

FEDERAL PRETRIAL MOTION PRACTICE
Talk Before Filing
by
U.S. Magistrate Judge Morton Denlow¹

I. INTRODUCTION.

Federal practitioners and judges spend a great deal of time with pretrial motions. Because so few cases proceed to trial, lawyers and judges devote more time to pretrial motions than to trial. As a result, it is important to understand how and when to bring such motions. In this article, I discuss the practical use of pretrial motions.

Many of the issues raised by pretrial motions could be avoided if attorneys would use an antique piece of technology: the telephone. As a judge, I observe a tendency by attorneys to file motions when a telephone call or letter to opposing counsel would suffice. This failure to talk to one another before filing a motion results in a waste of time, money, and a loss of credibility by counsel before the court. In addition, certain motions can result in more benefit to the responding party than to the movant. Therefore, before filing a motion attorneys should analyze whether the motion will likely advance their client's interests.

Pretrial motions can be divided into three broad categories: 1) motions directed to the pleadings; 2) discovery motions; and 3) dispositive motions. Properly used, these motions can facilitate the progress of the case. When misused, these motions cause delay and expense without any resulting benefit to the client.

II. MOTIONS DIRECTED TO THE PLEADINGS.

Rules 11 and 12 are the two primary rules which deal with motions directed to the pleadings. Rule 12 addresses how to raise certain defenses and objections to the pleadings and contains the most common pleading motions. Rule 11 governs signing of court papers and sanctions.

A. Rule 12

The most common motions attacking the pleadings arise under Rule 12(b).² A motion to dismiss under Rule 12(b)(1) raises the issue of whether the court has subject matter jurisdiction. This is a critically important issue because lack of subject matter jurisdiction may be asserted at any time, and at any level.³ Such motions are generally filed when the complaint fails to allege diversity of citizenship between the parties or when the amount in controversy does not exceed the required jurisdictional amount.⁴ Subject matter jurisdiction is to be determined as of the time when jurisdiction is invoked.⁵

When confronted with a problematic complaint, I suggest defense counsel first call plaintiff's counsel to point out and discuss the jurisdictional problem. Plaintiff's counsel can either cure the defect by filing an amended complaint or voluntarily dismiss the action if the defect is not curable (e.g., lack of diversity of citizenship). It does not make sense to file a motion, briefs, and obtain a ruling where the decision results in an opportunity for plaintiff to file an amended complaint to cure the jurisdictional defect.⁶ On the other hand, if plaintiff's counsel is unwilling to voluntarily dismiss an action where federal jurisdiction is lacking, defendant's counsel should proceed promptly with the motion because parties cannot agree to

confer subject matter jurisdiction on the court.⁷

Similarly, a motion for a change of venue under (b)(3) should also be raised at an early stage if you expect to be successful. A court is less likely to transfer a case after it has made substantive rulings.

Motions for lack of jurisdiction over the person under (b)(2), insufficiency of process under (b)(4), and insufficiency of service under (b)(5) are generally curable defects which a court will permit the plaintiff to correct. Therefore, it is largely a waste of time to bring these motions where the net result will lead to a corrective action on the part of plaintiff's counsel. Judges prefer not to require parties to jump through hoops to obtain service of process.

The most common motion under Rule 12 is the Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted. The tactical consideration facing counsel in connection with a Rule 12(b)(6) motion is the question of whether you wish to educate opposing counsel. Very often, defense counsel files a Rule 12(b)(6) motion which simply causes plaintiff's counsel to amend their complaint to better allege the various elements of their case.⁸ These Rule 12(b)(6) motions educate plaintiff's counsel as to the necessary elements and provide a road map for plaintiff's counsel to follow in discovery and trial. Therefore, counsel should consider raising certain matters by means of an affirmative defense and waiting until a later point in the litigation to deal with the substance. If a party relies upon material outside of the pleadings under a Rule 12(b)(6) motion, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56. Therefore, if the Rule

12(b)(6) motion will be converted into a Rule 56 motion, counsel should carefully consider waiting for discovery to be completed and to raise the issue as part of a summary judgment motion.

Rule 12(c) motions for judgments on the pleadings are rare.⁹ These motions can also be converted into summary judgment motions if a party relies upon material outside the pleadings.

A Rule 12(e) motion for more definite statement is also rare. Given the federal notice pleading practice, most courts will require the parties to explore these issues through discovery.¹⁰ Any Rule 12(f) motion to strike is generally a useless motion. The Seventh Circuit has greatly limited the use of the Rule 12(f) motion.¹¹

Judges expect motions to advance the case in some meaningful way and not waste the court's time with issues counsel can easily resolve. The questions to consider before bringing a motion include: 1) how does the motion advance the case?; 2) can this issue be resolved by a phone call or letter to opposing counsel?; and 3) what action will the court likely take if the motion is presented? The court is more likely to treat the motion seriously if you have taken the time to speak to opposing counsel and to see if you can work the matter out before coming to court. Even if you are not successful, the court will appreciate your efforts to directly resolve the dispute with opposing counsel and to narrow the issues for decision.

B. Rule 11

Rule 11 should be read carefully by all attorneys.¹² Rule 11 requires counsel to sign

every pleading (provided the party is not *pro se*). That signature constitutes a representation to the court that some basis exists for the filing of the document. The most common issue faced by courts in connection with Rule 11, is the motion for sanctions under Rule 11(c). Since the amendment of the federal rules in 1993, the quantity of sanction motions has dropped dramatically.

Rule 11 now creates a safe harbor to avoid sanctions if the challenged paper is withdrawn or corrected within the 21 day period after service of the motion. As a result, parties are more often willing to correct their pleading than take a chance on sanctions. The other major area which has led to the reduction in Rule 11 sanction motions is the requirement that the sanction be limited to what is sufficient to deter repetition of such conduct. Such sanctions can include directives of a non-monetary nature, an order to pay a penalty into the court, or the payment of reasonable attorney fees and other expenses.¹³

Therefore, before you embark on a Rule 11 motion, you should be aware that you may be incurring additional expense for your client without obtaining any countervailing benefit.

For example, if the court orders the offending party to pay a fine to the court, your client may not be thrilled that you spent its money in bringing a motion to enrich the United States treasury. Once again, before filing a Rule 11 motion, the parties should talk to one another and see whether they can reach some type of accommodation before coming to court.

III. DISCOVERY MOTIONS.

Rules 26 through 37 govern the discovery process. An amendment in 2000 to Rule 26

made significant changes to the discovery process. The first major change to Rule 26 appears in the initial disclosure requirements of Rule 26(a)(1). Former Rule 26(a)(1) required a party to disclose the identities of witnesses and documents “relevant to disputed facts alleged with particularity in the pleadings.” Under amended Rule 26(a)(1), a party is only required to disclose the identities of witnesses and documents “that the disclosing party may use to support its claims or defenses.” This new standard is far more narrow in scope than the former standard.

The second major change to Rule 26 is contained within the definition of the scope of discovery. Under the scope of discovery set forth in former Rule 26(b)(1), a party could “obtain discovery regarding any matter, not privileged, which was relevant to the subject matter involved in the pending action.” This standard often allowed a party virtually unlimited access to another party’s documents, employees and witnesses, except to the extent limits were imposed under Rule 26(b)(2). Amended Rule 26(b)(1) narrows the scope of discovery by limiting discovery to information “relevant to the claim or defense of any party.” However the liberal standard under former Rule 26(b)(1) is not totally eliminated since amended Rule 26(b)(1) adds, “for good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”

The most common motions faced by courts on discovery matters are motions to compel discovery under Rule 37(a)¹⁴ and protective orders to limit discovery under Rule 26(c). Examples of motions to compel discovery are a failure: by a party to make Rule 26(a)

disclosure, to answer deposition questions, to answer interrogatories, or to produce documents.¹⁵ Any motion to compel must be read in conjunction with Northern District of Illinois Local Rule 37.2, Central District of Illinois Local Rule 37.3(A), or Southern District of Illinois Local Rule 37.1 which contain a meet and confer requirement on the part of the parties prior to filing a discovery motion.¹⁶ Under these local rules parties must state the date, time and place of the conference and the names of all parties participating in that conference before bringing the motion. Parties are encouraged to use common sense to anticipate what the court will likely do if presented with the motion. Quite frequently, the court will ask the parties to step into the hallway to make one last effort at resolving the dispute.

Courts dislike discovery motions because they generally remind judges of school children who cannot get along. Where serious matters such as attorney-client privilege or the work product doctrine are involved, courts are amenable to becoming directly involved. Therefore, parties should treat the meet and confer requirement seriously before bringing a discovery motion if they do not wish to be looked at as naughty children by the court.

Rule 26(c) provides for entry of two types of protective orders. This rule also requires the parties to confer and then permits the court to permit the disclosure of discovery or limit the discovery in some way. The first type of protective order is a standard agreed order between the parties on discovery of documents in a case. Northern District of Illinois LR 26.2 provides the order shall specify the persons allowed access to the restricted documents without order of the court and the minute order shall specify qualifications as to access and

disposition of the documents.¹⁷ Such orders are not looked upon favorably by the courts and require a prior determination of good cause before entry.¹⁸ A protective order does not shield the documents from the public indefinitely; rather, Northern District of Illinois LR 26.2 provides the clerk of the court to only maintain the documents as restricted documents for 63 days following final disposition.¹⁹

The second type of protective order is a preventative type of order. This type of protective order is designed to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense in a variety of situations. Parties are remind to use deference and be practical when seeking such an order.

The amended federal rules now limit the number of depositions,²⁰ interrogatories,²¹ and the length of deposition.²² Since these amendments have come into effect, lawyers have presented very few motions to change the limitations under Rule 26(b)(2). This reflects the fact that lawyers generally stipulate between themselves to these changes without the necessity for court intervention.

IV. DISPOSITIVE MOTIONS.

The two principle forms of dispositive motions are: the motion for default under Rule 55 and the motion for summary judgment under Rule 56. The clerk of the court can enter a default judgment when the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain.²³ Otherwise, the motion for default must be presented to the court.²⁴

Rule 56 summary judgment motions are in vogue. They have been encouraged by a trilogy of Supreme Court cases²⁵ and a strong willingness by the Seventh Circuit to support disposition of cases by means of summary judgment.²⁶

The motion for summary judgment is an expensive proposition. Local Rules such as Northern District of Illinois LR 56.1 require parties to prepare a statement of material facts as to which the moving party contends there is no genuine issue, supporting affidavits, and a memorandum of law. The respondent is required to answer the statement, submit a memorandum of law, prepare a statement of any additional facts that require the denial of summary judgment, and supporting affidavits.²⁷

Prior to filing such a motion, parties should meet and confer to discuss the merits of the possible motion.²⁸ The reason for this is quite simple. The party filing the motion will be required to fully set forth the basis for the motion in her papers. The party responding will also be required to provide the court with a full explanation of why summary judgment should be denied. If counsel meet to discuss this in advance they may: 1) avoid filing motions for summary judgment where a fact question exists; 2) determine whether the respondent agrees that the motion has merit in whole or in part; 3) discuss whether issues can be resolved without the necessity of briefing; 4) narrow the issues for review by the court; and 5) explore the possibility of settlement before the parties incur the expense of briefing a summary judgment motion.

Because the majority of federal cases settle for under \$50,000, it makes sense for

counsel to discuss whether settlement is possible without proceeding with summary judgment. Once the motion is filed and the expenses incurred it is much more difficult to settle the case until the motion has been decided.

V. CONCLUSION.

Pretrial motions should be presented to the court only after counsel have conferred and have been unable to reach agreement. The process of conferring enables counsel to avoid briefing unnecessary motions and to focus the issues for those motions which require court intervention. A motion that does not advance a client's interests should not be filed. Parties should always "talk before filing."

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1. I wish to acknowledge my law clerk, Arika J. Osacky, for her assistance in the preparation of this article.
2. Fed. R. Civ. Pro. 12(b)
How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses

may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

3. *International Armor & Limousine Co. v. Moloney Coachbuilders, Inc.*, 272 F.3d 912, 914- 918 (7th Cir. 2001) (dismissing case dating back to 1988 for lack of subject matter jurisdiction); *Karazanos v. Madison Two Associates*, 147 F.3d 624, 626 (7th Cir. 1998) (“It is never too late, of course, to raise a jurisdictional challenge”).
4. *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1319 (7th Cir. 1997) (holding the “requisite diversity jurisdiction does not exist” because a Delaware corporation was on both sides of the law suit).
5. *Cook v. Winfrey*, 141 F.3d 322, 326 (7th Cir. 1998).
6. *Delinger v. Brennan*, 87 F.3d 214, 217 (7th Cir. 1996) (reversing dismissal to allow pro se plaintiffs to “cure a potentially curable defect”). Fed. R. Civ. P. 15(a) “[A] party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.”
7. *Insurance Corp. of Ireland, LTD. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104 (1982) (finding no action of the parties can confer subject-matter jurisdiction upon a federal court).
8. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (overturning the District Court’s dismissal of a case based on Fed.R.Civ.P. 12(b)(6) and stating “confusing or ambiguous complaints are poor grounds for rejecting potentially meritorious

claims...[and can be dealt with] by means other than dismissal”).

9. 5A Wright and Miller, *Federal Practice and Procedure*: Civil 2d § 1369 (“At this point in time the Rule 12(c) motion is little more than a relic of the common law and code eras. Its preservation in the original federal rules undoubtedly was due to the undeveloped character of the summary judgment procedure and the uncertain scope of the Rule 12(b)(6) motion”).
10. *Cook v. Winfrey*, 141 F.3d 322, 328 (7th Cir. 1998) (ruling Defendant entitled to proceed either by motion for a definite statement or through the discovery devices made available in Rules 26 through 36).
11. 5A Wright and Miller, *Federal Practice and Procedure*: Civil 2d § 1380 (“Both because striking a portion of a pleading is a drastic remedy and because it often is sought by the movant simply as a dilatory tactic, motions under Rule 12(f) are viewed with disfavor and are infrequently granted”); *Williams v. Jader Fuel Company, Inc.*, 944 F.2d 1388, 1400 (7th Cir. 1991) (holding “motions to strike ‘are not favored and will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense’”); *Balabanos v. North Am. Inv. Group, Ltd.*, 708 F.Supp. 1488, 1497 (N.D. IL 1988) (finding “the motion to strike is disfavored by the Federal Courts”).
12. Fed. R. Civ. P. 11
 - (a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney’s individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer’s address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
 - (b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
 - (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
 - (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
 - (3) the allegations and other factual contentions have evidentiary support or, if

specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service or the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct

determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

13. *Divane v. Krull Electric Co.*, 200 F.3d 1020, 1030-1031 (7th Cir. 1999) (finding the award of reasonable attorneys' fees as sanctions does not constitute an abuse of discretion and a monetary sanction "should ordinarily be paid into the court as a penalty").
14. 8A Charles Alan Wright, Arthur R. Miller, Richard L. Marcus, *Federal Practice & Procedure*: Civil 2d § 2285 (2001) (a "motion to compel discovery, available under Rule 37(a), has come to play a much more important role in the discovery process than did the Rule 37 motion to compel before 1970").
15. 8A Charles Alan Wright, Arthur R. Miller, Richard L. Marcus, *Federal Practice & Procedure*: Civil 2d § 2285 (2001).
16. Northern District of Illinois Local Rule 37.2; Central District of Illinois Local Rule 37.3(A); Southern District of Illinois Local Rule 37.1.
17. Northern District of Illinois Local Rule 26.2(b);
18. *Citizens First National Bank of Princeton v. Cincinnati Insurance Company*, 178 F.3d 943, 946 (7th Cir. 1999) (finding "most cases endorse a presumption of public access to discovery materials and therefore require the district court to make a determination of good cause before he may enter the order;" however, that determination need not be made on a document-by-document basis. Rather, the judge must satisfy himself the parties know what the demarcated category is, are acting in good faith, and either party or any interested member of the public can challenge the secreting of the document.).
19. Northern District of Illinois LR 26.2(e) Disposition of Restricted Documents.
When a case is closed in which an order was entered pursuant to section (b) of this rule, the clerk shall maintain the documents as restricted documents for a period of 63 days following the final disposition including appeal. Except where the court in response to a request of a party made pursuant to this section or on its own motion orders otherwise, at the end of the 63 day period the clerk shall place the restricted documents in the public file.
Any party may on written motion request that one or more of the restricted documents be turned over to that party. Such motion shall be filed not more than 63 days following

the closing of the case period.

In ruling on a motion filed pursuant to this section or on its own motion, the court may authorize the clerk to do one of the following for any document covered by the order:

- (1) turn over a document to a party; or
- (2) destroy a document; or
- (3) retain a document as a restricted document for a period not to exceed 20 years and thereafter destroy it.

See also, William F. Zieske, *Your Court Documents Filed Under Seal: Will They Stay Confidential?* Illinois Bar Journal, November 2001.

20. (10 pursuant to Fed. R. Civ. P. 30(a)(2)(A)).
21. (25 pursuant to Fed. R. Civ. P. 33(a)).
22. (One day of seven hours pursuant to Fed. R. Civ. P. 30(d)(2)) without a court order or stipulation).
23. Fed. R. Civ. P. 55(b)(1).
24. Fed. R. Civ. P. 55 (b)(2).
25. 10A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice & Procedure: Civil 3d* § 2727 (2001) (Taken together, the cases of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986) “signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials, and the lower courts have responded accordingly”).
26. 10A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice & Procedure: Civil 3d* § 2712 (2001). *Hunt-Golliday v. Metropolitan Water Reclamation District of Greater Chicago*, 104 F.3d 1004, 1006 (7th Cir. 1997) (finding “‘Discrimination suits’ are a staple of federal court practice as we consider hundreds of cases each year falling under its general banner . . . In 1996 alone, in published opinions alone, we restated and applied . . . methodology for resolving discrimination claims in 26 cases where district courts granted defense motions for summary judgment”).
27. Northern District of Illinois Local Rule 56.1(b); See also Central District of Illinois Local Rule 7.1 (D); and Southern District of Illinois Local Rule 7.1(c), (d), and (h).

28. I have previously written an article specifically on this topic, *Summary Judgment: Boon or Burden*, Vol. 37, *The Judges' Journal* 26 (Summer 1998), in which I encourage parties to talk settlement before filing a summary judgment motion.