have the means to prepay a portion of the fee and, if so, in what amount. The judge will try to make a decision on your application as quickly as possible. As a general rule, you will be notified of the judge's decision by mail within a couple of weeks of the date you submit your complaint for filing.

When the judge reviews your application, he or she will look first to see whether you have shown that you cannot afford to prepay the $350 fee. If the judge concludes that you can afford to prepay the filing fee or a portion of it, a deadline will be set within which you must make the payment. If you do not make the payment within the specified time, the judge will dismiss your case.

Even if the court determines that you cannot afford to prepay any portion of the filing fee, or determines that you have prepaid the amount it ordered you to prepay, the judge must review or screen your complaint and dismiss it if your complaint (1) is frivolous or malicious (that is, its only purpose is to harass the other side); (2) fails to state a proper legal claim (that is, a claim on which relief may be granted); or (3) seeks money from a defendant who is legally not required to pay money damages. These requirements are laid out in the federal statute, 28 U.S.C. § 1915(e)(2).

Even if the judge grants your request for leave to proceed *in forma pauperis,* the only fee that you will be excused from **prepaying** is the initial $350 filing fee. You will **still** have to pay all other applicable fees listed above. In addition, if you are a prisoner, you will have to pay in monthly installments whatever portion of the $350 fee remains after you have paid any amount assessed as an initial partial payment. The Prison Litigation Reform Act allows courts to collect from a prisoner's inmate account 20% of his or her previous month's income until the fee is paid in full. This requirement is set out in 28 U.S.C. § 1915(b)(2).

CHAPTER 5
WHAT ARE THE RULES FOR SERVING A COMPLAINT OR OTHER DOCUMENTS ON THE DEFENDANTS IN A LAWSUIT?

The rules for serving your original complaint on the defendants are different from the rules for serving the defendants with documents you file later in the lawsuit. (The rules for serving documents you file with the court after the complaint has been served is discussed at the end of this chapter). If the complaint is not properly served on the other parties, the case will not proceed. However, every pro se complaint that is filed in this court is reviewed by the judge to insure that it is one over which the court may exercise its jurisdiction. If jurisdiction is lacking, your complaint will be dismissed immediately on the court's own motion. For this reason, **you should not serve your complaint on the opposing party or parties unless and until the court asks you to do so.** If the court directs you to serve your complaint, this chapter explains what you must do.

What are the rules for serving the complaint?

Rule 4 of the Federal Rules of Civil Procedure sets out the rules for serving the original complaint. Serving a complaint is often called "service of process." The rules for serving a complaint can be very complicated, but they must be followed carefully. Until the complaint is served, nothing else will happen in the lawsuit.

In order to serve the original complaint, you must get a summons from the court. You can get a summons form from the clerk's office or at the court's website at http://www.wiwd.uscourts.gov. Usually, you need one summons listing all of the

defendants for the court and a separate summons for each defendant named in your lawsuit.

Rule 4 of the Federal Rules of Civil Procedure describes the different ways to serve a complaint. The basic parts of the rule are explained here, but you should read Rule 4 for yourself to see the complete rules that apply.

What if I filed *in forma pauperis*?

As discussed in the previous chapter, filing or proceeding *in forma pauperis* means filing or proceeding as one who cannot afford to prepay the court fees, which includes the fee for serving your complaint on the defendants. If the court approves your application to proceed *in forma pauperis*, the court will issue the summonses and forward them to the United States Marshal. The United States Marshal will then serve the summonses on the defendants.

If you are suing employees of the Wisconsin Department of Corrections, including prison officials at a Wisconsin state prison, the court will arrange for service of your complaint on the defendants in the manner described in a Memorandum of Understanding between the Wisconsin Department of Justice and the Western District of Wisconsin. The Memorandum provides that:

The court will notify the Department of Justice by electronic notice of any order granting a plaintiff leave to proceed *in forma pauperis* in a civil action or a habeas corpus action.

The electronic notice will include a link to the court's order and the petition or complaint that the lawyers in the Department of Justice will be able to see.

The Department will ask the named defendants to give the Department authority to accept service of process on their behalf.

Within 15 days of the date of the electronic notice, the Department will inform the court of the names of those defendants on whose behalf the Department will accept service of process and the names of any defendant on whose behalf the Department cannot accept service of process (usually, this is because the defendant no longer works for the Department).

All defendants agreeing to service in this manner will have 40 calendar days from the date of the electronic notice to answer or otherwise plead to a civil complaint. (A shorter response deadline for a habeas corpus petition is included in the order allowing the petition to proceed.)

For any defendant who cannot be served in this manner, the court will arrange for issuance of a summons and forward it with a copy of the complaint to the United States Marshal, who will then serve that defendant.

How do I get summonses if I'm not proceeding *in forma pauperis*?

When you have paid the filing fee, the clerk of court will forward your complaint to the judge to decide whether the court has jurisdiction to consider the matters raised in your complaint. If the judge concludes that your complaint is not one that can be heard

in federal court, the judge will enter an order dismissing your complaint. If the judge concludes that your complaint is properly filed in federal court, he or she will issue an order explaining what you must do to serve your complaint on the defendants. Summons forms will be sent to you with that order.

What do I need to serve with the complaint?

You must serve the complaint and the summons together. The only exception is if you request and get what is called a "waiver of service," which is explained below.

How do I get the defendant to waive formal service?

If the defendant waives service, it means that he or she agrees to give up the right to insist on formal service by hand, and to accept instead 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" or find someone else who is at least 18 years old and not a party to the lawsuit to serve the summons and complaint for you. You will still have to be able to prove that the defendant actually got the complaint and required documents, so you want the defendant to sign and send back to you a form saying that he waived formal service and got a copy of the documents in the mail. That form is called a "waiver of service."

Under Rule 4(d) of the Federal Rules of Civil Procedure, you can ask for a waiver of service from any defendant who is not:

1. A minor or incompetent person in the United States; or

2. The United States government, its agencies, corporations, officers or employees; or

3. A foreign, state, or local government.

Rule 4(d) of the Federal Rules of Civil Procedure also sets forth the requirements for requesting a waiver of service. This court provides a form for requesting waiver of service and a form for waiver of service that comply with the requirements of Rule 4(d). You may obtain a copy of the forms in the clerk's office or at this court's website, http://www.wiwd.uscourts.gov.

You should send the forms to the defendant by first-class mail or other reliable means, along with a copy of the complaint, plus an extra copy of the request to waive service and a self-addressed envelope with sufficient postage to return the waiver of service to you. 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 the defendant returns a signed waiver of service to you, you do not need to do anything else to serve that defendant. Just file the defendant's signed waiver of service with the court. Be sure to save a copy for your own files.

What if I mailed a waiver form and the defendant doesn't sign it and send it back?

If the defendant does not return the waiver of service to you, you must arrange to serve that defendant in one of the other ways explained in Rule 4 of the Federal Rules of Civil Procedure. However, if the defendant does not return the waiver of service to you and both you and the defendant are located in the United States, you may ask the court to order the defendant to pay you all your costs to serve the defendant another way.

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

In general, how do I serve individuals?

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

1. Hand deliver the summons and complaint to the defendant;

2. Hand deliver the summons and complaint to the defendant's home and leave both with another responsible person who lives there;

3. Hand deliver the summons and complaint to an agent authorized by the defendant or by law to receive service of process for the defendant; or

4. Serve the summons and complaint by any other method provided for by the law of the State of Wisconsin or the state where the defendant is served. Wisconsin law on service of process can be found in the Wisconsin Statutes at § 801.11.

How do I serve individuals in foreign countries?

Rule 4(f) of the Federal Rules of Civil Procedure provides for several ways to serve an individual in a foreign country. Rule 4(g) provides that only a few of those methods may be used to serve a minor or incompetent person outside the United States. Please review Rules 4(f) and 4(g) carefully before attempting to serve a defendant outside the United States.

How do I serve minors or incompetent persons?

Rule 4(g) of the Federal Rules of Civil Procedure provides that service on a minor or incompetent person in the United States must be made according to the law of the state where the minor or incompetent person is served. Wisconsin law for service of process on minors and incompetent persons can be found at § 801.11(2) of the Wisconsin Statutes.

How do I serve a business?

Rule 4(h) of the Federal Rules of Civil Procedure lists several methods for serving the complaint and summons on a corporation, partnership, or other unincorporated association.

If you serve a business in the United States:

1. You may serve the complaint and summons according to the laws of the State of Wisconsin or the state in which the business is served. Wisconsin law on serving corporations, partnerships, and unincorporated associations can be found at Wis. Stat. §§ 801.11(5) and (6).

2. Alternatively, you may serve the complaint and summons by:

Hand delivering both documents 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 them 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 serve a business outside the United States, you may use any method described in Rule 4(f) except personal delivery.

How do I serve the United States, its agencies, corporations, officers, or employees?

The rules for serving the complaint and summons on the United States government or its agencies, corporations, officers, or employees are set out in Rule 4(i) of the Federal Rules of Civil Procedure.

To serve the complaint and summons on the United States, you must:

- Hand deliver the complaint and summons to the United States Attorney for the Western District of Wisconsin, or
- Hand deliver the complaint and summons to an assistant United States Attorney or clerical employee designated by the United States Attorney in a writing filed with the clerk of the court, 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 Western District of Wisconsin.

In addition you must:

- 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 the validity of 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 serve the summons and complaint on an agency or corporation of the United States, or an officer or employee of the United States you are suing only as an official, you must

- serve the United States 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 serve the summons and complaint 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

- serve the United States 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 foreign country?

To serve the summons and complaint on a foreign country, or a political subdivision, agency, or instrumentality of a foreign country, you must follow the procedure stated in the federal statute 28 U.S.C. § 1608.

How do I serve a state or local government?

The rule covering service of a complaint on a state or local government is explained in Rule 4(j)(2) of the Federal Rules of Civil Procedure. The rule provides that you must:

- Hand deliver a copy of the summons and complaint to the chief executive officer of the government entity you wish to serve; or

- Serve the summons and complaint according to the law of the state in which the state or local government is located. Wisconsin law governing service on a state or local government can be found at Wis. Stat. §§ 801.11 (3) and (4).

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

Rule 4(m) of the Federal Rules of Civil Procedure requires you to either obtain a waiver of service or serve each defendant within 120 days after the complaint is filed, although the judges of the Western District of Wisconsin expect that the plaintiff will make efforts to serve the defendants promptly so that the case can move forward well before 120 days has elapsed. If you do not meet the 120-day deadline, and you do not show the court that you had a good reason for not serving a defendant within that time, the court may dismiss all claims against any defendant who was not served. The court must dismiss those claims without prejudice, which means that you can file another complaint later in which you assert the same claims that were dismissed. If you file a new complaint, you will have another 120 days to try to serve the complaint and summons.

There is no time limit for completing service of the complaint and summons in a foreign country.

What is a certificate of service?

After you complete service of the complaint and summons, you should file a "certificate of service" (or a "proof of service") with the court that shows when and how you served the complaint and summons on each defendant. The purpose of the

certificate of service is to allow the court to determine whether service of the documents was actually accomplished in accordance with the requirements of the law. The certificate 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 name and street address of each person served; and

5. The documents that were served.

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

After the complaint has been served on the defendants, how do I serve other documents?

Fortunately, once you serve the complaint it usually becomes easier to serve other documents. 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 decides

not to get 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:

1. Handing it to the person; or

2. 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; or

3. 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; or

4. Mailing a copy to the person's last known address; or

5. If the person you want to serve has no known address, you may leave a copy with the clerk of the court; or

6. If the person has consented in writing to electronic service, sending it by electronic means; or

7. You may deliver a copy by any other method that the person you are serving has consented to in writing.

For all the documents you serve on other parties, you need a certificate of service like the one you needed for the complaint.

CHAPTER 6
AFTER THE COMPLAINT HAS BEEN SERVED ON THE DEFENDANT, WHAT HAPPENS NEXT?

Filing and serving the complaint starts a case with the court. At that time, a judge is assigned to the new case. From then on, papers filed go to that judge. There are two kinds of judges at the district court: district judges and magistrate judges. District judges are appointed under the Constitution by the President of the United States and confirmed by the U.S. Senate. They are appointed for life and cannot be removed unless impeached. Magistrate judges are appointed under federal statute by the district court. They are selected by the district judges to serve eight-year terms subject to renewal.

My case has been assigned to a magistrate judge – what does that mean?

It is possible that your case will be assigned or referred to a magistrate judge. If the case is assigned to a magistrate judge when it is filed, you will be asked whether you consent to have the magistrate judge handle the entire case. This decision is up to you and the other parties; you may accept a magistrate judge, or decline to accept a magistrate judge. If all parties consent, that magistrate judge will be the judge for the entire case, including trial, and will have the same powers as a district judge. If any party refuses to consent, the case will be reassigned to a district judge.

It is also possible that a part of the case–such as a motion regarding a discovery dispute–will be referred by a district judge to a magistrate judge (motions and discovery are discussed in later chapters). In that event, the magistrate judge will rule on the referred matter. Unlike the situation when a magistrate judge is assigned for the entire

case, however, when your case is "referred" to a magistrate judge, your consent is not required for the magistrate judge to rule on a referred matter. But the magistrate judge's ruling may be appealed to the district judge. See Chapter 16.

What's next after the complaint is served?

After the defendant has been served with the complaint, he or she must file a written response to the complaint. The written response must eventually be an "answer," but before filing the answer, the defendant has an opportunity to file a motion to dismiss the complaint, a motion for a more definite statement, or a motion to strike parts of the complaint.

When the defendant files an answer, he or she can also file a counterclaim, which is a complaint against the plaintiff.

If the defendant does not file an answer in the proper amount of time, you may file a motion for a default judgment against the defendant. If the court grants your motion for default judgment, you have won the case.

This chapter will briefly discuss all of these procedures.

How much time does a defendant have to respond to the complaint?

After a defendant is served with the complaint, he or she has a limited amount of time to file a written response to the complaint. The amount of time the defendant has to file a response to the complaint depends on who the defendant is and how he or she was served.

Rule 12(a)(1) of the Federal Rules of Civil Procedure states that unless a different time is specified in a United States statute, most defendants must file a written response to the complaint within 21 days after being served with the summons and complaint.

According to Rule 4(d)(3) and Rule 12(a)(1)(B) of the Federal Rules of Civil Procedure, if the defendant returned a signed waiver of service within the amount of time specified in the plaintiff's request for a waiver of service, the defendant gets extra time to respond to the complaint. If the request for waiver of service was sent to a defendant at an address **inside** the United States, the defendant has 60 days from the date the request was sent to file a response to the complaint. If the request for waiver of service was sent to a defendant at an address **outside** the United States, the defendant has 90 days from the date the request was sent to file a response to the complaint.

According to the Memorandum of Understanding between the Wisconsin Department of Justice and the District Court for the Western District of Wisconsin, all defendant Department of Corrections employees agreeing to electronic notice of service have 40 calendar days from the date of the electronic notice to answer or otherwise plead to a civil complaint.

Rule 12(a)(3)(A) 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 in an official capacity must file a written response to the complaint within 60 days after the United States Attorney is served.

Rule 12(a)(3)(B) 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 file a written response to the complaint within 60 days after he or she was served, or within 60 days after the United States Attorney is served, whichever is later.

The time limits are different for responding to an amended complaint. According to Rule 15(a) of the Federal Rules of Civil Procedure, if the proposed amended complaint is filed before the defendant has filed an answer, the defendant must file a response to the 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. In most instances, however, the court must review the proposed amended complaint before it can become the operative pleading in the action. If the court allows the amendment, the opposing party will have 14 days from the date of the order granting leave to amend, 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 you have been served with a complaint, you 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 you choose to file a motion, you still must file an answer, but you do not have to file the answer until after the court rules on your motion.

Answers and Counterclaims

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

Rules 8(b)-(e) and Rule 12(b) of the Federal Rules of Civil Procedure state the requirements for writing an answer to a complaint, although they do not actually use the term "answer." The answer serves two main purposes. First, because Rule 8(b) requires you to state which parts of the complaint you admit and which parts you dispute, the answer shows both sides where they disagree. Second, because Rule 12(b) requires you to state in the answer all legal and factual defenses you believe you have to each of the claims against you, the answer also informs the plaintiff what legal and factual issues you intend to bring up during the lawsuit.

It is customary to write your answer in the same numbered paragraph style as the original complaint. So 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, etc.

Rule 8(b) requires you to admit or deny every statement in the complaint. If you do not have enough information to determine whether a statement is true or false, you must state that you do not have enough information to admit or deny that statement. If only part of a statement in the complaint is true, you must admit that part and deny the rest. Generally, under Rule 8(d), you are considered to have admitted every statement that you do not specifically deny, except for the amount of damages.

Rule 8(c) and 12(b) require you to state all legal and factual defenses you may have to the plaintiff's claims. Each defense should be listed in a separate paragraph at the end of the answer.

Generally, if you do not state a defense in your answer, you 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 your answer can have dramatic consequences for your lawsuit, you should exercise great care when you prepare your answer.

The answering defendant must sign the answer, and the answer must be served upon all the other parties in the lawsuit and filed with the court.

Can I make claims against the plaintiff in my answer?

If you want to assert a claim against the plaintiff in your answer, you must file a counterclaim, which is the name for a complaint by the defendant against the plaintiff. You may include a counterclaim at the end of the document containing your answer to the complaint, and file the answer and 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. The requirements for counterclaims are covered in more detail below.

Can I amend the answer after I file it?

Under Rule 15(a) of the Federal Rules of Civil Procedure, you can amend your answer at any time within 21 days after it is served on the plaintiff. You do not need permission from the court or from the plaintiff.

If you want to amend your answer more than 21 days after you served the answer on the plaintiff, Rule 15(a) provides two ways to do it.

First, you can file the amended answer if you get written permission from the plaintiff. When you file the amended answer, you must also file the document showing that you have written permission from the plaintiff to amend your answer.

Second, if the plaintiff will not agree to let you amend your answer, you must file a motion with the court seeking permission to amend your answer. In that motion, you must explain why you need to amend your answer. You should include a copy of the amended answer that you want to file. If the court grants your motion, you can then file your amended answer.

Because an amended answer completely replaces the original answer, you cannot just file the changes that you want to make to the original answer. The caption of your amended answer should read: "FIRST AMENDED ANSWER" (or, if your answer includes a counterclaim in the same document, "FIRST AMENDED ANSWER AND COUNTERCLAIM"). If you amend your answer a second time, the caption should read: "SECOND AMENDED ANSWER" (or, if your answer includes a counterclaim in the same document, "SECOND AMENDED ANSWER AND COUNTERCLAIM").

After the answer is filed, does the plaintiff file a response to it?

Rule 7(a)(7) says that a reply to an answer is permissible, but only if the court orders it. Otherwise, a reply is not permitted, even if you strongly disagree with the

statements in the answer. This is because 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.

What are the requirements for counterclaims?

A counterclaim 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. A compulsory counterclaim is a claim by the defendant against the plaintiff that is based on the same events or transactions as the plaintiff's claim against the defendant. A permissive counterclaim is a claim by the defendant against the 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 or her money because the plaintiff breached a different contract would be a permissive counterclaim.

Under Rule 13(a) of the Federal Rules of Civil Procedure, compulsory counterclaims generally must be filed at the same time the defendant files his or her answer. As a general rule, if you don't file a compulsory counterclaim at the same time you file the answer, you will lose the ability to ever sue the plaintiff for that claim. One exception is that you do not have to file a compulsory counterclaim if you have already

filed that claim in another court. Other more complex exceptions are listed in Rule 13(a).

If you want to file a permissive counterclaim, you should file it as early as you can, but there is no rule that requires you to file it at the same time you file your answer. Whether to file a permissive counterclaim is entirely up to you. By not filing a permissive counterclaim, you do not lose the ability to sue the plaintiff for that claim at another time.

The court automatically has subject matter jurisdiction over compulsory counterclaims if it has subject matter jurisdiction over the plaintiff's claim against the defendant. However, the court can decide a permissive counterclaim only if there is an independent basis for subject matter jurisdiction over the counterclaim. You 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 you would use to write a complaint. All of the rules that apply to writing a complaint also apply to writing a counterclaim.

If you file your counterclaim at the same time you file your answer, you can include the answer and the counterclaim in separate sections of the same document. If you include the answer and counterclaim in the same document, the caption of the document should say: "ANSWER AND COUNTERCLAIM."

If you forget to file a compulsory counterclaim at the time you file your answer, Rule 13(f) of the Federal Rules of Civil Procedure allows you to file a motion with the court asking for permission to amend your answer and counterclaim to include the counterclaim you forgot to file.

After a counterclaim is filed, should the plaintiff file a response to it?

Because a counterclaim is a complaint against the plaintiff, the plaintiff must file a written response to it. Rule 12(a)(1)(B) of the Federal Rules of Civil Procedure requires the plaintiff to file an answer to a counterclaim within 21 days after being served, unless the plaintiff files a motion to dismiss under Rule 12(b). Otherwise, the same rules that apply to filing a written response to a complaint also apply to filing a written response to a counterclaim.

Motions Challenging the Complaint

As explained above, once you are served with a complaint, you have a limited amount of time to file a written response to the complaint. That written response must eventually be an answer. However, you can also choose to file one of the motions specified in Rule 12 of the Federal Rules of Civil Procedure. If you file one of those motions, you do not need to file your answer until after the court decides your motion.

What is a motion to dismiss the complaint?

You may file a motion to dismiss the complaint if you think 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:

1. Motion to dismiss the complaint for lack of subject matter jurisdiction.

In this type of motion the defendant argues that the court does not have the legal authority to hear the kind of lawsuit that the plaintiff filed.

2. Motion to dismiss the complaint for lack of personal jurisdiction over the defendant.

In this type of motion the defendant argues that he or she has so little connection with the district in which the case was filed that the court has no legal authority to hear the plaintiff's case against that defendant.

3. Motion to dismiss the complaint for improper venue.

In this type of motion the defendant argues that the lawsuit was filed in the wrong federal court.

4. Motion to dismiss the complaint for insufficiency of process, or for insufficiency of service of process.

In these types of motions the defendant argues that the plaintiff did not prepare the summons correctly or did not properly serve the summons on the defendant.

5. Motion to dismiss the complaint for failure to state a claim.

In this type of motion the defendant argues that even if everything stated in the complaint is true, the defendant did not violate the law. A motion to dismiss for failure

to state a claim is **not** appropriate if the defendant 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 defendant assumes that the facts alleged in the complaint **are** true, but argues that those facts do not constitute a violation of any law.

6. 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.

Under Rule 12(a)(4) of the Federal Rules of Civil Procedure, if the court denies a motion to dismiss, the defendant must file an answer within 14 days after receiving notice that the court denied the motion.

If the court grants the motion to dismiss, it can grant the motion "with leave to amend" or "with prejudice."

If the court grants a motion to dismiss with leave to amend, that means that there is a legal problem with the complaint that the plaintiff may be able to fix. The court will give the plaintiff a certain amount of time to file an amended complaint in which the plaintiff can try to fix the problems identified in the court's order. Once the defendant is served with the amended complaint, he or she must file a written response to the amended complaint within the time ordered by the court. The defendant can either file an answer or file another motion under Rule 12 of the Federal Rules of Civil Procedure.

If the court 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 court grants a motion to dismiss the entire complaint with prejudice, the case is over.

If the court grants a motion to dismiss some claims with prejudice and denies the motion to dismiss other claims, the defendant must file an answer to the remaining claims within 14 days after receiving notice of the court's order.

What is a motion for more definite statement?

Instead of filing a motion to dismiss, Rule 12(e) permits a defendant to file 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 point out 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 a written response to the complaint within 14 days after the defendant receives the more definite statement. The written response can 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 a written response to the complaint within 14 days after receiving notice of the court's order.

What is a motion to strike?

Rule 12(f) permits the defendant to file a motion to strike from the complaint any redundant, immaterial, impertinent or scandalous matter.

What does it mean to win by default judgment?

If you have properly served the defendant with the complaint and the defendant does not file an answer within the required amount of time, the defendant is considered to be in "default." Default simply means that the defendant did not file an answer to the complaint.

If the defendant does not file an answer, the plaintiff is 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) 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 within the appropriate amount of time, the

clerk will enter default against the defendant. Once the clerk enters default, the defendant is not permitted to respond to the complaint without first filing a motion with the court, seeking to set aside the default under Rule 55(c) of the Federal Rules of Civil Procedure.

Second, 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 some of the rules for obtaining a default judgment.

Along with the motion for default judgment you as the plaintiff must include a declaration showing that the defendant was served with the complaint but did not file a written response within the required amount of time and that default has been entered. You also must file one or more declarations proving the amount of damages that you have suffered because of what you alleged in the complaint the defendant did.

Under Rule 54(c) of the Federal Rules of Civil Procedure, the court cannot enter a default judgment that awards you more money than you asked for in your complaint. The court also cannot give you any type of relief other than that for which you specifically asked in your complaint.

Special rules apply if you are seeking a default judgment against any of the following parties:

1. A minor or incompetent person (see Rule 55(b) of the Federal Rules of Civil Procedure);

2. The United States government or its officers or agencies (see Rule 55(e) of the Federal Rules of Civil Procedure);

3. A person who is in military service (see federal statute 50 U.S.C. App. § 520); or

4. A foreign country (see federal statute 28 U.S.C. § 1608(e)).

CHAPTER 7
WHAT IS A MOTION, AND HOW DO I WRITE OR RESPOND TO ONE?

Filing and serving a complaint is the first step in a lawsuit. After that, whenever you want the court to do something, you must file a motion. A motion is a formal request you make to the court. 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. You may make verbal (or "speaking") motions during a hearing or trial, but even then the court may ask you to put your motion in writing.

Generally, the following things occur when a motion is filed. First, one side files a motion explaining what they want the court to do and why the court should do it. The party who files a motion is referred to as the "moving party." Next, the opposing party files an opposition brief explaining why it believes the court should not grant the motion. Then the moving party files a reply brief in which it responds to the arguments made in the opposition brief. At that point, neither side can file any more documents about the motion without first getting permission from the court. Once all of the papers relating to the motion are filed, the court can decide the motion based solely on the arguments in the papers, or it can hold a hearing. If the court holds a hearing, each side has an opportunity to talk to the court about the arguments in their papers. The court then has the option of announcing its decision in the courtroom (ruling from the bench), or take the motion under consideration and send the parties a written decision.

What are the requirements for filing a motion?

In addition to requiring most motions to be in writing, Rule 7(b) of the Federal Rules of Civil Procedure also states that all of the court's rules about captions and the format of documents apply to motions. (A sample caption page can be found at the end of Chapter 3 of this guide.) Rule 7(b) also requires the party who is filing the motion to sign the motion in accordance with Rule 11 of the Federal Rules of Civil Procedure. Rule 11 requires parties not to file any motions that are based on facts that they know to be false, that they did not fairly investigate or that have no reasonable legal basis. You should read Rule 11 before signing and filing any motion. You can be subject to penalties if you violate the rule.

All motions should include the following parts:

1. **Name of motion**: In the caption, under the case number, you should state the name of the motion, for example: "PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL."

2. **Statement of purpose**: In the first paragraph of your motion, you should make a brief statement about what you are asking the court to do.

3. **Statement of facts:** With any motion, it is necessary to explain the facts that are relevant to the motion. Sometimes, the facts supporting a motion are simple and may be explained briefly in short paragraphs in the motion. For example, if the motion is a motion for an extension of time to do something the court has asked you to

do, you may explain in the motion why you need more time to accomplish the task. Alternatively, you may file one or more declarations with your motion in which you tell the court the facts relevant to the motion. An explanation of what a declaration is provided at the end of this chapter.

Sometimes a motion concerns the facts underlying the lawsuit, such as a motion for summary judgment or a motion for preliminary injunctive relief. In the Western District of Wisconsin, there are special procedures for presenting facts and evidence for motions for summary judgment and for preliminary injunctive relief. The procedures relating to motions for summary judgment are available in another chapter in this guide. A copy of those procedures are sent to the parties as a matter of course early on in the lawsuit, after a preliminary pretrial conference has been held. The procedures relating to motions for preliminary injunctive relief are included at the end of this chapter. In addition, they are provided to the parties if such a motion is filed in the case. Finally, if you have a computer, you can find a copy of these procedures on this court's website, http://www.wiwd.uscourts.gov.

4. **Brief in support:** In a separate document accompanying the motion, you should file a supporting brief. In your brief, you should explain why the court should grant your motion. Ordinarily, this means that you will bring to the court's attention the laws, rules, and cases you believe support your argument that you are entitled to the relief you seek in your motion. Every mention of a law, rule or case is referred to as a "citation." When you mention a law, rule or case in a memorandum, you are citing that

law, rule or case. You do not have to provide the court with copies of the laws, rules or cases that you have cited in your memorandum, unless the court asks for them.

When citing a case, use the format that is required by the court. For example, if you are citing a case from the Western District of Wisconsin, the rules require that the citation be as follows (you'll need to fill in the numbers for everything that appears in brackets): [the volume number of the Federal Supplement (the book) in which the case appears] F. Supp. [the number of the page where the case starts], [the number of the page where the point you are citing appears] (W.D. Wis. [the year the case was decided]). An example of a complete citation, using the Western District of Wisconsin format, would look like the following:

Wacker v. Home Depot U.S.A., Inc., 543 F. Supp. 2d 976, 978 (W.D. Wis. 2008).

All motions must be served on all of the other parties to the lawsuit (or the party's lawyer, if the party has a lawyer) as soon as the motion is filed.

What are the requirements for opposing a motion?

An opposition brief must follow the same general format as a supporting brief. For example, in the caption of the document, under the case number, you should put the title: "OPPOSITION TO [name of motion]". In addition, you should explain why you believe the motion should be denied, with citations to the appropriate law.

If you are responding to a motion for a preliminary injunction or a motion for summary judgment, your response must be made according to the special procedures for those motions. As noted above, the special procedures are available in this guide, from the clerk of court and on this court's website, http://www.wiwd.uscourts.gov.

What are the requirements for reply briefs?

Reply briefs must follow the same general format as a supporting brief. In the caption of the document, under the case number, put the title: "REPLY BRIEF IN SUPPORT OF [name of motion]." In this document you should address only the arguments raised in the opposition brief. You should not repeat the arguments you made in your supporting brief, except to the extent it is necessary to explain why you believe the arguments in the opposition brief are wrong. **In your reply brief, you may not include new arguments in support of your motion**. Because the opposing party usually is not allowed to file a response to a reply brief, it is unfair to include new arguments in your reply brief. Therefore, in your reply brief, you may only include only arguments explaining why you believe the argument in the opposition brief is wrong.

As noted above, there are special procedures for filing replies to motions for summary judgment or for preliminary injunctive relief. Please be sure to refer to those procedures in order to properly prepare your reply.

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

Rule 6(b) of the Federal Rules of Civil Procedure allows the court to give you extra time to respond to a motion if you show a good reason why you need it. Under Rule

6(b), the court can grant extra time with or without a motion if you make the request before the original deadline passes. If you wait until after the original deadline passes before asking for extra time, you must make a motion and show that excusable neglect caused you to miss the deadline. The court cannot extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in each of those rules.

What is an ex parte motion?

An ex parte motion is a motion that is filed without giving notice to the opposing party. You may file such a motion **only** if a statute, federal rule or standing order authorizes the filing of an ex parte motion **and** you have complied with all the applicable requirements. Ex parte motions are rare.

What if the motion is urgent?

Sometimes, but not often, a motion raises an urgent issue that needs to be decided very quickly. Rule 65 of the Federal Rules of Civil Procedure allows district courts to issue a preliminary injunction if such an injunction is warranted. If you are moving for a preliminary injunction, you must show first that an injury alleged in the complaint is continuing and that if the relief is not granted you will suffer irreparable harm. In addition, you must show that you have some likelihood of success on the merits of your case, that the irreparable harm you would suffer outweighs the irreparable harm the opposing party would suffer if the injunction is granted, and that the injunction will not frustrate the public interest.

NOTE: A motion for a preliminary injunction is not appropriate for raising matters that are unrelated to the claims raised in the lawsuit.

What if I want to move for a preliminary injunction?

If you decide it is appropriate to ask the court to give you emergency injunctive relief, you may file a motion for a preliminary injunction. However, the court will not consider your motion unless you comply with the court's Procedures to be Followed on Motions for Injunctive Relief.

If you file a motion for a preliminary injunction, the court will review it promptly. If the court finds that you have complied with the court's special procedures for such motions, it will schedule expedited briefing on the motion. Once briefing is complete, the court will decide it as quickly as possible. If the parties' submissions show that there are material facts in dispute, the court will schedule a hearing on the motion.

Where can I find the procedures I must follow if I want to ask for a preliminary injunction?

The Procedures to be Followed on Motions for Injunctive Relief in the district court for the Western District of Wisconsin are appended to this guide. In addition, the procedures may be obtained directly from the clerk of court or from the court's website at http://www.wiwd.uscourts.gov.

What is a declaration?

A declaration is a written statement signed under penalty of perjury by a person who has personal knowledge that what he or she states in the declaration is true. For the court to accept as true factual statements made in support of a motion, the statements must be presented in a declaration. Declarations may contain only facts, and should not contain law or argument. If the issue is not factual, or if the person signing the declaration does not explain how he or she personally knows that each statement in the declaration is true, then the court will not consider the statements.

The first page of each declaration should contain the caption of the case, and include, under the case number, the name of the document, for example "DECLARATION OF JOHN SMITH IN SUPPORT OF PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL." The declaration should consist of a series of numbered paragraphs, with each paragraph containing a different fact. At the end of the declaration, you must include the following language:

a. If the declaration is being signed in the United States, the language must read: "I declare under penalty of perjury that the foregoing is true and correct. Executed on (insert the date the document is signed)."

b. If the declaration is being signed outside of the United States, the language must read: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (insert the date the document is signed)."

Below that language, the person whose statements are included in the declaration (the "declarant") must sign and date it.

CHAPTER 8
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, on a rare occasion a party might forget to tell the court or the opposing party immediately when he or she has a new address or has filed a motion. For these reasons, you may wish to check the docket or the electronic case file 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.

The original copy of every document that is filed with the court is scanned into a permanent electronic file for the case that is maintained by the clerk of court. Each case has its own electronic file.

The docket is the computer file for each case, maintained by the court. It lists the title of every document filed in the case, the date each document was filed and the date each document was entered into the docket. The text of the documents listed on the docket is not visible on the docket sheet. However, each listed document has an electronic link to the text of the document, which you can see if you are looking at the docket from a computer with Internet access.

How do I review the case file?

Cases are filed in the clerk's office by case number, so in order to review a case file, it helps to know the case number. If you brought a copy of your complaint to the clerk's office when you filed it, or supplied a copy to be stamped and returned to you, you will find the case number stamped on the complaint on the caption page. It will look something like this: 08-cv-0306-bbc. The first two digits are the last two digits of the year in which the case was filed. In the sample above, the case was filed in 2008. The "cv" means civil case. The next set of numbers is a unique number which identifies a particular case. Usually, the number starts at 1 for the first case filed in a given year and goes up as the number of filings increase. In the above sample case number, the case was the 306th civil case to be filed in 2008. The initials at the end are the initials of the judge who has been assigned to the case.

If you do not have the case number, you can find it by looking up the names of the parties on the PACER system on any computer with Internet access. You can also find the case number by looking up the names of the parties on a computer system that is available for use in the clerk's office during normal business hours. If you do not have access to a computer, you may write to the clerk of court or call the clerk's office at (608) 264-5156 to request the number.

How do I review the docket?

There are several ways to obtain docket information:

1. Docket information is available through the PACER system on the Internet at http://pacer.wiwd.uscourts.gov. PACER stands for "Public Access to Court Electronic Records."

2. If you do not have access to a computer, you can use the public computer in the clerk's office during normal business hours to obtain docket information.

3. If you do not have access to a computer and you cannot come to the clerk's office in person, you may write to the clerk of court at 120 N. Henry St., Madison, WI, 53703 or P.O. Box 432, Madison, WI, 53701, and ask for a copy of the docket sheet. Ordinarily, the court will provide a copy of the docket free of charge. If you want copies of documents referred to on the docket, however, you will have to specify which documents you want and pay for the copies at $.10 a page if you are indigent and $.50 a page if you are not. You will qualify for the indigent rate if the court has already granted you leave to proceed in the case *in forma pauperis.* Otherwise, your request for copies must be accompanied by a trust fund account statement for the previous six-month period if you are a prisoner or a civilly committed patient, or by an affidavit of indigency if you are not institutionalized. Forms for an affidavit of indigency may be obtained directly from the court or from the court's website at http://www.wiwd.uscourts.gov.

Dockets are updated every night. The updates are typically, but not always, complete by midnight Central Time. Therefore, when you retrieve a PACER docket, you typically get the docket as it stood at the close of the previous business day.

PACER has a U.S. party/case index, which can be used to search for cases nationwide. Registered PACER users may find a link to the index at http://pacer.uscourts.gov/. Once you are in the index, you can search by type of case (for example, criminal or civil or bankruptcy), case number, party name or for cases filed within a specified range of dates. The PACER system allows users to:

1. Review the docket online;

2. Print a copy of the docket; and

3. Download docket information for later review.

You must register to become a PACER user before you can use any version of the PACER system. You can register online to become a PACER user at http://pacer.psc.uscourts.gov. You can also call the PACER Service Center at (800) 676-6856 to obtain a PACER registration form by mail. There is no cost for registering.

Once the registration form is received by the PACER Service Center, you will receive a login and password in the mail within about two weeks. Logins and passwords will not be faxed, emailed or given out over the phone. (Note: The login and password are different from the user name and password you will need if you want to file papers in this court by electronic means as discussed in Chapter 4 of this guide under the title "Filing Electronically.")

Internet access to PACER is billed at $.08 for each page of information responding to your query. A page is defined as 54 lines of data. There is not an additional per-minute charge. You will be billed quarterly by the PACER Service Center.

The public computer in the clerk's office does not use the PACER system. Therefore, you do not have to be registered on PACER to use it and there is no charge to look up docket information. However, because this computer is not connected to the PACER system, you cannot look up docket information on cases filed in other courts. You can obtain docket information only about cases filed in Western District of Wisconsin.

If you cannot afford to pay the PACER access fees, you may file a motion with the court asking to be excused from paying those fees. Upon a showing of good cause, a court may exempt persons from the electronic public access fees in order to avoid unreasonable burdens and to promote public access to such information. Your motion must show that it would be an unreasonable burden for you to pay the fees and that it would promote public access to electronic court docket information if you were permitted to use the PACER system without paying a fee. Exemptions may be granted for a definite period of time and may be revoked at the discretion of the court. If the court grants your motion, you must send a copy of the court's order to the PACER Service Center, P.O. Box 780549, San Antonio, Texas, 78278-0549, so that you will not be billed to use the PACER system. If the court denies your motion, you must pay the PACER fees in order to use the PACER system.

If you have problems with your PACER account, please call the PACER Service Center at (800) 676-6856.

CHAPTER 9
WHAT IS A PRELIMINARY PRETRIAL CONFERENCE OR STATUS CONFERENCE, AND HOW DO I PREPARE FOR IT?

What is a preliminary pretrial conference?

A preliminary pretrial conference is the scheduling conference for a civil case. As a general rule, it is held by telephone, with the magistrate judge presiding and all parties (or their attorneys) on the phone. During the conference, the magistrate judge will set a trial date, as well as deadlines for completing discovery, making dispositive motions and identifying witnesses. The preliminary pretrial conference is scheduled to be held shortly after the defendants file their response to plaintiff's complaint.

What should I do before the preliminary pretrial conference?

About three weeks before a preliminary pretrial conference, the court will send you a notice of the time and date of the conference. The notice will be accompanied by a document titled, "Notice Regarding the Telephonic Preliminary Pretrial Conference." If you are reading this guide on a computer, you may review the contents of the notice by clicking on the hyperlink above. Otherwise, you will find a copy of the notice attached to this guide.

As the magistrate judge suggests, you should prepare for the preliminary pretrial conference by writing down questions you might want to ask about court procedure or notes about anything important in your case that you might want to bring to the court's attention. (Keep in mind that the magistrate judge cannot give legal advice to the parties in a case. For example, he cannot tell a party what kind of motions the party should file

or what should be written in a motion. Those are matters the parties must decide on their own.)

Although Rules 16(a), 26(a)(1) and 26(f) of the Federal Rules of Civil Procedure impose certain duties on parties to meet and exchange the names of persons likely to have information about the issues and certain documents, the notice you will receive states expressly that these rules do NOT apply in cases in which one or more parties are representing themselves.

What is the preliminary pretrial conference order?

After the preliminary pretrial conference, the magistrate judge will issue a preliminary pretrial conference order documenting the deadlines set at the conference. This order will control the schedule for the rest of the case unless it is changed later by a judge.

What is a status conference?

Although status conferences are rare in the Western District of Wisconsin, a judge or magistrate judge may schedule one to check on the status of the case, if it is not proceeding promptly for any reason.

CHAPTER 10
EXPERT WITNESS DISCLOSURES

At the preliminary pretrial conference, the magistrate judge will ask whether any party intends to rely on an expert witness and will explain the obligations the parties have if they do intend to rely on such evidence. They must disclose the name of any expert witness, file an expert report and supplement the report, if necessary. For example, a doctor may testify about what he did at the scene of an accident in caring for the victim without having to file a report. However, if the doctor is asked to give an opinion about the future effect of the injuries, he or she must file a report.

What are expert disclosures?

In an expert disclosure, you tell the other parties the identity of any expert witness you may intend to use at summary judgment or at trial, and explain what each expert will testify about. Expert disclosures are required by Rule 26(a)(2) of the Federal Rules of Civil Procedure. An expert witness is a person who has medical, scientific, technical or other specialized knowledge that can help the court or the jury understand the evidence.

If you find an expert witness willing to give testimony in your case, you must not only tell the other parties the name of that expert, but you must give them a written report prepared by the expert witness and signed by the witness, unless the court orders otherwise. This written report is usually referred to as an "expert report."

The requirement for an expert report does not apply to experts such as physicians, nurses or others who will be offering evidence only about what they did, rather than offering new expert opinions.

Timing: Expert disclosures must be made by the time ordered by the magistrate judge in the preliminary pretrial conference order. These disclosures must include the names of all experts, including those that are not required to file expert reports.

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

1. A complete statement of all opinions the expert witness intends to give and the basis and reasons for those opinions;

2. The data or other information considered by the expert witness in forming those opinions;

3. Any exhibits to be used as a summary of, or support for, the opinions;

4. The qualifications of the expert witness, including a list of all publications authored by the witness within the preceding ten years;

5. The compensation to be paid for the study and testimony of the expert witness; and

6. A list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Form: Under Rules 26(a)(4) and 26(g) of the Federal Rules of Civil Procedure, these 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 you and the expert witness, and 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: Rule 26(e)(1) of the Federal Rules of Civil Procedure imposes on you a duty to supplement your expert disclosures if you learn that the information you disclosed is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. 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 under Rule 26(a)(3) are due.

What are pretrial disclosures?

In a pretrial disclosure each party files with the court and serves on the other parties certain kinds of information about evidence it may present at trial. The requirements for pretrial disclosures are governed by Rule 26(a)(3) of the Federal Rules of Civil Procedure.

Timing: Rule 26(a)(3) sets a deadline for pretrial disclosures of at least thirty days before trial, "unless otherwise ordered by the court." In the Western District of

Wisconsin, the deadline for the disclosures required by this rule are set either in the preliminary pretrial conference order or in an order issued approximately two months in advance of trial.

CHAPTER 11
WHAT IS DISCOVERY?

"Discovery" is the process by which parties discover facts and information about the case that are in the other side's possession. For example, if you sue the driver who caused your automobile accident, you'll want to know whether the driver has insurance. For his part, the driver will want to know about your injuries and your medical bills and whether you had to miss work. There are several different ways to ask for and get this information. Sometimes parties will turn over this information without a formal request. More often, you'll have to serve your opponent with a particular request, which may be requests for document production, requests for admissions and requests for physical or mental examinations. You may also serve your opponent with requests for interrogatories, or questions the other party must answer. Finally, you may schedule a deposition of your opponent or of anyone who has knowledge about the facts of the case. All of these discovery methods are explained in this chapter.

Are there any limits to discovery?

Under Rule 26(b) of the Federal Rules of Civil Procedure, any party may ask 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. The court can limit the use of any discovery method, however, if it finds that:

1. The party asking for discovery is seeking information that has already been provided, or that is already available from some other source that is more convenient, less burdensome, or less expensive; or

2. The party seeking discovery has already had enough chances to get the information sought; or

3. 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 the other side and get an answer back that you have asked for privileged information, that is, information that is protected by law, such as the conversations between a party and her lawyer. In addition, there are some limits to how many requests you can make. These limits are discussed in the more detailed explanation of each method of discovery.

When can discovery begin?

In the Western District of Wisconsin, a party may not begin discovery until the magistrate judge sends out a preliminary pretrial conference order setting deadlines for discovery.

After I get discovery from my opponent, when should I file it with the court?

As a general rule, the judges in the Western District of Wisconsin do not want the parties to file their discovery materials with the court, except to support some other matter in their lawsuit, such as a summary judgment motion. Once a document or copy of a document is in the court's file, no one has to file another copy, as long as the parties make it clear to the court where the court can find the document in the file. The exception to this rule is that deposition transcripts must be filed promptly after they are prepared and must be in "compressed format," a term the person preparing the transcript will understand.

Interrogatories

What are interrogatories?

Interrogatories are written questions that one party sends to any other party to the lawsuit, and these questions must be answered under oath. Note that interrogatories can be served only on parties. Rule 33 of the Federal Rules of Civil Procedure states 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) of the Federal Rules of Civil Procedure, you do not need the court'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 with the court asking for the court's permission. Your motion should be supported by a list of each additional interrogatory you want to ask and an explanation for needing to ask each additional question. Ordinarily, however, the court does not give either side permission to ask more than 25 interrogatories. Therefore, you should use your 25 interrogatories carefully and ask the most important questions.

How many interrogatories can I serve?

As noted above, under Rule 33(a), you may serve 25 interrogatories on each party unless you get permission from the court to serve more. Note that you can serve different interrogatories on different parties. Thus, for example, if there are three defendants, the plaintiff may serve up to 25 interrogatories on each of the three defendants without first getting permission from the court or the other parties.

Parties cannot get around the 25-interrogatory limit by combining several questions in one. Each question is one interrogatory. If your questions have separate subparts, then each subpart is counted as a separate interrogatory.

What kinds of questions can I ask?

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?

Usually, parties write out each interrogatory with a separate number.

Under Rule 26(g)(2) of the Federal Rules of Civil Procedure, you must sign the interrogatories and list your address. By signing the interrogatories, you are telling the court that:

1. The questions seek information that is 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 you to get this information; and

2. You are not serving the interrogatories for any improper purpose, such as to harass anyone or to cause unnecessary delay or to needlessly increase the cost of the litigation; and

3. 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?

You must respond to interrogatories served on you within 30 days. You can either answer the question or object to the question, or both. If you need more than 30 days to respond, you may ask the other party to agree to give you more than the 30 days provided for under Rule 33(b) of the Federal Rules of Civil Procedure. If the other party

refuses to allow a reasonable extension of time, then you must file a motion with the court requesting additional time.

When you answer interrogatories, you must answer each one separately and completely and you must do so in writing under oath. You do not need to answer any question you object to, but you must explain in writing your reasons for objecting. If you object to part of a question, you must answer the rest of the question.

Rule 33(a) of the Federal Rules of Civil Procedure requires a party served with interrogatories to answer them with all information the party has available. "Available" means more than simply information that a party remembers without doing research. Under Rule 33(d), if you can find the answer to an interrogatory in your records or in some other place available to you, then you must look for the answer. If the answer to an interrogatory could be found in public records or other records available to the other side and it would be as easy for the other side to find the answer in the records as for you to do so, you may answer the interrogatory by simply telling the other side the records in which the answer can be found. You must identify the records carefully so that the party who served the interrogatories can locate and identify the records in which the answer can be found. Also, you must give the party who served the interrogatories a reasonable opportunity to review and copy those records. Discovery depends upon parties' giving complete answers to questions. It is not appropriate to answer "I don't know" to an interrogatory if the information you need to answer the question is available to you.

Duty to supplement answers to interrogatories

If you have already answered an interrogatory question, but later you learn something that changes your answer, you must let the other side know by supplementing your original answer, that is, sending the other side additional information in writing to update your original answer. Rule 26(e) of the Federal Rules of Civil Procedure imposes a duty on all parties to supplement their answers to interrogatories if they learn that the first response is incomplete or incorrect.

Requests for Document Production

If you think the other side has documents that would be useful to you in your case, you may file 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 reasonably believe would have information in them about the issues in the lawsuit. You then ask that person to make available to you the documents that satisfy your descriptions. You may serve a document request on any person, not just a party to the lawsuit, but you must use different types of requests depending on whether you are trying to get documents from a party to the lawsuit or from a non-party.

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 Rules 34(a) and (b) of the Federal Rules of Civil Procedure. Under Rule 34(a), any party may serve on another party:

1. A request for production of documents, in which you ask to inspect and copy any paper documents or information that is on a computer that is in that party's possession, custody or control; or

2. A request for production of tangible things, that is physical things that are not documents, if you think you need to inspect and copy, test or sample any such object that is in the opposing party's possession, custody or control; or

3. A request for inspection of property, in which you ask to go onto the property of a party for the purpose of inspecting and measuring, surveying, photographing, testing or sampling the property or any object on that property.

In making a request, you must list the items that you want to inspect and describe each one in enough detail that the other party can 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. Rule 34 does not require a party to make free photocopies of documents for you. If you want photocopies of documents you are inspecting, you must pay the copying costs yourself.

Form

Ordinarily, you should number each request for documents separately. Under Rule 26(g)(2) of the Federal Rules of Civil Procedure, you must sign the requests for document production and state your address. By signing the requests for document production, you are telling the court that:

1. Your requests 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; and

2. You are not serving them for any improper purpose, such as to harass anyone or to cause unnecessary delay or needless increase in the cost of the litigation; and

3. 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 of money in dispute and the importance of the issues at stake in the litigation.

You may serve a request for document production on a party 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?

If you have been served with a request for documents, you must serve a written response within 30 days after the request is served, unless the court has set a shorter or longer time for responding or you have reached an agreement with the other party for a different schedule.

In answering each response, you must state either that you will allow the inspection and related activities that were requested, or that you object to the request. If

you object, 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 of the rest.

A party who produces documents for inspection must either:

1. Produce the documents as they are kept in the usual course of business or

2. Organize and label the documents to correspond with the categories in the request.

If, after you have responded to a document request, you discover more documents or you create more documents on the subject that respond to the request, you will have to provide those documents as well. Rule 26(e) 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 that you want to give you documents is <u>not</u> a party to the lawsuit, you must follow Rules 34(c) and 45 of the Federal Rules of Civil Procedure. Under Rule 34(c), you may ask the court to direct a non-party to produce documents and physical objects or to submit to an inspection, according to the procedures stated in Rule 45. Rule 45 sets out the rules for issuing, serving, protesting and responding to subpoenas, including subpoenas duces tecum.

What is a subpoena duces tecum?

A "subpoena duces tecum" is a court order requiring someone to give another person copies of papers, books or other things that the court orders. "Duces tecum" is an old term that means "bring them with you." It is a discovery tool you can use by itself or in connection with a deposition or trial. If you want a non-party to bring documents to a deposition or trial, or you want to inspect documents in a non-party's possession, you must serve the non-party with a subpoena duces tecum. Remember, you should never need to subpoena documents from *parties*. Parties are required to produce documents where and when you ask for production in a request for documents made under Rule 34 of the Federal Rules of Civil Procedure.

Form

The same form is used for subpoenas duces tecum and for deposition subpoenas. (Depositions are discussed at the end of this chapter.) If you want a non-party to produce documents at his or her deposition, you may fill out only one subpoena form directing that person to appear at the deposition and to bring certain documents with him or her. Under Rule 30(b)(2), the documents you want must be listed in the subpoena duces tecum. You may serve a subpoena duces tecum and a deposition subpoena separately, so that the person will produce documents at one time and appear for a deposition at another time. You may also choose to serve only a subpoena duces tecum, or only a deposition subpoena, depending on what information you need for your lawsuit.

You can get a blank subpoena from the clerk's office for any production of documents or inspection that will occur in the Western District of Wisconsin. If the document or thing is outside the Western District of Wisconsin, however, you will need to get the subpoena from the federal court in the district where the document production or inspection will take place.

Is there anything else to keep in mind about subpoenas duces tecum?

Under Rule 45 of the Federal Rules of Civil Procedure, a subpoena duces tecum may be served by any person who is at least 18 years old and not a party to the lawsuit. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, sending also a check or money order for the fees for one day's attendance and the mileage allowed by law. If the subpoena commands the production of documents, electronically stored information or physical objects or the inspection of premises before trial, then before it is served, you must serve a notice on each party.

Also under Rule 45 of the Federal Rules of Civil Procedure, you must take reasonable steps to avoid imposing an undue burden or expense on the person receiving the subpoena duces tecum.

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

Under Rule 45(c)(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 or she also has been subpoenaed to appear for a deposition, hearing or trial at the same time and place. For example, he or she may simply send the documents to you. However, if you decide you want to take with you a copy of any document produced for you, you are responsible for paying the copying costs.

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

1. Produce the documents as they are kept in the usual course of business, or

2. Organize and label them to match the categories of documents asked for in the subpoena.

If a person who has been asked to produce subpoenaed documents objects to a part or all of your request, that person must serve his or her objections no later than the date you specified in your subpoena for production or 14 days after you served the subpoena, whichever is *earlier*. If you believe the objections are unwarranted, you will have to file a motion with the court to compel a response to the requests to which the other side objected.

Requests for Admission

What is a request for admission?

In a request for admissions you write out statements of fact you believe are true, and ask the other party to admit that those statements are true. Requests for admission can be sent only to other parties to the suit. If the other party admits to anything you

requested under this procedure, you may refer to the admission as a proposed undisputed fact when you file proposed findings of fact with the court in connection with a motion requiring the submission of proposed findings of fact or at trial.

Form

Rule 36 of the Federal Rules of Civil Procedure establishes the requirements for requests for admission.

You may serve requests for admission by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including service by mail.

You must set out each request for admission separately, and number them in order. Under Rule 26(g)(2) of the Federal Rules of Civil Procedure, you must sign the requests for admission and state your address. By signing the requests for admission, you are telling the court that:

a. 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; and

b. You are not serving them for any improper purpose, such as to harass anyone or to cause unnecessary delay or needless increase in the cost of the litigation; and

c. 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 of money in dispute 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 and do not cause undue burden or expense.

What kind of a response can I expect to my requests for admission?

If a party objections to a request for admission, he or she must state the reasons for the objection. Responses to requests for admission must be signed by the party or by the party's attorney.

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) of the Federal Rules of Civil Procedure. That time can be increased or decreased by agreement of the parties or if the court orders a different time for responding. If no response is served within 30 days (or the time otherwise set by the court or by agreement), all of the requests for admission are automatically considered to be admitted.

How do I respond to a request for admissions served on me?

You must either admit or deny a request for admission or explain in detail the reason why you cannot truthfully admit or deny it. If you cannot admit or deny a particular request in full, then you must admit the part that is true and either deny the rest or explain why you cannot admit it. In some cases you may not know the answer. In those cases you may answer that you do not have enough information to admit or

deny the requested information. Before you do that, you must make a reasonable search for the information and explain that even after doing so, 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 court allows the answering party to withdraw or change the admission. Any admission is valid only for the purpose of the litigation. It may not be used for any other purpose, including in any other proceeding.

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 you fail to admit a fact in a request for admission and the other party later proves that the fact is true, you may have to pay reasonable attorney fees to the other party. If the other party files a motion with the court, the court *must* grant the motion unless it 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 it might prevail on that matter; or

There was other good reason for the failure to admit.

Duty to Supplement Responses

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 his or her response, Rule 26(e) of the Federal Rules of Civil Procedure requires the party to supplement that earlier response if it is incomplete or incorrect.

Physical and Mental Examinations

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 court to order that person to submit to a physical or mental examination. For example, if you are suing because of physical injuries you suffered in an automobile accident, the other side could ask for a medical examination of you by a doctor hired by the other party. 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?

Yes, unless the other party agrees to the examination without an order.

Unlike other discovery procedures, a party may obtain a mental or physical examination 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:

1. Explain why there is a need for the examination;

2. Specify the time, place, manner, conditions and scope of the proposed examination; and

3. Identify the person or persons who will conduct the examination.

Can I use Rule 35 to ask the court to order that I be examined?

No. Under Rule 35, the court can order one party to submit to an examination only at the request of the opposing party. Under certain circumstances, this rule also allows a party who has a person in his or her custody or under his or her legal control to be compelled to produce that person for a physical examination, if the other party has filed the proper motion. The rule is not intended to cover a situation in which a party wishes an examination of himself.

What happens to the results of an examination?

If the court orders a mental or physical examination, the party or other person who is to be examined has the right to ask for a detailed written report from the examiner and for any reports of earlier examinations of the same condition to which the examiner has access. The examiner's report must include the results of all tests made and the examiner's findings, diagnoses and conclusions. If an examiner does not produce a report, the court can exclude the examiner's testimony at trial.

If the results of the examination raise new issues the parties did not think of earlier, the party that arranged for the examination may ask the opposing party to produce any other medical reports it may already have or be able to obtain concerning the same condition.

These requirements for examiners' reports also apply to mental or physical examinations that are agreed to by the parties, unless their agreement specifically states otherwise.

Depositions

What is a deposition?

A deposition can be a very effective way of obtaining information from a prospective witness, as well as giving insight into the witness's credibility and knowledge about the facts. At the same time, it is the most expensive form of discovery because it requires hiring a court reporter. Also, just as it serves as a way for you to gauge the strength of the other side's witnesses, it will give the opposing party insight into the strengths and weaknesses of your case.

A deposition is a question-and-answer session that takes place sometime after the preliminary pretrial conference but before the trial. It is just like questioning a witness at trial. You may schedule a deposition of your opponent or of anyone who has knowledge about the facts of the case, including eyewitnesses, expert witnesses, or another party to the lawsuit. The person questioned is under oath, which means that he or she swears that all of the answers are true. Rule 30 of the Federal Rules of Civil Procedure explains the procedures for taking a deposition. When you get to ask someone questions about his or her knowledge of the case in a deposition, that process of questioning is called deposing the person, or taking a deposition. The person who answers the questions in a deposition is referred to as the "deponent."

The questions and answers in a deposition must be formally recorded by a person certified to make such a recording. The party taking the deposition, that is, 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 by audio or audiovisual means. The written record of a deposition is called the transcript of the deposition, and the person who records what everyone says is usually referred to as a court reporter or a court stenographer. Rule 30(b) of the Federal Rules of Civil Procedure explains the ways the deposition can be recorded, the role of a court officer in recording the deposition and other important details.

The person wanting to take the deposition must pay the cost of recording the deposition, must serve the person to be deposed with a notice of the deposition and arrange for a place to hold the deposition.

Do I need the court's permission to take a deposition?

Usually, you do not need the court's permission to take a deposition. However, under Rule 30(a) of the Federal Rules of Civil Procedure, you need the court's permission to take a deposition in any of the four following situations:

1. The person you wish to depose (the deponent) is in prison.

2. Your side of the lawsuit has already taken ten depositions, and the other parties have not stipulated in writing that you can take more depositions. Rule 30(a) allows all of the plaintiffs or all of the defendants to take no more than ten depositions

without the court'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 court's permission.

3. The deponent has already been deposed in the same case, and the other parties have not agreed in writing that the deponent can be deposed again.

4. You want to take a deposition before the preliminary pretrial conference has been held. There is one exception to this rule for persons who are about to leave the United States. If this unusual circumstance occurs in your case, consult Rule 30.

How do I arrange for a deposition?

It is a good idea to consult first with opposing counsel to choose a convenient time for the deposition. You should take into account the convenience of the lawyers, the parties and the witnesses.

Once you have picked a convenient time for the deposition you have a reasonable amount of time before the deposition to give written notice of the deposition to the deponent, and to all of the other parties in your lawsuit. You may serve the notice of deposition by any of the methods listed in Rule 5(b) of the Federal Rules of Civil Procedure, including by mail. You should not file the notice of deposition with the court.

What do I say in a notice of deposition?

Under Rules 26(g)(2) and 30(b) of the Federal Rules of Civil Procedure, the notice of deposition must include:

1. The time and place where the deposition will be held.

2. 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 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 is "the guard who was on duty on [a specified date] [in a specified unit] [of a specified prison] [at a specified time]"). If you do not know which person at a business or government agency has the information that 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.

3. The method by which the deposition will be recorded.

4. Your address and signature. By signing the notice of deposition, you are telling the court that:

a. 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; and

b. You are not serving the notice of deposition for any improper purpose, such as to harass anyone or to cause unnecessary delay or simply to increase the cost of the litigation; and

c. Taking this deposition is not unreasonable or unduly burdensome or expensive, considering the needs of the case, the discovery that has already been taken in the case, the amount of money in dispute 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 serve the notice of deposition described above. If the deponent is not a party to the lawsuit, a so-called "non-party deponent" or a "non-party witness," you must also serve the deponent with a "subpoena." A subpoena is a document issued by the court 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 for any deposition that will take place in the Western District of Wisconsin. If the deposition is going to be taken outside the Western District of Wisconsin, however, you must get the subpoena from the federal court for the district in which you will take the deposition. A subpoena may be served (that is, hand-delivered) on the deponent by any person who is not a party to the lawsuit and who is at least 18 years old. When you arrange to serve a subpoena on a deponent, you must also provide the deponent with a check or money order to pay the deponent a witness fee and mileage allowance. Under 28 U.S.C. § 1821, a non-party deponent must be paid $40 per day for deposition testimony.

If the non-party deponent travels to the deposition by bus, air or train, you also must pay the deponent's actual travel expenses, as long as he or she takes the shortest practical route and travels at the most economical rate reasonably available. You do not have to pay this kind of travel expense 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 air, bus, train, you must pay a mileage fee, plus any toll charges and parking fees. In addition, you must pay a subsistence allowance to any witness who must travel so far from his or her residence as to require an overnight stay. The mileage and subsistence fees change often. For current rates, you may refer to 28 U.S.C. § 1821 or call the office of the clerk of court at (608) 264-5156.

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 court *quash the subpoena*. "Quashing" means that the court decides that the person does not have to obey the subpoena. If the court quashes a subpoena, the deponent does not have to appear for the deposition at the time and place listed on the subpoena.

Under Rule 45(c)(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 you subpoena for a deposition. If the deponent thinks there is something improper in your subpoena, he can try to get the court to quash it for that reason. In addition, under Rule

45(c)(3)(A)(ii), if your deposition subpoena requires a non-party deponent to travel more than 100 miles from his or her home or work address, and the deponent objects, the court *must* quash the subpoena. Therefore, it is a good idea to take the deposition at a location within 100 miles of the non-party deponent's home or business address.

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

If the deponent is a party to the lawsuit, Rule 30(b)(5) of the Federal Rules of Civil Procedure lets you serve a request for document production along with the notice of deposition. Rule 34 of the Federal Rules of Civil Procedure states the rules for requests for document production. Those rules were discussed earlier in this section under the heading, "Requests for Document Production." If the deponent is a non-party to the lawsuit, you will have to serve the deponent with a subpoena duces tecum, which is also discussed earlier in this section.

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 seven hours. If a party thinks the deposition should go more than seven hours, it must either get all parties to agree or get authorization from the court.

Does the deponent have to answer all questions?

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 Rule 30(c), the deponent is entitled to state any legal objections he or she has to any question. There are specific types of objections that are proper. For example, you may object to the form of a question (that is, the question is vague, the question is really several questions all together, the question is argumentative), or because 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), the deponent may refuse to answer a question only in the following three situations:

1. When answering would violate a confidentiality privilege, such as the attorney-client or doctor-patient privilege; or

2. When the court has already ordered that the question does not have to be answered; or

3. To let the deponent or a party to present a motion to the court under Rule 30(d)(3). Rule 30(d)(3) allows a deponent or a party to present a motion to the court 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 at the deposition. Usually, the party who arranged for the deposition asks all of his 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 completed, the deponent 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 court can see where any changes are being made.

CHAPTER 12
WHAT CAN I DO IF THERE ARE PROBLEMS WITH DISCLOSURES OR DISCOVERY?

It is not unusual for the parties to disagree about disclosures or discovery. Most of the time, the parties can work out these disputes between themselves. The party asking for discovery may realize he has asked for more than the other is required to provide or the party withholding discovery may reconsider its position or agree to provide at least a portion of the requested discovery. If negotiation fails, the parties can get help from the court.

What is the first step?

First, you should try to work out a disagreement on your own if you can do so quickly. The court will want to know what you have done to try to resolve the dispute. It will allow you to skip this step only if it appears certain that informal discussion about the dispute will be a waste of both sides' time.

What if the parties cannot resolve the problem?

If you are served with a discovery request for documents or information you believe you do not have to give to your opponent, you may file a motion for a protective order. A protective order is a court order limiting discovery or requiring discovery to proceed in a certain way. The Federal Rules of Civil Procedure provide for protective orders in Rule 26(c).

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

A motion for a protective order must include:

1. A statement from you that you have tried to confer in good faith with the other parties to resolve the dispute without help from the court or that you met with the other parties but were still unable to resolve it;

2. A copy of the discovery requests that were served on you for which you want a protective order; and

3. An explanation of the dispute and what you want the court to do.

What if the parties are stuck on a problem in the middle of a discovery event?

A "discovery event" is an occasion when you meet with the other side to exchange discovery information, for example, a deposition or inspection of documents. If a dispute about discovery arises during one of these events and you believe that it would save a lot of time or expense if the dispute were resolved immediately, you may call the chambers of the magistrate judge to ask that he address the problem in a telephone conference with the parties.

Before calling the magistrate judge, you must discuss the issues with the other parties and attempt to resolve the problem on your own. You may call the magistrate

judge's chambers only if your negotiations with the other parties do not resolve the problem.

The magistrate judge is not required to hold a telephone conference to resolve your dispute. He may be busy with other cases when you call or he may decide that the issue is not urgent and can be addressed in a written motion.

What do I do if the opposing party does not respond, or if the response is inadequate?

When a dispute arises over disclosures or over a response or a failure to respond to a discovery request, you may file a "motion to compel" to force the other party to respond. Before filing a motion to compel, you must confer with the party or person refusing to cooperate to try to resolve the dispute on your own. Under some circumstances, you may also move the court to impose sanctions on a person who is unwilling to cooperate with a discovery request.

What is a motion to compel?

A motion to compel is a motion asking the court to order a person to make disclosures or to respond to a discovery request or to provide more detailed disclosures or a more detailed response to a discovery request. Rule 37 of the Federal Rules of Civil Procedure addresses the requirements for motions to compel.

How do I file a motion to compel?

Under Rule 37(a)(1), a motion to compel a ***party*** to make disclosures or to respond to discovery must be filed in the court in which the lawsuit is pending. A

motion to compel a ***non-party*** to respond to discovery must be filed in the court in the district in which the discovery is being taken.

Content: A motion to compel must include:

1. A certification that you have conferred in good faith or tried to confer in good faith with the other parties to resolve the dispute without help from the court;

2. An explanation of the dispute and what you want the court to do; and

3. If the dispute involves a written discovery request, you must include the complete text of each disputed discovery request followed immediately by the complete text of the objections or disputed responses to that request.

Paying for the motion to compel

If the court grants your motion to compel, or if the person against whom you filed the motion gave you the requested discovery shortly after you file your motion to compel, the court is required to first allow the person an opportunity to be heard and then may order that person (or that person's lawyer, or both) to pay your reasonable expenses in making the motion. Reasonable expenses will **not** be awarded if the court finds that:

1. You filed the motion without first making a good faith effort to get the disclosure or discovery without court action; or

2. The opposing party's refusal to disclose or its objection was substantially justified; or

3. Other circumstances make an award of expenses unjust.

Persons who are not represented by a lawyer may not receive an award of attorney fees for bringing a motion to compel.

What is a motion for sanctions?

In a motion for sanctions, a party asks the court to punish a person for failing to make required disclosures, refusing to respond to a discovery request or refusing to obey a court order to respond to a discovery request. Rules 37(b) through (e) of the Federal Rules of Civil Procedure address the requirements for motions for discovery sanctions.

Under what circumstances may I ask for discovery sanctions?

You may ask for discovery sanctions only if a person:

1. Fails to obey a court order to respond to a discovery request;

2. Fails to appear for a deposition for which he has proper notice;

3. Fails to answer interrogatories that have been properly served on him; or

4. Fails to respond to a request for document production or inspection that has been properly served.

A motion for discovery sanctions must be filed as a separate motion and not as part of another motion. It should be filed as soon as you learn about the circumstances that make the motion appropriate.

Content: A motion for sanctions must include the following:

1. An explanation of the dispute and what you want the court to do;

2. A declaration or affidavit that explains the facts and circumstances that support the motion and sets out in detail the efforts you made to resolve the dispute without help from the court.

What kinds of things will a court do as a discovery sanction?

If the court grants a motion for sanctions, it may issue any order that is just and appropriate to address the problem. Rule 37(b)(2) lists some of the types of orders that may be appropriate:

1. An order resolving certain issues or facts in favor of the party who made the motion;

2. An order refusing to allow the disobedient person to support certain claims or defenses at trial, or prohibiting that party from introducing certain evidence;

3. An order striking certain documents or parts of documents from the case, staying the lawsuit until the order is obeyed or dismissing the lawsuit or any part of the lawsuit or issuing a default judgment against the disobedient party; or

4. 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 disclose its witnesses as required by the magistrate judge's preliminary pretrial conference order or to supplement a prior response under Rules 26(e)(1) and (2), that party cannot use as evidence at the trial, at a hearing or on any motion any information or witness that was not disclosed unless the court decides the failure to disclose was harmless.

Paying for the motion for sanctions

If the court grants a motion for discovery sanctions, it must require the disobedient person or that person's lawyer, or both, to pay the reasonable expenses, including attorney fees, caused by their disobedience, unless the court finds that the conduct was substantially justified or that other circumstances make an award of expenses unjust. A party who does not have a lawyer may not receive an award of attorney fees.

If I am served with a motion to compel discovery or a motion for a protective order, what should I do?

In the Western District of Wisconsin, a party who is served with a motion to compel discovery or a motion for a protective order must serve and file a written response within five calendar days of receiving the motion. (If you are a prisoner, you must have your response in the mail stream at the prison within five calendar days.) You are not to file a reply unless the court asks for one.

CHAPTER 13
WHAT HAPPENS AT A COURT HEARING?

What is a hearing?

A hearing is a proceeding held before a judge or magistrate judge at which all parties participate. If the matter to be heard is a scheduling question, a discovery dispute or another relatively minor matter, the judge or magistrate judge will often hold it by telephone. If the judge decides that there is a dispute about facts raised in connection with a motion that cannot be resolved without assessing the credibility of the parties or their witnesses, the judge will schedule a formal hearing in the courtroom. In most cases, however, the judge will decide motions in the case on the basis of the parties' written submissions.

What do I do before a hearing?

Before a hearing, you should take time to review all of the papers you have that relate to the motion that is the subject of the hearing. 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, most courtrooms are arranged as follows.

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

b. To one side of the bench is a chair where witnesses sit when they testify. This is the "witness box."

c. There may be a court reporter seated in front of the judge's bench. The court reporter uses the machine to create a record of everything that is said at the hearing. Alternatively, the court will use a tape recorder to record the hearing.

d. Near the bench, there will be a seat for a "courtroom deputy," who assists the judge.

e. In the middle of the courtroom is a wooden stand with a microphone (a "lectern"), next to an "electronic visual evidence presenter." You can use the visual presenter to display the image of a document or physical object on monitors in front of the judge, parties, witness, jury and spectators. With the touch of a fingertip, you can set the visual presenter to selectively display the document or object on the screen to any or all of the people with monitors. For example, if you want the judge to see an exhibit but keep it from the jury until the judge has decided whether it can be admitted into evidence, you can turn off the jury's monitor by touching the screen. If you want to use the visual presenter during a hearing or at trial, you should let the courtroom deputy know in advance of the hearing so that the deputy can show you how to use it.

f. At one side of the courtroom against the wall, there is a box holding two rows of chairs. This is the "jury box," where the jurors sit during a trial. During a hearing, no one will be seated in this area.

g. In the center of the courtroom, there will be two long tables with several chairs. This is where the lawyers and the parties sit during a hearing or trial. The plaintiff sits at one table and the defendant sits at the other.

h. In the back of the courtroom are several rows of benches where members of the public may sit and watch the hearing or trial.

How should I behave at a hearing?

1. When you attend a hearing, you should show respect for the court by dressing as if you were going to a job interview.

2. You should be on time. It is much better to arrive at the hearing a few minutes early than to arrive a few minutes late.

3. When the judge enters the courtroom, you should stand and remain standing until the judge sits down or the courtroom deputy tells you to be seated.

4. At the beginning of the hearing, the judge or courtroom deputy will announce the name of your case and ask for "the appearances" of the parties. If you are the plaintiff, you should introduce yourself first, saying something like, "Good [morning or afternoon], your honor, my name is [your name], and I am the plaintiff."

5. When you speak to the judge, it is customary to refer to the judge as "Your Honor" instead of using the judge's name.

6. If the judge asks you questions, you should answer them completely. Do not interrupt the judge or anyone else when they are speaking. Neither the court reporter nor the recording equipment can make an accurate record when people speak over one another. When the judge is finished asking questions, he or she will usually ask whether the parties have anything else they want to discuss.

How does a motion hearing work?

If the judge is hearing a motion, the hearing usually goes as follows. First, the party who filed the motion has a chance to question his or her witnesses or produce evidence and argue why the motion should be granted. Then, the opposing party will present its witnesses and evidence and argue why the motion should be denied. Finally, the party who filed the motion has an opportunity to explain why he or she believes the opposing party's argument is wrong.

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 down ahead of time. However, you should probably have a pen and paper with you so that you can take notes about anything that the judge asks you to do.

When one party is speaking, the other party should sit at the table. Never interrupt the other party. Always wait until it is your turn to speak.

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 may go over the other points you wanted to make.

CHAPTER 14
WHAT IS A MOTION FOR SUMMARY JUDGMENT?

A motion for summary judgment is a way to have your case decided without going through a trial. If the parties agree about the facts or one party can show that the other party does not have any evidence to support its version of the facts, a trial may be unnecessary. In those circumstances, the court may be able to resolve the dispute without having to decide disputed matters of law. If a party files a motion for summary judgment, that party is asking the court to decide the lawsuit without holding a trial because that party believes the evidence will show there is no real dispute about the facts of the case.

If the court grants a motion for summary judgment, the lawsuit is over. If the court denies a motion for summary judgment, the case will go to trial unless the parties decide to settle their dispute through a compromise and end the case themselves. By denying summary judgment, a court does **not** decide that it believes one side over the other. Rather, denying summary judgment means that there is a real dispute about the facts that a jury will have to decide.

Rule 56 of the Federal Rules of Civil Procedure explains the requirements for filing motions for summary judgment. A party may move for summary judgment on all of the claims in a lawsuit or on one or more individual claims. For instance, a plaintiff may move for summary judgment because it seems undisputed that the defendant is liable

(that is, it violated the law), even if there is still a dispute over the amount of money or other kinds of damages the plaintiff should get.

What does a party have to do to win on a motion for summary judgment?

If you as the plaintiff file a motion for summary judgment, it will be your job to submit evidence to prove that there is no real dispute about the facts relating to your claim. If the defendant defends against your claim, you may also have to prove that the defendant does not have any evidence to prove his defense. (In a civil case, an affirmative defense is most often an attack on the plaintiff's *legal* right to bring an action, as opposed to an attack on the truth of the claim made in the plaintiff's complaint. For example, in a number of instances, the law requires a plaintiff to exhaust his administrative remedies before filing a lawsuit. A defendant may introduce evidence that a plaintiff failed to comply with available exhaustion procedures to prove that the defendant is entitled to a decision in his favor.)

If the defendant files a motion for summary judgment, he may succeed in getting a decision in his favor either by showing that the plaintiff does not have the evidence necessary to prove an element of his claim, or by showing that there is no real factual dispute about any part of the plaintiff's claim and that the law supports a decision in his favor or by showing that there is no real factual dispute on any element of his affirmative defense against the plaintiff's claim.

Summary judgment will be granted in favor of the party who moved for summary judgment only if the evidence shows that a jury could not reasonably find in favor of the opposing party.

In deciding a motion for summary judgment, the court must consider all of the admissible evidence from both parties and draw all inferences in favor of the party that does not want summary judgment. That means that if evidence could be interpreted in many ways, the court must interpret it in the way that favors the party who opposes summary judgment.

What do I do on a motion for summary judgment?

In the Western District of Wisconsin, the judges require the parties to follow very specific procedures for filing and opposing motions for summary judgment. These procedures may be found on the court's website at www.wiwd.uscourts.gov and are attached to this guide. In addition, the magistrate judge sends a copy of the procedures to the parties early on in the lawsuit. Although the procedures are discussed in some detail below, you should always refer directly to the copy of the procedures provided to you.

Party moving for summary judgment

A party moving for summary judgment must do three things:

- Serve and file evidence. Evidence may be submitted in the form of affidavits, documents such as contracts or medical records and admissions made by the opposing party in response to discovery requests. Each type of evidence is discussed in greater detail later in this chapter. That evidence must show either that there is no real factual dispute about any part, or "element," of the claim the

court must decide or, where the defendant is the moving party, the evidence may also show that the plaintiff lacks the evidence necessary to prove one or more of the elements of his or her claim. (An "element" is one of the building blocks of a legal claim. For example, A plaintiff suing a defendant for recklessly disregarding his safety must prove three elements: 1) the plaintiff faced a substantial risk of serious harm; 2) the defendant was aware that the plaintiff faced a substantial risk of serious harm; and 3) the defendant acted or failed to act in disregard of that risk. If a plaintiff making such a claim were to fail to submit evidence to prove one of these elements, his claim would be subject to dismissal.)

- Serve and file a document titled "Proposed Findings of Fact," listing proposed facts that the party believes are undisputed. Each fact must be stated in a separately numbered paragraph that is followed immediately by a reference to the evidence that supports the fact.
- Serve and file a separate document titled "Brief in Support of Motion for Summary Judgment," explaining the party's view of the law supporting a decision in his or her favor.

Party opposing a motion for summary judgment

To counter the moving party's motion for summary judgment, the opposing party must:

- Serve and file any evidence the opposing party needs to obtain a ruling in its favor that does not already exist in the court's record of the case. The opposing party's evidence must show that one or more of the moving party's proposed facts is

disputed or disprove the opposing party's attempt to show that no evidence exists to prove an element of the moving party's claim or affirmative defense.

- Serve and file a document titled "Response to Proposed Findings of Fact," setting out a response to each fact proposed by the moving party using the same format as the moving party used to list his or her proposed facts.
- Serve and file a separate document titled "Brief in Opposition to Motion for Summary Judgment," explaining that party's view of the law to be applied to the matter raised on the motion for summary judgment.

In addition,

- If, despite responding to the moving party's proposed facts, the opposing party is unable to explain all of the facts the court must know in order to rule in the opposing party's favor, the opposing party should file a document titled "Additional Proposed Findings of Fact," listing in separately numbered paragraphs the additional statements of fact, each of which is followed immediately by a reference to evidence in the record that supports the fact.

NOTE: If you do nothing in response to a motion for summary judgment, or fail to submit evidence that is admissible or follow the court's procedures for citing to evidence in your proposed findings of fact, you will risk losing the motion and the case.

Moving party's reply

After the opposing party submits its evidence, response to the moving party's proposed findings of fact and brief in opposition to the motion, the moving party gets a chance to file a reply. The reply should include:

- A document titled "Reply to [Opposing Party's] Response to [Moving Party's] Proposed Findings of Fact," setting out an answer to each numbered factual statement made by the non-moving party in its response, followed by a reference to evidence supporting the statement.
- Where the opposing party has submitted "Additional Proposed Findings of Fact," a document titled "Response to [Opposing Party's] Proposed Additional Proposed Findings of Fact," answering each numbered factual statement made by the non-moving party, followed by a reference to evidence supporting the statement.
- A reply brief.
- All evidence necessary to support the factual statements made in the reply or response described immediately above in paragraphs 1 and 2.

Opposing party's sur-reply

As a general rule, a party may not file a sur-reply. Such a reply is permitted under one condition only, and that is when the moving party has filed a response to "Additional Proposed Findings of Fact" filed by the opposing party. In that instance, the opposing party may file:

- A document titled "Reply to [Moving Party's] Response to [Non-Moving Party's] Additional Proposed Findings of Fact," setting out an answer to each numbered factual statement made by the moving party in its response, followed by a reference to evidence supporting the statement.
- A sur-reply brief.

- Any evidence necessary to support a factual statement made in the reply to the moving party's response to the non-moving party's additional proposed findings of fact.

What evidence does the court consider for summary judgment?

Every fact that you rely upon in connection with a motion for summary judgment 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 in other papers you filed earlier. You need to direct the court to admissible evidence that supports what you have said.

The only evidence the court will consider in deciding a motion for summary judgment is evidence submitted by the parties for or against the motion for summary judgment *that is brought to the court's attention in their "proposed findings of fact."* The court will not consider facts that are not proposed in support of or opposition to the motion in the parties' proposed findings of fact. For example, if you make a statement of fact in a brief that you have not made in your proposed findings of fact, the court will ignore that fact. In addition, if you fail to cite evidence to support a proposed fact listed in your proposed findings of fact, the court will disregard the proposed fact. The court will not search the record of a case for evidence that could have been submitted in connection with the summary judgment motion. It will consider only that evidence that the parties cite in their proposed findings of fact.

As a general rule, allegations you make in your complaint are not evidence. Evidence usually consists of the following documents:

Affidavits

Affidavits are written statements (sometimes called "declarations") of fact. They are written by an actual witness to those facts and are either sworn to and signed under oath before a notary public or are signed and declared to be true "under penalty of perjury." Either affidavits or declarations may be used as evidence in supporting or opposing a motion for summary judgment. They are written versions of what a person would testify to if they were in court on the witness stand. Rule 56(e) of the Federal Rules of Civil Procedure explains how affidavits and declarations are used for summary judgment. According to Rule 56(e), any affidavit or declaration submitted by a party must:

1. Be made by someone who has personal knowledge of the facts contained in the written statement;

2. State facts that are admissible in evidence; and

3. Tell how the person making the statement is competent to testify to the facts contained in the statement, that is, how the person learned of the facts. Was he an eye witness? Or did he learn of them some other way?

If a person making an affidavit testifies about a particular document in his affidavit or declaration, that document must be attached to the affidavit or declaration as an exhibit.

A party preparing an affidavit or declaration must bear in mind that statements based on "hearsay" are not admissible as evidence and must be disregarded by the judge. For example, a person who swears or declares under penalty of perjury that he heard from someone else that the defendant was running a red light when his car hit the plaintiff would be offering hearsay testimony in an attempt to prove that the defendant ran a red light. Generally, it is not appropriate to say something happened because you heard someone else say it happened. There are many exceptions to this prohibition on hearsay, however. The rules on the use of hearsay statements can be found in Rules 801 through 807 of the Federal Rules of Evidence.

Documents

Some of your evidence may be in the form of documents such as letters, records, emails or contracts, etc. Those documents are "exhibits" to your motion. Just because you submit an exhibit with your papers, however, does not make it admissible. For one thing, exhibits can be hearsay too, so the hearsay rules in Rules 801-807 of the Federal Rules of Evidence apply. For example, if you were to submit an incident report prepared by a police officer or prison official describing a particular incident that took place on a certain day, the court would not be able to accept that document as proof that the incident actually took place as the officer or prison official described it in the report. If the reporting officer saw the incident and you want the court to have that officer's testimony about the incident, you would have to obtain an affidavit or declaration from the officer and submit that affidavit or declaration as your evidence. Even if a document is admissible under the hearsay rules, however, it may not be admissible for other

reasons. For example, exhibits such as reports or medical records that are submitted as evidence must be authenticated before they can be considered by the court.

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

1. Submitting a statement under oath from someone who can testify from personal knowledge that the document is a real and unaltered version of the document it purports to be; or

2. Demonstrating that the document is self-authenticating, as described in Rule 902 of the Federal Rules of Evidence.

Admissions

Answers to interrogatories and to requests for admission and deposition testimony may be used as evidence showing that the other side admitted to a particular fact.

How should I cite to evidence in my proposed findings of fact?

Affidavits

When you refer the court to testimony in an affidavit to support a fact you have proposed, you must tell the court the name of the person who swore to the affidavit (the affiant), the date of the affidavit or its docket number, and the page and paragraph number in the affidavit where the court will find the information that you recited in your proposed factual statement.

> **Example**: "1. Plaintiff Smith bought six Holstein calves on July 11, 2001. Harold Smith Affidavit, Jan. 6, 2002, p.1, ¶3."

Documents

When you cite to a document to support a particular proposed fact, you should identify the exhibit number, if the exhibit is attached to an affidavit, the name of the affiant and date of the affidavit, and the exact page and line of the exhibit where the court will find the information that you recited in your proposed factual statement.

> **Example**: "2. Doctor Bishop gave plaintiff a diagnosis of acute appendicitis." Exhibit C to Bishop Affidavit, Feb. 12, 2008, p.1, Line 16."

Deposition Testimony

When you cite deposition testimony, you should give the name of the witness, the date of the deposition and the page and lines of the transcript on which the court will find the information you recited in your proposed factual statement.

> **Example**: "6. Defendant Little tackled plaintiff and held him to the ground with his knees until he had secured plaintiff with handcuffs. Little Deposition, May 6, 2007, p. 14, lns. 6-8."

Admissions

When you cite answers to interrogatories or answers to admissions, you should state the name of the party answering the interrogatories or admissions and the number of the answer or admission.

> **Example**: "18. Defendant Randolph was not wearing a seatbelt at the time of the accident. Randolph Answers to Int., June 10, 2008, ¶3."

When can a motion for summary judgment be filed?

The magistrate judge will set the deadline for filing a motion for summary judgment at the preliminary pretrial conference held in the case shortly after the defendant files an answer to the complaint. The parties should not file motions for summary judgment before the preliminary pretrial conference has been held and both sides have had an opportunity to obtain evidence through discovery.

What if my opponent files a motion for summary judgment before I have obtained all 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, you may file a motion under Rule 56(f) of the Federal Rules of Civil Procedure for an extension of time ("continuance"). In order to get a continuance, however, you must show that your failure to obtain discovery was not your fault. In addition, you will have to explain exactly what sort of information you still need from discovery and why you need it.

CHAPTER 15
WHAT HAPPENS AT A TRIAL?

The last stage of a lawsuit in district court is a trial. If the court does not dismiss the case or grant a motion for summary judgment, and if the parties do not agree to a settlement, the case will go to trial. Trial is a process that requires a good deal of preparation.

What is the difference between a jury trial and a court trial?

There are two types of trials: jury trials and court trials (sometimes referred to as "bench trials.").

During a jury trial, a jury made up of at least six people will listen to the testimony of witnesses and review documentary evidence presented by the parties and will decide what it thinks actually happened. At the end of the trial, the judge will instruct the jury about the law that applies to the case so that the jury knows how to think about the facts that it believes to be true and decide who wins the case. A jury trial occurs when:

1. The lawsuit is a type of case that the law allows to be decided by a jury;

and

2. At least one of the parties asks for a jury trial within the time permitted, which is described in Rule 38 of the Federal Rules of Civil Procedure. Usually, a party who wants a jury trial asks for it right away in the party's complaint or answer. A party that fails to make a timely demand for a jury trial may forfeit the right to a jury trial.

A court trial (or "bench trial") is a trial held before the judge, without a jury. In a court trial, the judge will listen to the witnesses and decide who is credible, look at the documentary evidence and apply the law to determine the winner of the lawsuit. A court trial is held when:

1. None of the parties asks for a jury trial (or asks too late);

or

2. The lawsuit is a type of case that the law does not allow a jury to decide (for example, a case filed under the Federal Tort Claims Act, which the law says may be tried to a judge only).

When does the trial start?

As discussed in Chapter 9 of this guide, the parties set a trial date at the preliminary pretrial conference, usually at least six months after the conference.

What do I have to do to prepare for trial?

The first step in preparing for trial is to gather your evidence and identify your witnesses. This is a process you will have started immediately after the preliminary pretrial conference and are to have completed by the deadline set in the preliminary pretrial conference order. Chapters 11 and 12 explain the different ways in which a party may obtain evidence for use at trial.

About six weeks before the trial is scheduled to start, the judge will send the parties an order describing in broad terms what happens at a trial and explaining what

written materials the parties must submit before trial. In the order, the judge will set dates for submitting motions in limine, a copy of the exhibits you will be introducing at trial, and requests for any subpoenas or writs of habeas corpus ad testificandum (that is, a court order that a prisoner be brought before the court to testify) you might need to insure that your witnesses are present on the day of trial. Finally, the judge will give you a deadline to submit proposed jury instructions, proposed voir dire questions, and a proposed verdict form. Each of these items is discussed separately below.

Motions in limine

In a motion in limine, a party asks the court to decide whether the opposing party should be allowed to offer certain evidence at trial that the party believes is improper and that will have a critical effect on the case if it is allowed. Rules 103 and 104 of the Federal Rules of Evidence help explain the importance of making a record of any objection you might have to evidence the other side wants to introduce. They discuss what kinds of questions are properly raised in a motion in limine. For example, a plaintiff might want to file a motion in limine if it seems certain that the defendant intends to try to introduce evidence that the plaintiff has been in several motor vehicle accidents, when the only matter to be decided at trial is whether in an unrelated motor vehicle accident, plaintiff was injured by the defendant's allegedly defective seatbelt. In that instance, the judge may grant the motion in limine on the ground that evidence about plaintiff's previous accidents is prejudicial to the plaintiff and irrelevant to the question whether the seatbelt was defective.

Bear in mind that motions in limine are not intended as a way for the parties to resolve every dispute they may have about the admissibility of evidence. Most objections about evidence are made during trial or at the final pretrial conference held shortly before trial. Only when a dispute concerns a matter that may have a potentially large impact on the course of trial is it appropriate to file a motion in limine.

Exhibits

In preparing for trial, you must label all of the exhibits you plan to show to the judge or jury, either using exhibit labels available from the clerk's office or handwriting an exhibit number on each exhibit. Also, you must make two copies of each exhibit and prepare two lists of those exhibits on a separate sheet of paper. One copy of the exhibits is for your opponent; one is for the judge. Your exhibit list should include the number you assigned to the exhibit and a brief description of the exhibit. For example, if you intend to question a witness about a letter you sent to the defendant and a letter that the defendant sent you in response, you should mark each letter with an exhibit number, say "Exhibit No. 1" and "Exhibit No. 2," respectively. You should then list the exhibits on a sheet of paper like this:

Plt'f Exh. #1 – Letter to [name] dated [date.].

Plt'f Exh. #2 – Letter from [name] dated [date].

It is the practice in the Western District of Wisconsin for the plaintiff to use exhibit numbers 1-500 and the defendant to use exhibit numbers 501 and up, so that no two exhibits have the same number.

It is your responsibility to keep in your possession the exhibits that you moved into evidence.

Keep in mind that even if at some time earlier in your case you sent the court or the opposing party copies of the exhibits you plan to use at trial, you must have new copies of your exhibits available for trial, along with your exhibit list.

Arranging for witnesses to be present at trial

If you want a witness to testify for you at trial, you will need to make advance arrangements for the witness to be present. Early in the lawsuit, the magistrate judge will send the parties a document titled "Procedures for Calling Witnesses to Trial," attached to the preliminary pretrial conference order. The judge will send a second copy of the procedures to the parties again with the trial preparation order the judge issues approximately six weeks before trial. In addition, the procedures are available electronically on the court's website, www.wiwd.uscourts.gov. Finally, a copy of the procedures is available as an appendix to this guide.

It is important to pay strict attention to the court's witness procedures when you prepare your case for trial. You must follow one type of procedure to insure the presence of a witness who is willing to come to trial voluntarily and another procedure to insure that you properly subpoena a witness who refuses to come to trial voluntarily. You must follow yet another procedure to insure the presence of a witness who is incarcerated, whether or not the person has agreed to testify voluntarily. Each procedure must be

followed precisely. If it is not, you will risk going to trial without a witness you may want or need.

Before the judge will issue a trial subpoena or a writ of habeas corpus ad testificandum for a witness who is incarcerated, the judge must be satisfied that there is a good reason to do so. You will have to satisfy the court that the witness has personal knowledge of information relevant to your claim and you must tell the court whether the witness has refused to testify voluntarily. If the witness is not willing to come to trial without a subpoena, you must satisfy the court that you are prepared to pay the witness's travel expenses and a daily witness fee. More detailed information about how to subpoena an individual is discussed in Chapter 11 of this guide in the section titled "Depositions." The procedure for obtaining a subpoena for a deposition is the same procedure for obtaining a subpoena for trial.

Proposed Jury Instructions

It is up to the judge to decide what rules of law apply to your case and to communicate those rules to the jury. For example, the judge will tell the jury how certain terms are defined and what must be proved for a party to win. The judges for the Western District of Wisconsin have approved standard instructions that are given to juries in civil cases tried in this district. The magistrate judge will send a copy of the court's standard jury instructions to the parties with the preliminary pretrial conference order. If you want to submit additional instructions for the judge's consideration, you will be given a deadline in the trial preparation order in which to do so. Any proposed

instruction you write should include a notation telling the judge what legal precedent you are relying on in tailoring the instruction.

The Seventh Circuit, the circuit that governs the federal district courts in Wisconsin, Illinois and Indiana, has created pattern civil jury instructions covering a number of topics commonly raised in federal trials. These instructions may be found in some law libraries in booklet form at the end of Federal Jury Practice and Instructions (Thomson/West) and Modern Federal Jury Instructions (Lexis/Matthew Bender). You may also find them on the Seventh Circuit's website, www.ca7.uscourts.gov.

Remember that even if you propose instructions for the judge to consider, the judge is the sole decision maker about what instructions the jury will be given.

Proposed voir dire questions

"Voir dire" means loosely "to see them say." It is the process by which the judge questions prospective jurors about their backgrounds and potential biases. The court has several standard voir dire questions. The magistrate judge will send a copy of those questions with the preliminary pretrial conference order. If you want the judge to ask questions that are not listed in the standard questions, you may submit them to the court about a week in advance of trial. The judge will set a deadline for submitting proposed voir dire questions in the trial preparation order sent to you about two months before trial.

Proposed Verdict Form

A verdict form lists the questions the jury will have to answer during its deliberations after the evidentiary stage of the trial is complete. It is the formal document on which the jury records its answers to the questions that will determine who wins the case. In every case, the judge will decide the content of the verdict form. However, if you want to suggest questions to be listed on the verdict form, you may submit a proposed verdict form by the deadline the judge sets in the trial preparation order.

What happens on the day of trial?

About half an hour before trial starts, the judge will hold a final pretrial conference. This will be an informal meeting between the judge and the parties at which the court will resolve any final issues that remain before trial. No jurors will be present.

As soon as you come into the courtroom, you should give the opposing party a copy of your trial exhibits with a list of the documents. You should have another set of exhibits for the judge, with a list. The opposing party will provide you a set of his exhibits. This may be your first opportunity to examine the opposing party's exhibits. If you believe a particular exhibit should not be allowed into evidence, you may raise your objection to it at the final pretrial conference and explain to the judge why you object to the exhibit. If you do not think of a reason to object to an exhibit before trial, that does not mean that you will be unable to object to the exhibit later. If you realize during trial that an exhibit is improper, you may object to it when the opposing party attempts to refer to it.

You should retain possession of the original copies of your exhibits.

What happens during trial?

If the trial is a jury trial, the first order of business is to pick a jury.

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. As discussed earlier in this chapter, this is the process by which the judge asks each potential juror a series of questions. The questions are designed to reveal any biases jurors might have that would prevent them from being fair and impartial.

During questioning, the judge may excuse a prospective juror that appears to be too biased to be fair. Also, the judge will excuse persons who reveal by their answers to the voir dire questions that they are unable to perform their duties as jurors for other reasons. After the judge excuses these persons, each party has an opportunity to use "peremptory challenges" to strike additional prospective jurors. A party may use a peremptory challenge to eliminate a prospective juror without having to give the judge or the opposing side any reason why he wants that juror to be excused. Each party has a certain number of peremptory challenges (usually three) he can use to eliminate jurors that he wants to keep off the jury. There is one exception to this rule. If it appears that one party is using his strikes to discriminate against a racial minority, the other party may ask the judge to require the party to explain his reasons for exercising his

peremptory challenge. At this point, the party whose strikes are challenged must persuade the judge that he has a non-discriminatory reason for his strikes.

After the jury is chosen, the judge will give them introductory instructions, explaining how the trial will proceed, how they should evaluate the evidence and how they will be expected to behave during the trial. The judge also will instruct the jury that if they wish, they may take notes to help them remember the evidence the parties produced at trial, so long as their notetaking does not interfere with their duty to listen carefully to all of the evidence. Also, the judge will advise the jurors that if they want a witness to answer a question that neither party asked during their examination of the witness, they may write the question down and give it to the judge. The judge will then consult with the parties and decide whether it is a question that can be asked.

Although you can see that the trial is being reported, you should not expect to be able to use trial transcripts in your deliberations. You will have to rely on your own memories.

Opening statements

After the jury is chosen, the judge will offer each party an opportunity to make an opening statement. Your opening statement should be a short speech that will give the jury an understanding of the issues in the case and an explanation of what you expect to prove during the trial. It is not appropriate for you to testify or introduce evidence during an opening statement. The opening statement should serve as nothing more than

a simple roadmap for the jury of the nature of your dispute with the opposing party and the evidence you will produce to convince the jury that you should win the case.

Which side puts on witnesses first?

After the opening statements, the plaintiff presents his or her side of the case to the jury first. The plaintiff begins by asking each witness questions. This is called direct examination. Then the opposing party is allowed to cross-examine the witness by asking additional questions about the topics covered during the direct examination. If the opposing party asks questions, the plaintiff will have an opportunity to ask additional questions only about the topics covered during the cross-examination. This is called re-direct examination. If the opposing party asks no questions on cross-examination, the questioning of the witness is at an end. Similarly, if you ask no questions on re-direct, the opposing party will have no chance for re-cross-examination. Assuming you are the plaintiff, you will present all of your evidence before the defendant has a turn to put on his or her own case. However, the defendant is allowed to make objections to particular questions you might ask and cross-examine your witnesses.

When you question eyewitnesses, you will usually ask a series of questions. You should start by asking the witness his name and then ask questions that will show how your witness has personal knowledge of the event in question. For example, if you want your witness to testify about a car accident that is the subject of the lawsuit, you would first ask something like, "Where were you on [date] at around [time]?" Then you would ask questions that would allow the witness to explain whatever he or she knows about

what happened on that date and at that time. You may not ask questions like, "Did you see the defendant's car run the red light and hit me broadside?" That would be called "leading the witness," and if the other side objected to your question, the judge would have to sustain the objection. Once your witness has established that he was at the scene of the accident, an acceptable way to get your witness to describe what happened would be to ask, "Did you observe anything unusual at that time?" and when the witness answers "Yes," you might ask, "And what did you observe?" That way, you can obtain answers to questions that support your case without putting words into the witness's mouth.

How do I show exhibits during a trial?

When the time comes during the trial that you want to talk about an exhibit, you might introduce it by saying to the witness, "I am now going to show you a letter dated [date] marked Plaintiff's Exhibit 1. Do you recognize that letter?" Simply showing your letter to a witness and talking about it with the witness does not automatically make your exhibit "evidence" that the judge or jury can consider in deciding your case. In fact, it is the rule that before you may show any exhibit to the jury you must obtain the court's permission to do so. You do this by making a motion to the court for admission of the exhibit into evidence. Normally, you would say something like, "Your honor, I would like to move Exhibit No. 1 into evidence." The judge will then ask the other side whether it objects to the admissibility of the exhibit. Remember, even if the parties have looked at each other's exhibits before trial, it is sometimes the case that the other party will think of a reason during trial why the exhibit should not be admitted into evidence.

If the judge agrees with the objection and "sustains" it, you may not use the exhibit as evidence. If the objection is "overruled," you may show your exhibit to the jury and the jury may consider the exhibit during its deliberations.

During the trial, you are responsible for keeping your own exhibits in your possession. However, after the jury has been instructed and sent to a private room to deliberate, the judge will ask a deputy clerk to collect from the parties the exhibits that were accepted into evidence so that they may be sent into the jury room. Once deliberations are over, the exhibits will be returned to the parties.

Even if an exhibit is not allowed into evidence, it becomes part of the record for the purpose of an appeal if it was referred to at trial. It is each party's responsibility to retain his or her own exhibits and to make arrangements with the clerk's office for inclusion of the exhibits in the appeal record, if there is an appeal.

What if the other side wants to introduce improper evidence?

All evidence you want to present during trial must be admissible. The Federal Rules of Evidence explain the rules governing the admissibility of evidence. These rules should be available in any law library.

If you try to present evidence that is not allowed under the Federal Rules of Evidence or try to ask improper questions of a witness, the opposing party may object. It is the opposing party's duty to object to evidence that it 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 the improper

evidence on appeal. It is the parties' job to bring a potential problem with the evidence to the trial judge's attention through objections so that the judge has an opportunity to address the problem.

The way to object is to evidence or testimony is to state your objection to the judge with a brief explanation of the reason for your objection. For example, you might say, "Objection, your honor, inadmissible hearsay." If the judge wants to know more about your objection, he or she may ask for a better explanation or ask you and the other party to approach the bench where the judge sits out of the jury's hearing range to talk to you quietly. This is called a "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.

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?

After the plaintiff has presented all of his or her evidence, the defendant is allowed to make a motion for judgment as a matter of law if he believes that the evidence presented by the plaintiff is not sufficient as a matter of law to allow the plaintiff to prevail. (A plaintiff may move for judgment as a matter of law if he believes that the defendant has not put in enough evidence to support a verdict in his favor on an issue <u>if</u> the defendant has the burden of proof on that issue.) Rule 50(a) of the Federal Rules of

Civil Procedure explains the procedure for making a motion for judgment as a matter of law.

A motion for judgment as a matter of law is a request for the judge to decide the outcome of the case right then and there. If you are the plaintiff and the defendant moves for judgment as a matter of law after you have finished putting in all of your evidence, it means the defendant does not believe you have provided enough evidence to allow a reasonable jury to enter a verdict in your favor, even if the jury views the evidence in the light most favorable to you. If the judge grants the motion in full, the case is over. If the judge grants the motion in part, the trial will proceed on the remaining issues.

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

Even if the defendant asks for judgment as a matter of law after the plaintiff has finished presenting evidence, the judge may deny the motion or put off ruling on it until later. If either of these things happen, it is the defendant's turn to present witnesses and documentary evidence to support his or her defenses to the plaintiff's case. The questioning procedure is the same for the defendant as it is for the plaintiff. The defendant will ask witnesses questions, the plaintiff will cross-examine the witnesses, and the defendant will be allowed to ask the witnesses follow-up questions.

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 cases. In the rebuttal stage, whichever party has the burden of proof (usually the plaintiff) may want to introduce a witness who

can undermine the testimony of a witness for the opposing party. This is not an opportunity for plaintiff to present his or her case over again. Rebuttal is limited to countering what the other side has offered as evidence. For example, if a witness for the defendant testifies that he saw the plaintiff drive through the light while it was red, a rebuttal witness for the plaintiff might testify that he or she saw the defendant's witness and knows that witness could not have seen plaintiff's car from where he was at the time. A rebuttal witness may be a new witness or a witness the plaintiff questioned about other things during the presentation of his or her evidence. It is not necessary to produce rebuttal evidence in every case. Whether you offer a rebuttal depends on the need for it and your ability to produce rebuttal evidence.

What happens after both sides have finished presenting their evidence?

After all evidence has been presented, either party may make a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure.

A motion for judgment as a matter of law at the end of trial is proper when there is so little evidence supporting the other side's case that no reasonable jury could decide the case in favor of that party. If the court grants a motion for judgment as a matter of law, the case is over.

Closing arguments

If the judge does not grant judgment as a matter of law, or if no party asks for it, the court will ask the parties to give their closing arguments, starting with the plaintiff.

The purpose of the closing argument is to summarize the evidence and argue how the jury (or, in a court trial, the judge) should decide the case based on that evidence.

Instructing the jury

After closing arguments, the judge will instruct the jury about the law that applies to the case. The judge prepares these instructions in advance of trial. They include the court's standard instructions and instructions that are specific to the case, including those that you and the opposing party may have proposed earlier that the judge agrees are appropriate to give. Before the instructions are read to the jury, the judge will hold a final instruction conference with the parties and give them a chance to object to any proposed instructions or to add new instructions.

In a jury trial, what is the jury doing after closing arguments?

After the judge has instructed the jury, a court security officer will escort the jurors to a private room so that they can discuss the case and work to reach a unanimous decision about who should win the case. They will start by picking one of them to act as a "presiding juror." This is the person who will help guide the discussions, insure that all of the jurors have an opportunity to express an opinion and fill in the verdict form and sign it.

When the jury reaches its decision, the presiding juror will tell the court security officer that the jury has a verdict. The court security officer will relay that information to the judge and a deputy clerk, who will gather the parties together in the courtroom. Once the judge and jury have returned to the courtroom, the presiding juror will hand

the verdict over to the judge, who will review it and then ask the deputy clerk to read it aloud. The verdict is the official decision of how the case has been decided. Ordinarily, it ends the case.

After the verdict has been read, the deputy clerk will often "poll the jury." This means the deputy clerk will ask each juror whether the verdict as read was the verdict he or she reached. This assures the parties and the judge that the decision was unanimous. The judge will then discharge the jurors from their service as jurors and send them out of the courtroom.

Are any other matters taken up after the jury has been excused?

After the trial is over and the jury has left the courtroom, the judge will ask the parties whether they have anything else to discuss. In some instances, a party might renew its motion for judgment as a matter of law or ask the judge to set a schedule for filing post-trial motions, such as a motion for a new trial. This is also the time you will want to insure that any exhibits you gave the judge to send into the jury room are returned to you.

In a court trial, what does the judge do after closing arguments?

If the trial is to the court, the judge may choose to issue a ruling immediately after closing arguments or may take the evidence and arguments under consideration for a written decision to be issued at a later date. In either case, the final decision will be documented in a written judgment that will be mailed to the parties.

CHAPTER 16
WHAT CAN I DO IF I THINK THE JUDGE OR JURY MADE A MISTAKE?

Technically, there is no such thing in the Federal Rules of Civil Procedure as a "motion for reconsideration." However if, **before** judgment is entered in a case, you believe that the judge has made a serious mistake in an order, you may bring the matter to the judge's attention promptly by filing a motion asking for reconsideration. In addition, you may ask the judge to review certain orders a magistrate judge has entered in your case on matters that were not "dispositive" of the case or a claim in the case. A decision is dispositive only when it finally resolves a party's claims or defenses, such as decisions on a motion to dismiss or motion for summary judgment. Examples of non-dispositive decisions are decisions on motions for appointment of counsel, motions for extensions of time and motions to compel discovery.

After the case has ended and a final judgment has been entered, you may challenge the judgment either by filing an appeal with the Court of Appeals for the Seventh Circuit or by filing one of three different kinds of motions: 1) a renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50; 2) a motion for a new trial or to alter or amend the judgment under Federal Rule of Civil Procedure 59; or 3) a motion for relief from the judgment or final order under Federal Rule of Civil Procedure 60. These motions are discussed below. Appeals are discussed briefly in Chapter 17.

What is a judgment?

A "judgment" is a separate document issued by the court at the end of all proceedings declaring the winner of the case. It is the court's or jury's final decision regarding the rights and obligations of the parties to a case. Entry of a judgment signals to the parties that the time for filing an appeal has started to run.

What is a motion for reconsideration?

In a motion for reconsideration, you would ask the judge to consider changing a decision (other than the final decision or judgment in the case). You should not file a motion for reconsideration simply because you do not like a particular decision or want to repeat the same arguments that you made previously to the court.

A motion for reconsideration is proper when:

1. A significant change in the law occurs or new facts emerge about which you could not reasonably have known at the time you presented facts to the court in connection with a motion that the judge has decided; or

2. The judge clearly failed to consider essential facts or key legal arguments you made to the court before the judge issued an order.

If a party asks for reconsideration of an order, the opposing party should not file a response to the motion unless the court asks for one.

What is a renewed motion for judgment as a matter of law?

If you believe the jury made a serious mistake **and** if the judge denied your motion for judgment as a matter of law during trial, you may file a renewed motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure. However, you cannot file a renewed motion for judgment as a matter of law if you did not make a motion for judgment as a matter of law during trial.

A renewed motion for judgment as a matter of law must be filed no later than 28 days after entry of the judgment. When the judge rules on a renewed motion for judgment as a matter of law, he or she may:

1. Refuse to disturb the verdict;

2. Grant a new trial; or

3. Direct entry of judgment as a matter of law.

What is a motion for a new trial or a motion to alter or amend the judgment?

Rule 59 of the Federal Rules of Civil Procedure governs motions for a new trial and motions to alter or amend the judgment. Both types of motions must be filed with the court no later than 28 days after the court enters its judgment, without exception.

If the case was decided by a **jury,** the court may grant a motion for a new trial if the jury's verdict is against the clear weight of the evidence. The judge may weigh the evidence, but generally will not overturn the jury's verdict unless it is clear that the jury

made a mistake. If the judge grants a motion for a new trial, a new jury will be selected for the new trial.

If the case was decided by a judge following a **court** trial, the judge may grant a motion for a new trial if it appears certain that he or she made a clear legal or factual error or there is newly discovered evidence that could have affected the outcome of the trial. If the judge grants a motion for a new trial, he or she does not need to hold an entirely new trial. Instead, the judge may hear additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions and direct the entry of a new judgment.

If the case was decided on a dispositive motion rather than as the result of a court or jury trial, a party may file a motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure to call to the judge's attention newly discovered evidence or a clear error of law or fact that the judge made in his or her final order. As with other motions filed under Rule 59, you must file a motion made under Rule 59(e), without exception, within 28 days of the date judgment is entered.

What is a motion for relief from judgment or order?

A motion for relief from judgment or a final order made under Federal Rule of Civil Procedure 60 is similar to a motion to alter or amend the judgment made under Federal Rule of Civil Procedure 59, in that a party filing either motion is asking the judge to change the judgment. To avoid confusion between the two, the Court of Appeals for the Seventh Circuit has instructed judges presiding over cases in Wisconsin, Illinois and

Indiana to treat as a Rule 59 motion any motion to alter a judgment filed within ten days of the date of entry of the judgment, and to treat as a Rule 60 motion any such motion filed after the 28 days has expired.

Rule 60(a) allows the court to correct clerical errors in judgments and orders at any time, on its own initiative or as the result of a motion filed by one of the parties. This authority is usually viewed as limited to very minor errors, such as typographical errors.

Rule 60(b) permits any party to file a motion for relief from a judgment or final order for any of the following reasons:

1. Mistake, inadvertence, surprise, or excusable neglect;

2. Newly discovered evidence that with reasonable diligence could not have been discovered in time to move for a new trial under Rule 59(b);

3. Fraud, misrepresentation, or other misconduct by an opposing party;

4. The judgment is void;

5. The judgment has been satisfied, released, or discharged, or a prior judgment upon which it has been based has been reversed or otherwise vacated, or it is no longer fair that the judgment should be applied; or

6. Any other reason justifying relief from the judgment.

If you file a motion grounded on any one of the first three reasons, you must file it within one year of the date the judgment or final order is entered. This time limit cannot be extended. If you file a motion based on any of the last three reasons, you must file it within a "reasonable time." However, if the court decides that your motion really falls within one of the grounds for relief that is subject to the one-year time limit, you will not be allowed to obtain relief under the catch-all provision in Rule 60(b)(6). Even if you do file a proper motion under Rule 60(b)(6), such motions are rarely granted and only when extraordinary circumstances exist.

Can I get a magistrate judge's order or report reviewed?

In the Western District of Wisconsin, the judge who is assigned to your case will refer certain pretrial matters to a magistrate judge automatically, such as motions to compel discovery. In addition, the judge sometimes will refer certain kinds of cases to the magistrate judge, such as petitions for writs of habeas corpus. The procedure for obtaining review of a magistrate judge's decision depends on the type of matter that was referred to the magistrate judge.

Am I allowed to object to the magistrate judge's non-dispositive decisions?

As noted above, if the magistrate judge's decision does not dispose of any party's claim or defense on the merits, it is called a "non-dispositive matter." You can object to the magistrate's decisions on non-dispositive matters, but you should not object simply because you disagree with the magistrate judge's decision or because you want a second opinion from the judge that referred the matter to the magistrate judge. Objections are

proper under Federal Rule of Civil Procedure 72(a) and 28 U.S.C. § 636(b)(1)(A) only when the magistrate judge's decision is "clearly erroneous" or "contrary to law." You must file such objections with the judge who referred the matter no later than 14 days after you are served with a copy of the magistrate judge's order. The opposing party is not required to file a response to a moving party's objections unless the referring judge sets a briefing schedule.

How do I get review of a magistrate judge's final decision on the merits of a claim?

A decision that disposes of an entire claim on the merits is called a "dispositive matter." The procedure you follow when you disagree with a magistrate judge's final decision on the merits of a claim depends on whether you and the opposing party consented to the case being handled by a magistrate judge.

What if the parties did not consent to the case being handled by a magistrate judge?

A magistrate judge has authority to resolve the merits of a claim or the entire case only if the parties gave their consent for the magistrate judge to preside over the case. If the parties did not consent, the magistrate judge still can decide a motion affecting the merits of a claim or the case, but the decision must be made in a "report and recommendation" that will be reviewed by the referring judge in accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(B) and (C).

If you believe the magistrate judge made a legal or factual mistake in a report and recommendation, you have 14 days from the date you were served with the report in

which to file objections with the referring judge. The opposing party may respond to your objections within 14 days after being served with them.

If no objections are made to a report and recommendation, the referring judge will enter an order adopting the magistrate judge's report and accepting the magistrate judge's recommendation. If a party objects to some or all of the report and recommendation, however, the referring judge must make a "de novo" review of any portion of the magistrate judge's report and recommendation to which an objection has been made. A "de novo" review means that the judge will decide the matter as though he or she is looking at the parties' evidence and hearing their legal arguments without any input from the magistrate judge. The judge may accept, reject or modify the magistrate judge's recommendation or send the matter back to the magistrate judge for further review with additional instructions.

What if the parties did consent to having a magistrate judge preside over the case?

If you and the opposing party consented to having a magistrate judge preside over your case, you should not file objections to the magistrate judge's decisions with a district judge. Instead, you may file a motion under Rule 50, 59 or 60 of the Federal Rules of Civil Procedure directly with the magistrate judge, or file an appeal with the United States Court of Appeals for the Seventh Circuit.

CHAPTER 17
APPEALS

What if I want to file an appeal?

All final judgments may be appealed to the United States Court of Appeals for the Seventh Circuit. A final judgment is a document that is entered in a case after the jury has returned its verdict or the judge has made a final decision disposing of all of the claims raised in the lawsuit. Basically, it is a document that declares the winner of the case and signals to the parties that the time for filing an appeal has started to run. Rule 58 of the Federal Rules of Civil Procedure describes in more detail when a judgment is to be entered.

Ordinarily, you should not file a notice of appeal before a judgment has been entered. There are a few rare exceptions to this rule. For example, "interlocutory orders" such as a ruling on a motion for a preliminary injunction or a decision to deny a motion to dismiss on the ground of qualified immunity may be appealed before a final judgment is entered. This is because an erroneous decision in these types of motions is potentially so damaging to a party that an immediate appeal is allowed. In addition, 28 U.S.C. § 1292 allows a district judge to designate a decision as one that may be appealed immediately, so long as the judge states in writing in the order that the matter "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Most of the time, though, a party must wait to file an appeal until every claim in the lawsuit has been disposed of and a judgment has

been entered. This is especially important for prisoner litigants to understand, because under the Prison Litigation Reform Act, prisoners must pay filing fees for appeals either in installments or in a lump sum depending on the circumstances, even if the appeal is dismissed as having been filed too early.

Just as the Federal Rules of Civil Procedure govern the procedures for litigating a lawsuit in the district court, the Federal Rules of Appellate Procedure govern the procedures for litigating an appeal. In addition, each circuit has its own rules. The Court of Appeals for the Seventh Circuit is the court of appeals designated to hear appeals from appealable orders and judgments entered in cases filed in the federal courts of Wisconsin, Indiana and Illinois. The address for the court of appeals is 219 South Dearborn St., Chicago, Illinois, 60604. You can find the Federal Rules of Appellate Procedure and the Seventh Circuit rules in most law libraries or on the circuit court's website at:

http://www.ca7.uscourts.gov/Rules/rules.htm

PLEASE NOTE. This guide does not cover the rules of appellate procedure in detail. It discusses only those steps you must take in the district court to file an appeal.

What is a notice of appeal?

A notice of appeal is a document that initiates an appeal. According to Rule 3 of the Federal Rules of Appellate Procedure, a notice of appeal must:

Specify in the caption or body of the notice the party taking the appeal;

Specify the judgment or order being appealed; and

Name the court to which the appeal is directed. (As noted above, appeals from orders issued by federal courts in Wisconsin, Illinois and Indiana should be directed to the Court of Appeals for the Seventh Circuit.)

An example of a notice of appeal is shown below.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

HAROLD DOE,

Plaintiff, NOTICE OF APPEAL

v. 09-cv-100-bbc

JOHN PHILLIP MOE,

Defendant.

- -

Notice is hereby given that Harold Doe, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on the ________ day of _____________, 2009.

____
(Signature of plaintiff(s)

____
(Address)

____
(Date)

Where do I file a notice of appeal?

Rule 4 of the Federal Rules of Appellate Procedure provides that a notice of appeal must be filed in the *district court*. If a party makes the mistake of filing a notice of appeal directly with the court of appeals, the clerk of the court of appeals will note on the notice the date it was received and send it to the district court for filing as of the date the clerk of the court of appeals received it.

How much time do I have to file an appeal?

The deadlines for filing appeals are listed in Rule 4 of the Federal Rules of Appellate Procedure. That rule provides that a notice of appeal must be filed in the district court within 30 days after the judgment or order appealed from is entered. The deadline is 60 days in cases in which the United States or its officer or agency is a party. In addition, the time for filing an appeal may be extended automatically where a party has timely filed certain post-judgment motions, such as motions for a new trial or to alter or amend the judgment under Rule 59 of the Federal Rules of Civil Procedure. For a complete list of the types of motions that affect the deadline for filing an appeal, you should refer to Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure.

Can I ask for more time to file an appeal?

Rule 4 of the Federal Rules of Appellate Procedure provides that a district court may extend the time for filing a notice of appeal for a period not to exceed 30 days after the original deadline expires. However, extensions are appropriate only if the judge finds that the party asking for the extension has shown excusable neglect or good cause for filing a late appeal.

If I have to file my notice of appeal in the district court, how will the court of appeals know that I filed an appeal?

As soon as a litigant files a notice of appeal in the district court, it is the district court clerk's responsibility to send to the clerk of the court of appeals a copy of the notice of appeal, together with a copy of the docket entries from the record of the case in the district court.

Is there a fee for filing a notice of appeal?

There is a fee for filing an appeal. As of December 2009, the fee was $455. This fee increases from time to time. To insure that you pay the correct fee, you may call the clerk's office at (608) 261-5447 to ask for the current rate or refer to the most recent amendment to 28 U.S.C. § 1914. When you file a notice of appeal in the district court, you also must submit a check or money order made payable to the clerk of court in the amount of the filing fee. If you cannot afford to pay the filing fee, you may ask the district court to grant you permission to proceed with your appeal under the in forma pauperis statute, 28 U.S.C. § 1915. Information about how to ask for leave to proceed in forma pauperis is discussed immediately below.

What if I cannot afford to pay the fee for filing an appeal?

If you cannot afford to prepay the filing fee, or if you were allowed to proceed with your case in the district court under the *in forma pauperis* statute, 28 U.S.C. § 1915, you may ask the district court for permission to proceed *in forma pauperis* on appeal. If you submit a notice of appeal without also submitting the filing fee, the court will assume you are asking to proceed *in forma pauperis*.

When a party asks the district court for permission to proceed *in forma pauperis* on appeal, the judge must decide whether the party qualifies financially for pauper status and whether the appeal is taken in good faith. In addition, if the party asking for pauper status on appeal is a prisoner, the judge must determine whether the prisoner has three strikes recorded against him under 28 U.S.C. § 1915(g).

Financial eligibility

If the party filing a notice of appeal was granted leave to proceed in forma pauperis earlier in the district court action, the party is presumed to qualify financially for pauper status on appeal. All other persons seeking leave to proceed in forma pauperis on appeal must support their request with an affidavit of indigency revealing their financial status. Forms for an affidavit of indigency are available from the clerk of court.

If the appealing party is a prisoner, the prisoner must send the court a trust fund account statement for the six-month period immediately preceding the date he files his notice of appeal. From the trust fund account statement, the court will decide what portion of the filing fee, if any, the prisoner must prepay, as required by the Prison Litigation Reform Act. After the prisoner pays the initial partial payment, the rest of the fee will be collected from the prisoner's prison account in monthly installments. The formula under which the court must calculate a prisoner's initial partial payment and collect the balance is explained in 28 U.S.C. § 1915(b)(1) and (2).

If the judge determines that a party does not qualify financially for pauper status on appeal, the judge will deny the request for leave to proceed *in forma pauperis* and offer the party an opportunity to prepay the filing fee. If the party does not pay the fee, or a prisoner does not submit an assessed initial partial payment, the judge will notify the court of appeals of the failure to pay so that it may take whatever action it considers appropriate with respect to the party's appeal.

Good faith determination

28 U.S.C. § 1915(a)(3) provides that an appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith. With very few exceptions, the judge must certify an appeal as not taken in good faith in situations when the party is attempting to appeal from a non-appealable order or an order or judgment dismissing an action because it is frivolous or malicious, fails to state a claim upon which relief may be granted or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. §§ 1915(e)(2) and 1915A. In addition, the judge ordinarily will certify an appeal as not taken in good faith if it appears that the party is attempting to raise on appeal an issue that the court of appeals has already decided.

Three-strikes rule

The three-strikes rule, 28 U.S.C. § 1915(g), applies to prisoners only. Under the 1996 Prison Litigation Reform Act, the judge must deny a prisoner leave to proceed *in forma pauperis* on appeal if she determines that the prisoner has three strikes against him under 28 U.S.C. § 1915(g), unless it is clear from the issue the prisoner wants to raise on appeal that he is in imminent danger of serious physical injury.

What can I do if the judge denies my request for leave to proceed *in forma pauperis*?

If a party's request for leave to proceed *in forma pauperis* is denied, the party may choose to continue with the appeal by paying the filing fee in full. Alternatively, if the party disagrees with the judge's determination that the party does not qualify financially

for pauper status, the appeal is not taken in good faith, or the prisoner party has "struck out" under 28 U.S.C. § 1915(g), the party may ask the Court of Appeals for the Seventh Circuit to override the judge's decision. Under Rule 24(a)(5) of the Federal Rules of Appellate Procedure, the party has 30 days from the date of the order of the district court denying the request for leave to proceed *in forma pauperis* on appeal in which to ask the court of appeals to review the district court's denial. The party must include with the motion to the court of appeals: 1) a copy of the affidavit of indigency the party filed with the district court; 2) an affidavit describing the issues that the party intends to present on appeal; and 3) a copy of the district court's statement of reasons for denying the party's request for leave to proceed *in forma pauperis* on appeal.

What happens after I have been allowed to proceed *in forma pauperis* or have paid the filing fee?

After a party pays the filing fee or obtains leave to proceed *in forma pauperis*, the district clerk will notify the clerk of the circuit court of appeals and the circuit clerk will enter the appeal on the docket in the court of appeals. Also, the clerk of the district court will arrange for the record of the case to be forwarded to the court of appeals. The following papers constitute the record on appeal:

The original papers and exhibits filed in the district court;

Any transcripts of proceedings that were filed in the case; and

A certified copy of the docket entries prepared by the district court clerk.

Ordinarily, it is the duty of the party taking an appeal to order from the court reporter within 14 days after filing a notice of appeal any transcripts of proceedings

relevant to the appeal that are not already in the district court's record, and to pay the costs of transcription. However, in situations in which the party appealing the judgment is proceeding *in forma pauperis*, the court may order that the transcript be prepared at government expense either at the party's request or on the court's own motion. 28 U.S.C. § 753(f).

Certain items are routinely omitted from the record on appeal. Among them are briefs, motions to extend time, certificates of service and mailing, and various notices of filings or proceedings. For a complete list of omitted items, you may consult Seventh Circuit Rule 10. If you believe that one or more of the automatically excluded items is needed to support arguments you intend to make on appeal, you have ten days from the date the notice of appeal is filed to ask the district court to include the items, specifying each item by name and the date it was filed.

If a party believes that a document material to the issue on appeal has been omitted from or misstated in the record by error or accident, or if a party believes the record does not truly disclose what occurred in the district court, the party may bring the matter to the attention of the district court so that the record can be corrected. All other questions about the form and content of the record must be presented to the court of appeals.

Appeals Conclusion

Remember, this chapter does not cover every aspect of an appeal. It provides general information only about how to initiate an appeal. For a complete understanding of the rules governing appeals, you must consult the Federal Rules of Appellate Procedure

and the Court of Appeals for the Seventh Circuit's circuit rules. These rules may be found in any law library and are available on the circuit's website, http://ww.ca7.uscourts.gov/Rules/rules.htm

GLOSSARY

action	A lawsuit may also be called the *action* or the case.
adjourn	In the context of a trial, when the judge ends trial proceedings, he or she is said to *adjourn* the trial.
admissible evidence	*Admissible evidence* is evidence that the court must allow to be introduced at proceedings requiring the submission of evidence or at trial; the Federal Rules of Evidence govern the admissibility of evidence in federal court.
ADR	The acronym *ADR* stands for "alternative dispute resolution," which refers generally to methods other than a trial by which a complaint can be resolved.
affidavit	An *affidavit* is a statement of fact written by a witness, which the witness swears before a Notary Public.
amending a document	Changing a document that has been filed with the court is known as *amending* the document. The change itself is called an amendment.
amount in controversy	The *amount in controversy* refers to the dollar value of what the plaintiff asks for as relief in a complaint.
answer	The written response to a complaint is referred to as an *answer.*
application to proceed in forma pauperis	An *Application to Proceed in Forma Pauperis* is the document a plaintiff who cannot afford to pay the fee to file a complaint may file with the court to ask permission to file his or her complaint without prepaying the fee.
arbitration	An *arbitration* is a form of alternative dispute resolution in which the parties argue their positions in a less formal "mini-trial" to an arbitrator instead of a judge. Even when the outcome of the *arbitration* is not binding on the parties, it can be useful to see how a judge might view the issues to encourage the parties to resolve their dispute without trial.
arbitrator	An *arbitrator* is the third-party, neutral person who serves as a judge for an arbitration. Most *arbitrators* are lawyers.

authentication of evidence	Before documentary evidence is admissible in court, the party submitting it must establish that the evidence is what the party says it is, that is, that the evidence is authentic; the requirements for *authentication of evidence* are found in Rules 901 and 902 of the Federal Rules of Evidence.
bench	The large desk area, usually located at the front of the courtroom, where the judge sits is referred to as the *bench.*
bench trial	At a *bench trial*, there is no jury and the judge determines the law, the facts, and the winner of the lawsuit.
breach	When individuals fail to perform as they have agreed or contracted to do, they commit a *breach* of the agreement or contract.
brief	A *brief* is a written legal argument filed with the court by a party arguing for or against a motion.
caption	The *caption* is a formatted listing on the front of every document filed with the court, listing the parties and the name of the case and other identifying information. The specific information that must be included in the *caption* is explained in Rule 10(a) of the Federal Rules of Civil Procedure.
caption page	The cover page of the document containing the caption, always the first page of any document a party to a lawsuit files with the court, is called the *caption page*.
case file	The court maintains an electronic copy of every document filed with it in a *case file*, also referred to as the permanent case file.
preliminary pretrial conference order	The *preliminary pretrial conference order* is the court's written order scheduling certain events in a lawsuit; it is sent to the parties after the preliminary pretrial conference documenting the schedule the parties agreed upon during the conference.
certificate of service	The *certificate of service* is a document showing that a copy of a particular document–for example, a motion–has been mailed to all other parties in the lawsuit or to a party's lawyer, if a party is represented by a lawyer.

challenge for cause	During jury selection, the parties have an opportunity to ask the court to excuse any jurors they believe are too biased to be fair and impartial, or cannot perform their duties as jurors for other reasons; making such a request is called *challenging for cause*.
chambers	The private office of an individual judge is called his or her *chambers*.
citation	A reference to a law, rule or case in a brief or a reference to an evidentiary document in a party's proposed findings of fact is called a *citation*.
citing	When you refer to a law, rule or case or in a brief, or an evidentiary document in proposed findings of fact, you are *citing* that law, rule, case or evidentiary item.
claim	A *claim* is a statement or statements made in a complaint, in which the plaintiff argues that the defendants violated the law in a specific way; *claims* are sometimes also referred to as counts.
closing arguments	At the end of the presentation of all evidence at trial, each party has an opportunity to make a *closing argument*, the purpose of which is to summarize the evidence and argue how the jury (or, in a bench trial, the judge) should decide the case.
complaint	The *complaint* is a legal document in which the plaintiff tells the court and the defendants how and why the plaintiff believes the defendants violated the law in a way that has injured them.
compulsory counterclaim	A *compulsory counterclaim* is a claim by the defendant against the plaintiff that is based on the same events or transactions as the plaintiff's claim against the defendant.
contempt of court	*Contempt of court* refers to acts found by the court to have been committed in willful violation of the court's authority or dignity, or to interfere with or obstruct its administration of justice.
continuance	A *continuance* is a grant by the court of an extension of time, for example, of the time an opposition brief is due on a motion.
counsel	Attorneys, also called lawyers, are sometimes referred to as *counsel*; for example, the attorneys for an opposing party may be referred to as "opposing counsel."

count	A *count* is a statement made in a complaint in which the plaintiff argues that the defendants violated the law in a specific way; *counts* are sometimes also referred to as claims.
counterclaim	When a defendant files a complaint against the plaintiff, it is called a *counterclaim.*
court of appeals	The *court of appeals* is the court to which a party can go to get relief from a judgment and some interlocutory orders.
court reporter	A person authorized by law to record testimony, whether in the courtroom or outside it (for example, at depositions) is called a *court reporter* or a court stenographer.
court stenographer	A person authorized by law to record testimony, whether in the courtroom or outside it (for example, at depositions) is called a court reporter or a *court stenographer*.
courtroom deputy	A *courtroom deputy* is a person who assists the judge in the courtroom and usually sits at a desk near the judge.
cross-examination	At trial, after a party's direct examination of his or her witness, the opposing party gets to ask the witness additional questions about the topics covered during the direct examination. This additional questioning is called *cross-examination* of the witness.
damages	The money that can be recovered in court by a plaintiff for his or her loss or injury due to the defendants' violation of law is referred to as *damages.*
deliberating	*Deliberating* is when the jury goes back to the jury room to discuss the case and make their decision.
de novo review	A *de novo review* means the judge is considering a matter before it from the beginning so as to make it own determination. For example, if a referring judge gives a de novo review to a magistrate judge's report and recommendation, the judge considers all of the evidence in the record and comes to his or her own conclusion.
declarant	The *declarant* is a person making a declaration.

declaration	A *declaration* is a written statement signed under penalty of perjury by a person who has personal knowledge that what he or she states in the *declaration* is true; *declarations* may contain only facts, and may not contain law or argument.
default	When defendants who have been properly served with the complaint do not file an answer or other response within the required amount of time, they are said to be in *default.*
default judgment	If a defendant does not file an answer or other response to the complaint, the court may enter a *default judgment* against the defendant, which means the plaintiff has won the case.
defendants	The *defendants* are the people the plaintiffs claim injured them in violation of the law.
defenses	The reasons defendants give for why plaintiffs' claims against them should be dismissed are referred to as *defenses*.
deponent	The person who answers the questions in a deposition is referred to as the *deponent* or witness; a *deponent* can be any person who may have information about the lawsuit, including one of the other parties to the lawsuit.
deposing	The process of taking a deposition is called *deposing* the deponent or witness.
deposition	A *deposition* is a question-and-answer session, before trial and outside the courtroom, in which one party to the lawsuit asks another person who is under oath questions about the issues raised in the lawsuit.
direct examination	When a party at trial calls his or her own witness and asks the witness questions, this process is called *direct examination.*
disclosures	*Disclosures* are information that you must give the other parties to your lawsuit even if they do not ask for it.
discovery	*Discovery* is the formal process of asking other people to give you information about the issues in your case; *discovery* methods include depositions, interrogatories, requests for document production, requests for admission, and physical or mental examinations.

discovery plan	Rule 26(a) of the Federal Rules of Civil Procedure requires that prior to a preliminary pretrial conference, the parties agree on a joint proposed *discovery plan*, which must include the parties' views and proposals about various aspects (listed in Rule 26(a)) of how discovery should proceed in the lawsuit.
diversity jurisdiction	Federal courts are authorized to hear lawsuits between parties who are citizens of different states and in which the amount in controversy exceeds $75,000. This type of action is allowed to be brought in a federal court under the court's *diversity jurisdiction*.
docket	The *docket* is the computer file maintained by the court for each case, which lists the title of every document filed, the date each document was filed and the date each document was entered into the *docket*.
elements (of a claim or defense)	The individual components of a plaintiffs' claim or defendants' defense, each of which must be proved, are referred to as the *elements* of the claim or defense.
entry of default	*Entry of default* is a formal action taken by the clerk of court in response to a plaintiff's request against a defendant who has not responded to a properly served complaint; the clerk must *enter default* against the defendant before the plaintiff can file a motion for default judgment.
ex parte motion	An *ex parte motion* is a motion that is filed without giving notice to the opposing party.
ex parte	When you have contact with the judge without giving notice to the other parties and without them being present, you are said to have approached the court *ex parte.* Ordinarily, e*x parte* communications are forbidden.
exhibits	*Exhibits* are documents or other materials that are presented as evidence at trial or as attachments to motions or declarations.
expert disclosures	The disclosures required by Rule 26(a)(2) to the other parties of the identity of and additional information about any expert witnesses you may use at trial are referred to as *expert disclosures.*

expert report	An *expert report* is a written report signed by the expert witness that must accompany the expert disclosures for any expert witness whom you may use to give testimony in your case; Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure lists what must be included in an *expert report*.
expert witness	An *expert witness* is a person who has scientific, technical or other specialized knowledge that can help the court or the jury understand the evidence.
federal question jurisdiction	Federal courts are authorized to hear lawsuits in which at least one of the plaintiffs' claims arises under the Constitution, laws or treaties of the United States. This subject matter jurisdiction is referred to as *federal question jurisdiction*.
Federal Rules of Civil Procedure	The *Federal Rules of Civil Procedure* set forth the procedures to be followed in every federal court in the country.
Federal Rules of Evidence	The *Federal Rules of Evidence* set forth the rules for submitting evidence in the federal courts.
filing	*Filing* means providing the court with a document to be made a part of the record of the case.
filing fee	The courts charge parties money, or *filing fees* to process and file complaints and appeals. In federal court, the *filing fees* are set by the United States Congress and the Judicial Conference of the United States.
fraud	*Fraud* is a false representation of a past or present fact by a person on which another person or persons rely, resulting in their injury.
good faith	Acting in *good faith* means having honesty of intentions; for example, negotiating in *good faith* would be to come to the table with an open mind and a sincere desire to reach an agreement.
grounds	The reason or reasons for something is sometimes referred to in legal documents as the *ground* or *grounds* for that thing; for example, if you present the reasons you object to another party's discovery requests, you are giving the *grounds* for your objections.
hearing	A *hearing* is a formal meeting of the parties to a lawsuit with a judicial officer for the purpose of resolving some issue, often with evidence being presented and witnesses being heard; *hearings* are typically open to the public and held in the courtroom.

hearsay	*Hearsay* is a statement made by someone other than the witness or declarant, which is offered to prove the truth of the matter asserted in the statement.
impeach	When you call into question a witness' truthfulness, you are said to be attempting the *impeach* the witness.
interlocutory order	Certain appealable court orders issued before judgment are referred to as *interlocutory orders.*
interrogatories	*Interrogatories* are written questions served on another party in the lawsuit, which must be answered (or objected to) in writing and under oath.
judgment	At the conclusion of a trial, after the verdict has been announced in the courtroom, the judge issues a written *judgment* stating the verdict and the remedies, if any, that are ordered.
jury box	The two rows of chairs, usually located against a side wall in the middle of the courtroom, where the jury sits during a trial are referred to as the *jury box*.
jury deliberations	At trial, after having heard all the evidence, closing arguments from the parties, and instructions from the judge, the jurors go to the jury room to deliberate in secret and decide who will win the case; this process is referred to as *jury deliberations.*
jury instructions	*Jury instructions* are what the judge, at different points in the trial, tells the jury about their duties, how to approach the evidence, and about the law that applies to the lawsuit; before the trial begins, the parties are required to submit proposed jury instructions that the judge may read, in whole or part, to the jury at some point during the trial.
jury selection	*Jury selection* is the process by which the jury is chosen; usually *jury selection* includes a type of questioning referred to as voir dire.
jury trial	At a *jury trial*, a group of citizens, the jury will weigh the evidence presented by the parties, decide which evidence to believe, and determine what actually happened; in addition, the court will instruct the jury on the law, and the jury will apply the law to the facts that they have found, and determine who wins the lawsuit.
litigants	The plaintiffs and the defendants both are referred to as the parties to or the *litigants* in the lawsuit.

Local Rules	The *Local Rules* set forth additional requirements that a specific federal court has that supplement the Federal Rules of Civil Procedure; for example, the *Local Rules* of the United States District Court for the Northern District of California explain some of the additional procedures that apply only to this court.
magistrate judge	A federal *magistrate judge* is a judicial officer that has some but not all of the powers of a federal judge; for example, a *magistrate judge* may be designated by a judge to hear a variety of motions and other pretrial matters, and may, with the consent of the parties, preside over civil and misdemeanor criminal trials.
material fact	A fact that makes a difference in your lawsuit is referred to as a *material fact*.
meet and confer	When the parties get together to discuss an issue or issues, they *meet and confer*.
memorandum of points and authorities	The portion of a motion that contains your arguments and the supporting law for why the court should grant your motion is called the *memorandum of points and authorities*, sometimes also referred to as a brief.
mental examination	If the physical or mental condition of a party (or a person under the custody or legal control of a party) is at issue in a lawsuit, the court may order that person to submit to a physical or mental examination by a suitably licensed or certified examiner, such as a physician or psychiatrist; unlike other discovery procedures, physical or *mental examinations* can be obtained only by filing a motion with the court, or by agreement of the parties.
motion	When you apply to the court for a ruling or an order that something be done, your application is called a *motion*; *motions* usually are submitted in writing, but in certain limited circumstances—for example, during a hearing or trial—may be oral (sometimes called a "speaking motion").
motion for a more definite statement	In a *motion for a more definite statement*, a defendant argues that the complaint is so vague, ambiguous, or confusing that he or she cannot respond to it, and asks for the details that the defendant needs in order to respond to the complaint.

motion for a new trial	A *motion for a new trial* argues that another trial should be held because of a deficiency in the current trial, for example, because the jury's verdict in the current trial is against the clear weight of the evidence.
motion for default judgment	If the defendant does not answer the complaint, the plaintiff can file a *motion for default judgment*, asking the court to grant judgment in favor of the plaintiff. If the court grants the motion, the plaintiff has won the case.
motion for judgment as a matter of law	In a jury trial, *motion for judgment as a matter of law* argues that the opposing party's evidence is so legally deficient that no jury could reasonably decide the case in favor of the opposing party. Defendants may bring such a motion after plaintiffs have presented all their evidence, and after all the evidence has been presented, either party may bring such a motion; if the court grants the *motion for judgment as a matter of law*, the case is over.
motion for permission to file a motion for reconsideration	Before filing a motion for reconsideration, a party must ask the court for permission to file such a motion, which is done through a *motion for permission to file a motion for reconsideration*.
motion for protective order	If you receive a discovery request and believe the discovery sought is inappropriate or too burdensome, or you need more time to respond, you may file a *motion for protective order* to ask the court to order that the discovery be limited or proceed in a certain way.
motion for reconsideration	A *motion for reconsideration* asks the court to consider changing a previous decision, and cannot be filed without the permission of the court.
motion for relief from judgment or order	A *motion for relief from judgment or order* argues that a judgment or order should not be given effect or should be changed for one of the reasons permitted by Rule 60(b) of the Federal Rules of Civil Procedure.
motion for sanctions	A *motion for sanctions* asks the court to punish a person; for example, in the context of discovery, a *motion for sanctions* asks the court to punish a person for failing to make required disclosures, refusing to respond to a discovery request, or refusing to obey a court order to respond to a discovery request.
motion for summary judgment	A *motion for summary judgment* asks the court to decide a lawsuit without a trial because the evidence shows that there is no real dispute about the key facts.

motion to amend or alter the judgment	After entry of judgment, either party may file a *motion to amend or alter the judgment* if the party believes a mistake was made in the judgment that could be corrected by changing it.
motion to compel	A *motion to compel* is a motion asking the court to order a person to make disclosures or to respond to a discovery request, or to provide more detailed disclosures or a more detailed response to a discovery request.
motion to dismiss	A *motion to dismiss* the complaint argues that there are legal problems with the way the complaint was written, filed, or served, and asks the court to order the portions of the complaint with the legal problems dismissed.
motion to extend time	A *motion to extend time* is a motion asking the court to give you more time, or a continuance, before a due date, for example, to submit your brief on a motion.
motion to shorten time	A *motion to shorten time* is a motion asking that the court hear another motion on a faster than normal schedule.
motion to strike (portions of the complaint)	A motion in which you ask the court to order certain parts of the complaint deleted because they are redundant, immaterial, impertinent, or scandalous is called a *motion to strike.*
moving party	The party who files a motion is referred to as the *moving party*.
non-binding arbitration	One of the court's alternative dispute resolution (ADR) programs is *non-binding arbitration*, in which a neutral third-party (an arbitrator) gives a non-binding decision on the complaint after a hearing at which both parties have an opportunity to be heard.
non-party deponent	A deponent who is not a party to the lawsuit is called a *non-party deponent*, or a non-party witness.
non-party witness	A person who has information relevant to your lawsuit, but who is not a party, is called a *non-party witness*.
notice of deposition	Before you can take a deposition, you must serve a reasonable amount of time in advance of the deposition all of the other parties in your lawsuit with a written *notice of deposition*, giving them all of the information required under Rules 30(b) and 26(g)(2) of the Federal Rules of Civil Procedure.

Notary Public	A *Notary Public* is a public officer who is authorized by the state or federal government to administer oaths and to attest to the authenticity of signatures.
notice of motion	The *notice of motion*, contained in the first paragraph of a motion, is a statement telling the other parties what type of motion you have filed and when you have asked the court to hold a hearing on the motion.
opening statements	At the beginning of the trial, after the jury has been selected, if it is a jury trial, the parties have an opportunity to make individual *opening statements*, in which they can describe the issues in the case and state what they expect to prove during the trial.
opposing party	In the context of motions, the party against whom a motion is filed is called the *opposing party*; more generally, the party on the other side from you is referred to as the *opposing party*.
opposition brief	The party opposing a motion files a statement with the court, called an *opposition brief*—sometimes called an opposition, for short—explaining his or her arguments against the motion.
overrule (an objection)	During examination of witnesses at trial, if a party objects to evidence being admitted or a question being asked, the judge may *overrule* the objection, which means that the evidence will be admitted or the question may be asked, unless the judge later sustains a different objection.
PACER system	Docket information is available on the internet through the *PACER system*; *PACER* stands for "Public Access to Electronic Court Records."
parties	The plaintiffs and the defendants both are referred to as the *parties* to or the litigants in the lawsuit.
peremptory challenge	During jury selection, after all of the jurors challenged for cause have been excused, the parties will have an opportunity to request that additional jurors be excused without having to give any reason for the request; making such a request is called a *peremptory challenge.*
perjury	A person is guilty of *perjury* if he or she makes a false statement under oath or equivalent affirmation, when the statement matters and the person does not believe it to be true.

permanent case file	The court maintains the original copy of every document filed with it in a case file, also referred to as the *permanent case file.*
permissive counterclaim	A *permissive counterclaim* is a claim by the defendant against the plaintiff that is not based on the same events or transactions as the plaintiff's claim against the defendant.
physical examination	If the physical or mental condition of a party (or a person under the custody or legal control of a party) is at issue in a lawsuit, the court may order that person to submit to a physical or mental examination by a suitably licensed or certified examiner, such as a physician or psychiatrist; unlike other discovery procedures, *physical* or mental *examinations* can be obtained only by filing a motion with the court, or by agreement of the parties.
plaintiffs	The *plaintiffs* are the people who file the complaint and who claim to be injured by a violation of the law.
plaintiffs' table	In the center of the courtroom, there are several sets of long tables and chairs where the lawyers and parties sit during hearings and trial; the table nearest the jury box is where the plaintiffs sit and is called the *plaintiffs' table.*
prayer for relief	The last section of a complaint is entitled the *prayer for relief*, and in it the plaintiffs tell the court what they want it to do to relieve the injuries stated in their claims.
preliminary pretrial conference	A *preliminary pretrial conference* is a hearing with the magistrate judge at which the magistrate judge, with the help of the parties, sets a schedule for various events in the case.
pretrial conference	The *pretrial conference* is a hearing shortly before trial at which the court discusses its requirements for conducting trial and resolves any final issues that have arisen before trial.
pretrial disclosures	The disclosures required by Rule 26(a)(3) of the Federal Rules of Civil Procedure of certain information about evidence that you may present at trial (except for evidence that will be used solely for impeachment) is referred to as the *pretrial disclosures*.
procedural law	*Procedural law* sets forth the requirements for how lawsuits must be conducted in the courts.

process server	A *process server* is a person authorized by law to serve process on the defendant; usually *process servers* are professionals.
proof of service	The document by which you can prove that a certain document was served is called the *proof of service*; for example, a certificate of service is *proof of service.*
proposed findings of fact	A party's *proposed findings of fact* is a document in which a party lists all of facts related to the dispute raised in the lawsuit that the party believes are true, each of which fact is followed by a citation to the evidence in the record supporting the fact. *Proposed findings of fact* are required to be filed in connection with motions for a preliminary injunction and motions for summary judgment.
proposed jury instructions	Before the trial begins, the parties are required to submit *proposed jury instructions* that the judge may read, in whole or part, or in modified form, to the jury at some point during the trial, usually just before the jury deliberations, to instruct the jury on the law relevant to the lawsuit.
protective order	A *protective order* is a court order limiting discovery or requiring discovery to proceed in a certain way.
quash the subpoena	If a court *quashes the subpoena*, the deponent does not have to appear for the deposition and/or produce documents at the place and time listed on the subpoena.
rebuttal	*Rebuttal* is the final stage of presenting evidence in a trial
rebuttal testimony	At trial, after defendants have completed examining each of their witnesses, plaintiffs can call additional witnesses solely to counter—or "rebut"—testimony given by the defendants' witnesses, that is, to give *rebuttal testimony.*
re-direct examination	At trial, after the opposing party has cross-examined a witness, the party who called the witness gets to ask the witness questions about topics covered during the cross-examination; this process is referred to as *re-direct examination*.
referring judge	A federal judge who refers some matter or matters within a lawsuit to a magistrate judge is called the *referring judge.*

remedies	In the context of a civil lawsuit, *remedies* are actions the court can take to redress or compensate a violation of rights under the law.
renewed motion for judgment as a matter of law	After a jury trial, if you believe the jury made a serious mistake and you had a motion for judgment as a matter of law at the close of all evidence, then you may bring a *renewed motion for judgment as a matter of law* to argue that the jury erred in reaching the decision that it made because the evidence was so one-sided that no reasonable jury could have reached that decision.
reply	Both the answer to a counterclaim and the response to the opposition to a motion are referred to as a *reply*.
reply brief	The moving party usually will file a *reply brief*—sometimes called a reply, for short—responding to the opposing party's opposition brief.
report and recommendation	A federal judge may refer a matter within a lawsuit to a magistrate judge for a *report and recommendation*; that is, the magistrate judge is not permitted to issue an order on the matter, but rather must file with the referring judge a written *report and a recommendation* for how the matter should be decided.
request for entry of default	The first step for the plaintiff to get a default judgment granted by the court against a defendant is to file a *request for entry of default* with the clerk of the court, showing that defendant has been served with the complaint and summons, and has not filed a written response to the complaint in the required time.
request for inspection of property	In order to enter the property controlled or possessed by a party to your lawsuit for the purposes of inspecting and measuring, surveying, photographing, testing or sampling the property or any object on the property relevant to your lawsuit, you ask the *party* in writing in a document referred to as a *request for inspection of property*.
request for production of tangible things	In order to inspect and copy, test, or sample anything relevant to your lawsuit which is in the possession, custody, or control of another party to the lawsuit, you ask the party to make the items available to you in a document referred to as a *request for production of tangible things.*

request for waiver of service	A *request for waiver of service* is a form with which you ask the defendant to accept the summons and complaint without formal service.
requests for admission	A *request for admission* is a court procedure in which one party may ask another party in writing to admit the truth of any statement, or to admit the application of any law to any fact.
requests for document production	In order to obtain copies of documents that are relevant to your lawsuit from parties to the lawsuit, you ask the parties for them in writing in a document referred to as a *request for document production*.
ruling from the bench	If the court announces its decision on a motion during the hearing on the motion, it is said to be *ruling from the bench.*
sanction	A *sanction* is a punishment the court may be asked to impose on a person in certain circumstances, for example, if a person refuses to obey a court order, or refuses to respond to discovery requests.
self-authenticating	Certain documents do not need any proof of authentication beyond the documents themselves, to be admissible evidence in accord with Rule 902 of the Federal Rules of Evidence; these documents are said to be *self-authenticating.*
serve, service	When you provide a document to a party in accord with the requirements found in Rule 5 of the Federal Rules of Civil Procedure, you are said to have *served* or provided *service* to the party.
service of process	*Service of process* is when the original complaint in the lawsuit is provided to the defendants in accord with the requirements for service found in Rule 5 of the Federal Rules of Civil Procedure.
side bar	A *side bar* is when the judge calls the lawyers (or the parties if they don't have lawyers) to one side of the bench to discuss any issue away from the jury's view.
standing order	A judge's *standing order* explains certain procedures, in addition to those found in the Federal Rules of Civil Procedure and the Local Rules, that apply only to lawsuits that are heard by that particular judge.
Statement of Nonopposition	If the opposing party does not oppose a motion, he or she must file a written statement telling the court he or she does not oppose the motion, which is referred to as a *Statement of Nonopposition*.

statement of undisputed facts	A *statement of undisputed facts* is a list of facts that one party believes are true and that contains citations to the party's evidence that those facts are true; either a *statement of undisputed facts* or a joint statement of undisputed facts must be filed with a summary judgment motion.
status conference	A *status conference*, which may also be referred to as a subsequent case management conference, is a hearing the judge may call during the course of the lawsuit to assess the progress of the case, or address problems the parties are having.
statute of limitations	The *statute of limitations* is the amount of time the plaintiffs have to file a complaint after they have been injured, or, in some cases, after they have become aware of the cause of the injury.
stipulation	A *stipulation* is a written agreement signed by all the parties to the lawsuit or their attorneys.
strike	If the court orders that a document or a portion of a document be deleted, then it is said to *strike* the document or portion of it.
subject matter jurisdiction	If the law permits a court to hear a certain type of lawsuit, the court is said to have *subject matter jurisdiction* over that type of lawsuit.
subpoena	A *subpoena* is a document issued by the court which requires a person to appear for a court proceeding at a specific time and place, and/or to make available at a specific time and place documents specified in the *subpoena*.
subpoena duces tecum	A *subpoena duces tecum* is the form of subpoena used to require a non-party deponent to bring documents specified in the *subpoena duces tecum* to the deposition; the same form is used for a *subpoena duces tecum* as for a deposition subpoena.
substantive law	*Substantive law* determines whether the facts of each individual lawsuit constitute a violation of the law for which the court may order a remedy.
summary judgment	*Summary judgment* is a decision by the court to end a lawsuit, usually before trial, because the evidence shows that there is no real dispute about the key facts.
summons	A *summons* is a document from the court that you must serve along with your original complaint to start your lawsuit.

sustain (an objection)	During examination of witnesses at trial, if a party objects to evidence being admitted or a question being asked, the judge may *sustain* the objection, which means that the evidence will not be admitted or the question will not be asked.
taking a motion under consideration	If the court decides to consider a motion further after a hearing, or without a hearing, and send the parties a written opinion, it is said to be *taking a motion under consideration.*
time-barred	When the time limit has passed by which plaintiffs must make their claim (or, in other words, when the statute of limitations has run), the claim is said to be *time-barred*.
transcript	The written record taken down by a court reporter, or court stenographer, of what was said in a deposition or court proceeding is called a *transcript*.
trial subpoena	A *trial subpoena* is a type of subpoena that requires a witness to appear at trial on a certain date.
undisputed fact	A fact about which all the parties agree is an *undisputed fact*.
vacate	When a court sets aside an order it previously made so that the order has no further effect, it is said to have *vacated* the order.
venue	*Venue* refers to the place where the lawsuit is filed.
verdict	When the jury—or in a bench trial, the judge—decides who wins the trial, the decision is call a *verdict*.
verdict form	In a jury trial, the form the jury fills out to record their verdict is called a *verdict form*.
voir dire	*Voir dire* is a jury selection process in which each potential juror is asked a series of questions designed to show any biases that the juror may have that would prevent him or her from being fair and impartial; usually, the judge asks questions selected from a list the parties have submitted before trial, but sometimes the judge allows the lawyers for the parties (or any party without a lawyer) to ask additional questions.
waiver of service	If a party agrees that he or she does not require a document be provided in accord with the service requirements of Rule 5 of the Federal Rules of Civil Procedure, this agreement is called a *waiver of service.*

with prejudice	If a court dismisses claims in your complaint *with prejudice*, you may not file another complaint in which you assert those claims again.
without prejudice	If a court dismisses claims in your complaint *without prejudice*, you may file another complaint in which you assert these claims again. Dismissal *without prejudice* is sometimes also referred to as dismissal "with leave to amend" because you are permitted to file an amended complaint.
witness	A *witness* is a person who has personal knowledge regarding facts relevant to your lawsuit
witness box	The chair where witnesses sit when they are testifying in court, usually located in front of the courtroom and to the side of the judge's bench, is referred to as the *witness box.*

INDEX