UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURT HOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
ROOM 2609
TELEPHONE
(215) 597-9221

January 7, 1993

Mr. Abel J. Mattos
Chief, Court Programs Branch
Administrative Office of the
United States Courts
1120 Vermont Avenue NW
Washington, DC 20544

Dear Mr. Mattos:

Enclosed herewith is a copy of the Manual which was distributed at the Basic Civil Practice Seminar sponsored by the Eastern District Continuing Legal Education Committee and held in Philadelphia on November 12, 1992. The seminar was attended by 400 lawyers from the Philadelphia area and surrounding counties. This manual was very well received by members of the legal community in this area and serves as a handy reference for practice in the Eastern District of Pennsylvania.

Sincerely,

Michael E. Kunz
Clerk of Court

MEK/mcm
Enclosure

BASIC CIVIL PRACTICE

A SEMINAR ON
BASIC CIVIL PRACTICE BEFORE THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

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EASTERN DISTRICT CONTINUING LEGAL EDUCATION COMMITTEE

A JOINT UNDERTAKING OF
THE JUDGES OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

AND

THE FEDERAL COURTS COMMITTEE OF
THE PHILADELPHIA BAR ASSOCIATION

Thursday, November 12, 1992

BASIC CIVIL PRACTICE BEFORE
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Thursday, November 12, 1992

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FOREWORD

FOREWORD

This program is a continuation of a series of programs presented during the past 12 years as a joint undertaking of the Judges of the United States District Court for the Eastern District of Pennsylvania and the Federal Courts Committee of The Philadelphia Bar Association. The programs began as an outgrowth of efforts by the Judges to implement recommendations of the Judicial Conference of the United States, passed in response to the work of the Devitt Committee, that "[d]istrict courts should support continuing legal education programs on trial advocacy and federal practice subjects and should encourage federal bar members to attend."

The Continuing Legal Education Committee determined to present again a program in Basic Civil Practice because of the many changes that have occurred in recent years both as a result of the Civil Justice Expense and Delay Reduction Plan promulgated in the Eastern District of Pennsylvania, a "Pilot District" under Section 105(b) of the Civil Justice Reform Act of 1990 and the implementation of other innovative pilot programs including mediation. We have attempted to highlight these changes in the presentations while building on the success of earlier versions of this course.

The written materials which follow are presented as a supplement to the program, in the hope that they will prove to be not only informative but a useful reference to lawyers participating in the trial of a civil case in the United States District Court for the Eastern District of Pennsylvania. The Committee is committed to the continuation of similar programs of high quality on a regular basis, and wishes to extend its sincere appreciation

to the members of the Bench and bar who have given unstintingly of their time in furtherance of a shared goal to make the program a success.

THE CONTINUING LEGAL EDUCATION COMMITTEE
A Joint Undertaking Sponsored By

The Judges of the United States
District Court for the
Eastern District of Pennsylvania

and

The Federal Courts Committee of the
Philadelphia Bar Association

Honorable Louis C. Bechtle, Chief Judge
Honorable Edward N. Cahn, Program Co-Chairman
Michael E. Kunz, Clerk of Court
Roslyn G. Pollack, Esquire, Program Co-Chairman
Arlene D. Fickler, Esquire
Lloyd Ziff, Esquire

PROGRAM OUTLINE

PROGRAM OUTLINE

BASIC CIVIL PRACTICE BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DATE: **November 12, 1992**

CO-CHAIRMEN: Honorable Edward N. Cahn; Roslyn G. Pollack

TIME		SUBJECT	SPEAKER
9:15	I.	Introduction	Chief Judge Bechtle
9:30-10:00	II.	Civil Justice Plan	Robert Landis
10:00-10:30	III.	Commencement of Action: Jurisdiction, Venue, Service, Parties, Rule 11	Germaine Ingram
10:30-10:45	IV.	Internal Operating Procedures of Clerk's Office	Michael E. Kunz
10:45-11:00		Coffee Break	
11:00-11:15	V.	Mediation, Arbitration	H. Francis deLone Jr.
11:15-11:30	VI.	United States Magistrates: Powers, Duties & Procedures	Judge Charles Smith
11:30-12:00	VII.	Discovery -- Management & Control	Judge John Padova Nicholas Chimicles David Marion William Hangley
12:00-12:30	VIII.	Motion Practice and Interlocutory Appeals a) 1292(b) b) Rule 56 c) Cohen v. Beneficial Finance	Charles B. Burr
12:30-2:00		Lunch	
2:00-2:15	IX.	Special Proceedings -- Injunctions & Seizures	Dona S. Kahn
2:15-2:45	X.	Evidence	Judge Louis Pollak
2:45-3:00		Coffee Break	
3:00-3:30	XI.	Jury Trials	Judge Stewart Dalzell Clifford E. Haines Dennis R. Suplee
3:30-4:00	XII.	Non-Jury Trials	Judge William Yohn Alexander Kerr Elizabeth Ainslie
4:00-4:15	XIII.	Judgments, Post Trial Matters & Appealability	Richard K. Stevens
4:15-4:30	XIV.	Closing and Adjournment	

FACULTY PARTICIPANTS

FACULTY PARTICIPANTS

CHIEF JUDGE LOUIS C. BECHTLE

Chief Judge Bechtle was born on December 14, 1927, in Philadelphia, Pennsylvania. He received a B.S. and an LL.B. from Temple University in 1951 and 1954, respectively. Judge Bechtle was an Assistant United States Attorney in the Eastern District of Pennsylvania from 1956 to 1959. From 1959 to 1969, Judge Bechtle was in private practice in Norristown, Pennsylvania. He served as the Solicitor for Springfield Township from 1966 to 1969, and as the United States Attorney for the Eastern District of Pennsylvania from 1969 to 1972. Judge Bechtle was appointed to the United States District Court on February 5, 1972. He became Chief Judge in April 1990.

HONORABLE JOHN R. PADOVA

Judge Padova was appointed United States District Judge for the Eastern District of Pennsylvania on March 13, 1992 and entered on duty March 31, 1992. He received a B.A. degree from Villanova University in 1956 and a J.D. degree from Temple Law School in 1959. Judge Padova was in private practice concentrating in civil litigation until this appointment as a district judge. Judge Padova is a faculty member of the National Institute for Trial Advocacy and a lecturer at Temple Law School. He is a past member and former Vice-chairman of the Disciplinary Board of the Supreme Court of Pennsylvania, having chaired the Committee that proposed and introduced the Pennsylvania Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania in 1987. Judge Padova has been certified as a specialist in civil trial advocacy by the National Board of Trial Advocacy, and past member of the Philadelphia Bar Association's Professional Guidance Committee and Judicial Selection and Evaluation Committee. He has also been a member of the Chief Justice's Advisory Committee on Comprehensive Education and the Chief Justice's Criminal Task Force.

HONORABLE WILLIAM H. YOHN, JR.

The Honorable William H. Yohn, Jr. is a United States District Judge for the Eastern District of Pennsylvania. Judge Yohn was appointed United States District Judge on September 16, 1991 and entered on duty September 23, 1991. He received an A.B. degree from Princeton University in 1957 and a J.D. degree from Yale Law School in 1960. He was formerly an Assistant District Attorney for Montgomery County, 1962-1965; member of the Pennsylvania House of Representatives, 1968-1980 and Judge of Montgomery County Court of Common Pleas, 1981-1991. He was engaged in the private practice of law from 1961 to 1981.

HONORABLE STEWART DALZELL

Judge Dalzell was appointed to the United States District Court for the Eastern District of Pennsylvania on September 16, 1991. He received a B.S. in Economics from the University of Pennsylvania, Wharton School, in 1965. He thereupon worked at the National Broadcasting Company in New York City before returning to the University of Pennsylvania Law School, from which he received a J.D. in 1969. Judge Dalzell then was a Visiting Lecturer in Law at the Wharton School at the University of Pennsylvania for one year before entering the private practice of law in Philadelphia in June of 1970 at the firm of Drinker Biddle & Reath, where he was an associate until 1976, and then a partner from that year until his appointment in 1991.

HONORABLE CHARLES SMITH

Judge Smith was appointed by the District Judges of the Eastern District of Pennsylvania on June 1, 1992 to the position of United States Magistrate Judge. He is a graduate of Philadelphia's Central High School, Dickinson College and Dickinson School of Law. He was admitted to the Pennsylvania Bar in 1965 and thereafter served on active duty in the U.S. Army Judge Advocate General Corps for four years. Judge Smith was a practicing trial lawyer in West Chester, Pennsylvania for the next ten years and served as the Chester County Court's Mental Health Review Officer and Juvenile Court Master until his appointment and election to the Court of Common Pleas of Chester County in 1981. After being retained in 1991, he resigned that office to accept appointment as a United States Magistrate Judge.

MICHAEL E. KUNZ, CLERK OF COURT

Mr. Kunz is the Clerk of Court for the United States District Court, Eastern District of Pennsylvania. Prior to his appointment as Clerk of Court, he served as Chief Deputy from January, 1976 to April, 1979 and as a Deputy Clerk from February, 1962 to December, 1975. He received his B.S. in Business Administration from St. Joseph's University in 1970 and his M.B.A. in 1981. He was admitted as a Fellow of the Institute for Court Management, Court Executive Development Program and graduated in 1976. He is a member of the American Judicature Society and is Chairman of the Clerks Council of the Federal Court Clerks Association. He has served as a faculty member of the Federal Judicial Center, Pennsylvania Bar Institute, Federal Bar Association, Federal Circuit Advisory Committee and the Continuing Legal Education Committee of the United States District Court for the Eastern District of Pennsylvania.

ROSLYN G. POLLACK, ESQUIRE

Mrs. Pollack graduated from the University of Florida, magna cum laude and from the University of Pennsylvania Law School. She has served on the Philadelphia Bar Association's Board of Governors, as Chiar of the Legislation Subcommittee of the Federal Court Committee, and has written on a variety of legal topics. She is a partner in the firm of Cohen Shapiro, Polisher, Shiekman and Cohen.

ROBERT M. LANDIS, ESQUIRE

A.B. Franklin and Marshall College, 1941; LL.D. Franklin and Marshall College, 1991; J.D. University of Pennsylvania Law School, 1947; Editor-in-Chief, University of Pennsylvania Law Review. A Chancellor of the Philadelphia Bar Association, Mr. Landis has been President of the Pennsylvania Bar Association, President of the National Conference of Bar Presidents and President of the National Association of Railroad Trial Counsel. In his trial and appellate practice, he has largely represented corporate defendants in civil litigation. He is a former Chairman of the ABA Standing Committee on Federal Judicial Improvements and a former member of the ABA Board of Governors. A life member of the American Law Institute, he is a Fellow of the American College of Trial Lawyers and has been a member of its Board of Regents. He is former Chairman of the Federal Reserve Bank of Philadelphia.

H. FRANCIS DELONE, JR., ESQUIRE

Sandy deLone is a sole practitioner, with a practice devoted primarily to litigation and a particular emphasis on the representation of plaintiffs in civil rights and employment discrimination cases. He is also the chairman of the Alternate Dispute Resolution Subcommittee of the Federal Courts Committee of the Philadelphia Bar Association. Mr. deLone is a 1967 graduate of Indiana University in Bloomington, Indiana. In 1981, he earned his J.D. from the Columbus School of Law of the Catholic University of America, where he was the Comment Editor of the Law Review. Prior to entering law school, Mr. deLone spent time as a tire salesman, a ski bum, and a professional gambler.

NICHOLAS E. CHIMICLES, ESQUIRE

Nicholas E. Chimicles is a senior partner in the law firm of Greenfield & Chimicles and a member of the firm's Executive Committee. The firm, headquartered in Haverford, Pennsylvania, with branch offices in Los Angeles, West Palm Beach and Wilmington, Delaware, specializes in securities, environmental and complex commercial litigation. Mr. Chimicles was graduated from the University of Pennsylvania in 1970 and is a 1973 graduate of the University of Virginia School of Law, where he served on the Editorial Board of the Law Review. Mr. Chimicles has frequently lectured on securities and environmental law at the Rutgers University Law School-Camden, the Graduate Division of the Wharton School, the New York University Law School, and numerous bar association-sponsored seminars and programs. He also is a contributor to and member of the advisory boards of various publications related to the securities law field.

DAVID H. MARION, ESQUIRE

David Marion is Vice-Chairman of the firm Montgomery, McCracken, Walker & Rhoads, and Chairman of its Litigation Department. He graduated magna cum laude from the University of Pennsylvania Law School where he was Editor-in-Chief of the Law Review and winner of the Harrison Cup Moot Court Award. He is a fellow of the American College of Trial Lawyers, a member of the American Law Institute and a former Chancellor of the Philadelphia Bar Association. He has taught at the University of Pennsylvania Law School and lectured and authored numerous articles in the areas of complex business litigation, antitrust and securities class actions, constitutional and communications law.

WILLIAM T. HANGLEY, ESQUIRE

William T. Hangley, a member of Hangley Connolly Epstein Chicco Foxman & Ewing, is a 1966 cum laude graduate of the University of Pennsylvania Law School, where he was Comment Editor of the Law Review and was elected to the Order of the Coif. Mr. Hangley is the Co-Chair of the Federal Procedure Committee of the ABA Section of Litigation, and a member of the Section's Coordinating Group on Civil Justice Reform. His trial experience includes Antitrust, First Amendment, Attorney Malpractice, Intellectual Property, Construction, Securities, Environmental and other types of cases, and he lectures on professional ethics, trial techniques and substantive topics at area law schools and in continuing legal education programs.

CHARLES B. BURR, II, ESQUIRE

Mr. Burr is counsel and Senior Trial Attorney at the Philadelphia based law firm of Goldfein & Joseph. He received his B.S. (Industrial Administration) in 1962 from Yale University and his LLB in 1966 from the University of Pennsylvania Law School. As a former Assistant U.S. Attorney for the Eastern District of Pennsylvania, Mr. Burr has a well established reputation as a litigator who has concentrated in the defense of medical malpractice and product liability claims for 25 years. He is a member of the American, Pennsylvania, Philadelphia and Delaware County Bar Associations, and is admitted to practice before the United States Supreme Court. Mr. Burr has lectured frequently to professional groups and his numerous articles have been published in prestigious legal and medical journals. He is an adjunct professor at Villanova University School of Law and teaches a seminar course in Civil Pre-Trial Practice.

DONA S. KAHN, ESQUIRE

Dona Kahn received her B.A. from Brandeis University in 1954 and a JD from Rutgers University School of Law in 1957, where she was an Editor of the Law Review. Her practice area is federal and state court litigation in Employment and Labor Law. She joined Anderson Kill Olick & Oshinsky as "of counsel" in June 1990. Prior thereto she was a partner in the firm of Harris and Kahn from 1976-1990, specializing in representing companies in employment related matters. She was Associate General Counsel of the Equal Employment Opportunity Commission's Philadelphia Litigation Center from 1973-1976 and Chief, Legal Branch, of the Environmental Protection Agency's Region III Enforcement Division from 1972-1973. Before that she litigated antitrust and unfair trade practice cases under the Packers and Stockyards Act as a Trial Attorney, Department of Agriculture from 1960-1972. Presently she is a frequent lecturer on employment and discrimination law issues as well as women's health issues.

CLIFFORD E. HAINES, ESQUIRE

Clifford E. Haines, Esquire is a member of the firm of Litvin, Blumberg, Matusow & Young located in Philadelphia and engages exclusively in a civil litigation practice. He holds a Juris Doctor, cum laude from the Ohio State University College of Law. Prior to joining the firm in 1980, Mr. Haines served for 9 years as an Assistant District Attorney in Philadelphia where he was the Chief of the Homicide Division and Chief of Hiring and Training. Mr. Haines served as Chair of the Board of Governors and is presently Chair of the Evidence Code Task Force of the Philadelphia Bar Association. He was a member of the Lawyer Referral and Information Service Committee and has previously chaired that organization's State Civil Judicial Procedures Committee and Professional Responsibility Committee. He serves on the Board of the Campaign for Qualified Judges and previously served on the Board of Philadelphia Trial Lawyers Association. In addition, he is a member of the Pennsylvania Bar Association, American Bar Association, and the Association of Trial Lawyers of America. Mr. Haines has been a faculty member of the Academy of Advocacy, is a lecturer in law at the Temple University College of Law and has taught for the National Institute of Trial Advocacy at both the local and national level for several years. He has lectured and taught trial advocacy to private, governmental and American Bar Association Bodies throughout the country.

ALEXANDER KERR, ESQUIRE

Alexander Kerr received his B.A. from Yale University in 1967 and his J.D. from the University of Pennsylvania Law School in 1970, where he served as an Editor of the Law Review. A former deputy attorney general, Mr. Kerr is a founding partner of the firm of Hoyle, Morris & Kerr. He is a member of the Board of Governors of the Philadelphia Bar Association and Vice Chair of the Federal Courts Committee. He has taught trial advocacy for the Philadelphia Bar Association and the Academy of Trial Advocacy. He served as co-chair of the Eastern District Continuing Legal Education Committee seminar on Basic Civil Practice.

ELIZABETH K. AINSLIE, ESQUIRE

Elizabeth Ainslie has practiced with her own small litigation firm since 1984. She does both federal criminal defense work and civil litigation of all types. She graduated from Smith College magna cum laude and from Harvard Law School. After having practiced with the Boston firm of Bingham, Dana and Gould for five years, she moved to the Philadelphia area in 1979 and began work as a federal prosecutor. She was with the United States Attorney's Office in the Eastern District of Pennsylvania until 1984, and in 1983-84 was Chief of the Frauds Section.

RICHARD F. STEVENS, ESQUIRE

Senior Partner of the law firm of Stevens & Johnson, Allentown, Pennsylvania. The firm specializes in the trial of civil cases in both the Federal and State judicial system. Fellow American College of Trial Lawyers. Mr. Stevens was born in Allentown, Pennsylvania on November 28, 1931; admitted to the bar in 1956. He received his A.B. from Muhlenberg College in 1953 and his J.D. from the University of Pennsylvania in 1956. He was an Assistant District Attorney for Lehigh County form 1960 to 1963. Mr. Stevens is admitted to the Eastern and Middle District Courts of Pennsylvania and the Third and Tenth Circuit Courts. Also, all Pennsylvania State Trial and Appellate Courts; he is a member of the Lehigh County, Pennsylvania and American Bar Associations; National Association of Railroad Trial Counsel; Pennsylvania Defense Research Institute, The Association of Trial Lawyers of America. Fellow, American College of Trial Lawyers. Publications: "How To Handle Suits Against The Government", 15th Annual SMU Air Law Symposium, Sponsored by the Journal of Air Law and Commerce School of Law, Southern Methodist University, Dallas Texas - April, 1981. "How To Try A Jury Case - Post- Trial Matters", United States District Court for the Eastern District of Pennsylvania Continuing Education Seminar, Philadelphia, Pennsylvania - November, 1987.

CIVIL JUSTICE PLAN

Prepared By

Robert Landis, Esquire

AN OUTBURST OF CIVIL JUSTICE REFORM FOR THE FEDERAL COURTS IN THE NINETIES

Robert M. Landis
Dechert Price & Rhoads
Philadelphia, Pennsylvania,

Chairman, Advisory Group
under the Civil Justice Reform Act of 1990
United States District Court
for the Eastern District of Pennsylvania

I. An Overview

A. The Federal Courts Study Commission, a Congressional mission to project plans for the federal courts into the 21st century.

B. The Advisory Committee on the Federal Rules of Civil Procedure of the United States Judicial Conference, proposing amendments to Rules 11, 26, 29, 33, 37, 43, 54, and 56.

C. The Advisory Groups under the Civil Justice Reform Act of 1990.

D. The Agenda for Civil Justice Reform of the Competitiveness Commission (The Quayle Agenda).

1. President's Executive Order on Civil Justice Reform, October, 1991

(a) Government Litigation Counsel to file a pre-notification complaint about potential government litigation;

(b) Examine settlement possibilities and make reasonable efforts to work out settlements;

(c) Make reasonable attempts to undertake ADR opportunities and to work out ADR possible dispositions of claims;

(d) Government Litigation counsel should initiate and carry through disclosure of core information of litigation;

(e) Department of Justice and Litigation counsel should review all new legislation and consider the impact of proposed legislation including regulatory impact of legislative proposals.

E. The Administration's Access to Justice Act, S.2180, H.R.4155

1. (101) Federal Diversity Jurisdiction, pain and suffering claims shall not be included in the statutory federal jurisdiction amount of $50,000.

(a) The jurisdictional amount shall be affected by increases or reductions in the Consumer Price Index.

2.(102) "Loser Pays" Rule in diversity cases. Under this provision, the non-prevailing party shall pay the attorney's fees for the prevailing party, but loser's obligation is capped at the amount of the cost of litigation of the non-

prevailing party; applies to contingent fee cases.

3. (104) Requires pre-complaint notice of suit 30 days before suit is instituted in addition to the proviso that the statute of limitations is tolled during the 30 day pre-complaint notice procedure.

4. (106) Voluntary ADR procedures, including the whole array of ADR procedures from arbitration, mediation, mini trials, with one district in each federal court undertaking such a program.

F. Blueprint for Improving the Civil Justice System, an amalgam of past proposals of the ABA for dealing with the Quayle Agenda.

II. The Civil Justice Reform Act of 1990

A. The Background of the Act

B. The Statutory Mandates of the Pilot Courts

1. Systematic differential case management;

2. Early and ongoing control of pre-trial by involvement of a judicial officer;

3. Special case management provisions for complex cases;

4. Fixing early, firm trial dates;

5. Cost-effective discovery through voluntary exchange of information;

6. Alternative dispute resolution procedures.

C. A Survey of One Metropolitan Pilot Court, The United States District Court for the Eastern District of Pennsylvania

1. Findings on the State of the Court

2. The principal cause of delay: the failure to fill judicial vacancies expeditiously

(a) in the decade from 1980 to 1990, the caseload of this court increased 80% and the 19 authorized judgeships increased not at all;

(b) in the period from 1986 to 1990, the judicial vacancy months were the equivalent of 9 judges each sitting a full year;

(c) the Advisory Group recommended oversight hearings by the judiciary committees of the Senate and the House to examine the processes of authorizing judgeships and processing appointments to the federal bench.

D. The Impact of the Federalization of Criminal Law

1. The Speedy Trial Act for federal criminal cases;

2. Operation Triggerlock;

3. Federal alternatives to state trials (FAST);

4. Sentencing Reform Act of 1984;

5. These factors vary markedly among the District Courts.

E. Some Approaches to Reducing Cost and Delay

1. Differential case management;

2. Early, firm trial dates;

F. Self-Executing Disclosure--Pragmatism for the "New Order."

1. Self-Executing Disclosure will surely be built into federal judicial procedure in many Districts this year, and in all of them by the end of 1993. Learn to live with it and love it.

(a) Except for cases on a Specialized Management Track for Complex Cases, within 30 days of filing Answer, each party is required to:

(1) Identify witnesses reasonably likely to have information that bears significantly on the claims and defenses, identifying the subjects of information;

(2) Give a general description, including location, of documents, data and tangible things in possession or control of the party that are likely to bear significantly on the claims and defenses. (This does not mean

production; it means only general description, leaving to the other party more specific requests for production as required by Rule 34).

(3) State the existence and contents of any applicable insurance agreements. This is already largely required by Local Rules of discovery.

(4) Compute damages in any category and make available supporting data under Rule 34. While this is required in the proposed amendments to Rule 26, the Advisory Group for the Eastern District of Pennsylvania, did not recommend it, and it is not part of that Court's Plan. Other Advisory Groups have largely required such a statement.

(5) No ~~formal discovery~~ can commence without leave of court before self-executing ~~disclosure~~ has been completed.

2. Some practical applications of the new procedures:

(a) As a defendant, consider filing a more specific answer than normal, so that the plaintiff cannot claim the answer is so vague that it cannot understand the defenses;

(b) As a plaintiff, consider adding specific facts and allegations for the purpose of suggesting categories of documents that bear significantly on the defenses.

(c) A plaintiff wanting to begin discovery at the earliest possible time should serve its own disclosure statement and demand for disclosure at the time the complaint is filed.

(d) A defendant wanting to expedite discovery should serve its disclosure statement with its answer and a demand for plaintiff's statement to accelerate formal discovery.

(e) Every response or initial statement under these procedures must be signed by one counsel of record with the corresponding obligations under Rule 11.

COMMENCEMENT OF ACTION:

JURISDICTION, VENUE, SERVICE, PARTIES, RULE 11

Prepared By

Germaine Ingram, Esquire

INTERNAL OPERATING PROCEDURES OF CLERK'S OFFICE

Prepared By

Michael E. Kunz, Clerk of Court

Eastern District of Pennsylvania

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLERK'S OFFICE PROCEDURE HANDBOOK

REVISED MAY, 1992

This handbook has been prepared as a supplement to the local rules of the United States District Court for the Eastern District of Pennsylvania. It is intended to provide administrative information and act as a guide for specific procedural areas that have proven to be troublesome for many attorneys. However, if there is a conflict between this supplement and the local or federal rules of procedure, the rules govern.

We welcome any comments or suggestions for improving this handbook. Please write us at: Clerk's Office, United States District Court, Eastern District of Pennsylvania, 2609 United States Courthouse, Philadelphia, Pennsylvania 19106.

Michael E. Kunz
Clerk of Court

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BANKRUPTCY DIVISION

I. AUTOMATED CIVIL DOCKETING SYSTEM (CIVIL)

The District Court for the Eastern District of Pennsylvania is now utilizing an automated civil docketing system called CIVIL. For purposes of this automated docketing system, it is essential that all pleadings filed in the district court contain the attorney's Pennsylvania Bar identification number. Attorneys licensed in another state will be given an identification number by the Clerk of Court's Office.

CIVIL is an electronic docketing and case management system that entirely replaces and integrates the previously used paper systems. Developed for the United States District Courts, CIVIL provides the following capabilities for processing both civil and criminal cases:

* Automates maintenance of the case record and production of the docket sheet.
* Provides case status, document, and deadline tracking.
* Serves as a central, up-to-date information resource throughout the court or wherever a terminal is linked to the computer--in the clerk's office, judges' chambers, courtrooms, public areas, divisional offices, etc.
* Automates production of notices and other standard correspondence, case and party indexes, the JS-5 case opening report, and the JS-6 case closing report.
* Provides standard reports to assist judges and court administrators in monitoring case activity.
* Enables the courts to develop customized reports to address local information needs.

II. FILING A CIVIL ACTION

All new civil actions are to be filed on 8 1/2" x 11" paper in the Clerk's Office, Room 2609, second floor of the Federal Courthouse, between the hours of 8:30 a.m. and 5:00 p.m. The cost for filing a civil action is $120.00. Payment may be made in three forms: cash, credit card, or checks made payable to Clerk, U.S. District Court. Filings may be accomplished by mail as well as in person. The mailing address is:

United States District Court
Eastern District of Pennsylvania
2609 United States Courthouse
601 Market Street
Philadelphia, PA 19106

All subsequent filings, motions, pleadings and other papers are filed with the specific case processing clerk to whom

the case has been assigned in the Case Processing Division, Room 2609.

Counsel should include the following in the drafting of the complaint or petition: (a) name of court; (b) name and address of both parties, in caption form; (c) title of action; (d) a short and plain statement of the grounds upon which the court's jurisdiction depends; (e) a short and plain statement of the claim showing that the pleader is entitled to relief; (f) a demand for judgment for the relief to which the plaintiff deems himself entitled; (g) jury demand; and (h) name, address, Pennsylvania attorney identification number and signature of plaintiff's attorney.

A. Civil Justice Delay and Expense Reduction Plan

In response to a mandate by the Civil Justice Reform Act of 1991 and in an effort to reduce the cost and delay of civil litigation in the federal courts, this district adopted The Civil Justice Expense and Delay Reduction Plan with an effective date of December 31, 1991. A copy of the plan can be obtained by contacting Carol Sampson in the Clerk's Office. This district was selected as a pilot district and was required to implement a plan by December 31, 1991. An Advisory Group was appointed in April 1991 to prepare a report and recommendation on the status of the Eastern District of Pennsylvania. Based on this report, the judges developed the expense and delay reduction plan.

B. Designation Form

The designation form is to be used by counsel to indicate the category of the cause of action for the purpose of assignment to the appropriate calendar. (**Appendix A**) It is to be completed by plaintiff's counsel and submitted at the time of filing.

The court requires two copies of the designation form. Additional forms are not required for additional defendants, nor are additional forms required when the United States Government or an officer or agency thereof is involved.

Instructions for Completing the Designation Form

1. **Address of Plaintiff and Defendant**. House or apartment address, street, city, county and zip code are required in this section.

2. **Place of Accident**. The place of the accident, incident, or transaction; house or apartment address, street, city, county and zip code are required in this section. Note: Counsel should continue on reverse side if additional space is needed to fully explain this matter.

3. **Related Cases**. This refers to only those cases disposed of in the United States District Court for the Eastern District of Pennsylvania within a one-year period.

If the case is related, counsel must indicate the case number, the presiding judge, and the date terminated.

4. **Civil Category Checklist**. Counsel are required to determine whether the action arises under: (A) federal question, Title 28 U.S.C. §1331; or (B) diversity, Title 28 U.S.C. §1332. Counsel must check off the one specific category within the appropriate classification to which that case pertains. This is for the purpose of proper case assignment by classification.

5. **Arbitration Certification**. The arbitration certification is used to determine whether or not the case exceeds the damages threshold of $100,000, which is the maximum amount for any arbitration proceeding. Counsel are advised to refer to Local Rule 8, Section 3, Paragraph C, which states that damages will be presumed to be less than $100,000 and thus eligible for arbitration unless counsel, at the time of filing, states that the damages exceed that amount. The effect of this certification is to remove the case from eligibility for arbitration. Date and signature must be included in this section.

6. **Date and Signature**. The date of filing and signature of counsel is required in this section.

C. Civil Cover Sheet (Form JS 44)

The Civil Cover Sheet is required by the Clerk of Court for the purpose of initiating the civil docket sheet. It is completed by plaintiff's counsel and submitted at the time of filing. (**Appendix B**) Only one Civil Cover Sheet is required by the court to accompany the complaint, regardless of whether or not the United States of America, or an officer of an agency thereof, is a party.

Instructions for Completing Civil Cover Sheet

1. **Parties**. The complete name and address of plaintiff and defendant is required in this section.

2. **Attorneys**.

Plaintiff's Attorney: Firm name, address, Pennsylvania bar identification number and telephone number is required (if known).

Defendant's Attorney: Firm name, address, Pennsylvania bar identification number and telephone number is required (if known).

3. **Jurisdiction**. Counsel should place an "X" in the appropriate box corresponding to the jurisdictional basis of the action.

The following order of priority should be utilized in cases where more than one basis of jurisdiction is set out in the complaint.

(a) United States Plaintiff. Jurisdiction is based on 28 U.S.C. §§1345 and 1348. Suits by agencies and officers of the United States are in this category.

(b) United States Defendant. Jurisdiction is based on 28 U.S.C. §1346 and includes suits against agencies and officers of the United States.

(c) Federal Question. Various statutes give the district court jurisdiction to hear and determine controversies where federal rights between parties are covered by statute.

(d) Diversity of Citizenship. This refers to suits under 28 U.S.C. §1332. In this situation, parties are residents of different states. Note: If diversity is checked, it must be further categorized in the box at the lower left-hand portion of the sheet.

4. **Cause of Action**. In this section, a citation must be used for the U.S. civil statute under which the filing is made. In addition, a brief statement of the cause of action must also be included by counsel.

5. **Nature of Suit**. Counsel must indicate the general description of the suit by placing an "X" in the appropriate box. If more than one possible category applies, select the most explicit and specific classification. Note: Only one check mark is to be made in this area.

Explanatory information for social security. In the section for Other Statutes, the sub-category for Social Security lists six possible types of claims actions.

Suit Code Number	Abbreviation for Cause of Action	Substantive Statement Explaining Type of Litigation
861	HIA	All claims for health insurance benefits (Medicare) under Title XVIII, Part A, of the Social Security Act, as amended. Also includes claims by hospitals, skilled nursing facilities, etc. for certification as providers of services under the program. 42 U.S.C. §1395ff.(b))
862	BL	All claims for "black lung" benefits under Title IV, Part B, of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. §923).
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title II of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability (42 U.S.C. §405(g)).
863	DIWW	All claims filed for widow's or widower's insurance benefits based on disability under Title XVI of the Social Security Act, as amended (42 U.S.C. §405(g)).
864	SSID	All claims for supplemental security income payments based upon disability filed under Title XVI of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors' benefits under Title II of the Social Security Act, as amended. (42 U.S.C. §405(g)).

6. **Origin**. Counsel are required to indicate which one of the six possible categories is applicable to the case being filed. The following explanatory guidelines should be consulted in this matter.

(a) Original Proceedings - This category will be the appropriate one for most cases.

(b) Removed from State Court - Proceedings initiated in the State Courts may be removed to the District Court under Title 28 U.S.C. §1441.

(c) Remanded from Appellate Court - Use the date of remand as the filing date.

(d) Reinstated or Reopened - Use the reopening date as the filing date.

(e) Transferred from Another District - Self-explanatory.

(f) Multi-district Litigation - Use when a multi-district case is transferred into this district (Title 28 U.S.C. §1407).

(g) Appeal to District Judge from Magistrate Judgment - self-explanatory.

7. **Class Action**: This item should be checked if the case is alleged to be a class action under Fed. R. Civ. P. 23.

Demand: The dollar amount which is sought in the case should be inserted in this space.

Jury Demand: Counsel should check "yes" in this section only if a jury trial is demanded in the complaint.

8. **Related Case(s), if any**: This section is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judges' names for such cases.

9. **Date and Signature**: The date of filing and the signature should be the final insertion on the civil cover sheet.

D. Case Management Track Designation Form

Each civil case will be assigned to one of the following tracks: (**See Appendix C**).

1. **Habeas Corpus** - Cases brought under 28 U.S.C. §2241 through §2255.

2. **Social Security** - Cases requesting review of a decision of the Secretary of Health and Human Services denying the plaintiff Social Security benefits.

3. **Arbitration** - Cases designated for arbitration under Local Civil Rule 8.

4. **Asbestos** - Cases involving claims for personal injury or property damage from exposure to asbestos.

5. **Special Management** - Cases that do not fall into tracks 1 through 4 or that need special or intense management by th court due to one or more of the following factors:

(a) large number of parties;
(b) large number of claims;
(c) complex factual issues;
(d) large volume of evidence
(e) problems locating or preserving evidence;
(f) extensive discovery;
(g) exceptionally long time needed to prepare for disposition;
(h) decision needed within an exceptionally short time;
(i) need to decide preliminary issues before final disposition.

6. **Standard Management** - Cases that do not fall into any of the other tracks.

E. Verifications

Verifications or affidavits are not required to be filed with a complaint, except: (a) where the complaint seeks entry of a temporary restraining order (Federal Rule Civil Procedure 65(b)); and (b) in shareholder derivative actions (Federal Rule Civil Procedure 23.1). In lieu of a verification or an affidavit, it is appropriate to submit an unsworn declaration in the form set forth in 28 U.S.C. §1746.

F. Filing an Amended Complaint

A party may amend his/her complaint once, as a matter of course, at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he/she may so amend it any time within 20 days after it is served. Otherwise a party may amend his/her pleading only by leave of court or by written consent of the adverse party.

G. Class Action Complaints - Local Rule 27

Class action complaints must bear next to their caption the legend, "Complaint - Class Action." In addition, they must set forth certain "Class Action Allegations" which are described in Local Rule 27.

H. Copies of Co.plaints

It is not necessary to deliver multiple copies of the complaint and amended complaint to the Clerk's Office to be served on the defendant(s). It is only necessary to deliver an original complaint or an original amended complaint for filing. The Clerk's Office will process all completed summons and return it to counsel for service on the opposing party.

I. Number of Copies Required to File Consolidated Cases

If a case is consolidated "generally" you will need an original and a copy for each case in the consolidation. If consolidated "for all purposes" you will only need to file an original for the master file in which all other cases were consolidated.

J. Service of Process

Defendants have 20 days after the service of the summons and complaint to file an answer to the complaint unless otherwise ordered by the court.

The U.S. Attorney has 60 days after service to file an answer to the complaint in actions against the United States of America, an officer or agency thereof.

If you need additional information on filing complaints, call Mary Chase, Case Processing Supervisor, at 597-6959, or Robert E. Gohery, Operations Manager, at 597-7011.

III. PLEADINGS

All pleadings are to be filed on 8 1/2" x 11" paper in the Clerk's Office, Room 2609, second floor of the Federal Courthouse. The original docket sheets, record files, and indices to all cases are available for inspection. The civil dockets are divided among ten clerks and the last digit of each case determines the docket clerk to whom the case is assigned for processing.

The following personnel perform case processing duties in the civil section:

Clerk 1 - Helen Burkholder	597-7001
Clerk 2 - Ariel Guzman	597-7002
Clerk 3 - Marleen Seccio	597-7003
Clerk 4 - Patricia Horning	597-7004
Clerk 5 - Angela Mickie	597-7005
Clerk 6 - Sharon Carter	597-7006
Clerk 7 - Joan Carr	597-7007

Clerk 8 - Gayle B. Norman	597-7008
Clerk 9 - Kim Williams	597-7009
Clerk 0 - Theresa DePasquale	597-7010

Due to the large amount of asbestos cases filed in this district, the Clerk's Office has five asbestos case processors who maintain official case records as well as track and monitor the movement of asbestos cases. The Asbestos Coordinator is Jane E. Firestone, 597-8061. The asbestos docket clerks are:

Anna Marie Prudente (1-2)	597-9616
Aida Ayala (3-4)	597-7662
Dennis Taylor (5-6)	597-6644
Joyce Yaworski (7-8)	597-9441
Janice Owens (9)	597-9749
Sherrylynn Marshall (0)	597-9749

Criminal case processing is divided between two clerks, Richard Sabol, 597-9746, and James Hamilton, 597-9747. Overall compliance with the Speedy Trial Act is reviewed by our Speedy Trial Coordinator/Magistrates' Docket Clerk, Mary-Anne Mackiewicz, 597-7663.

Rule 11 of the Federal Rules of Civil Procedure requires that every pleading, motion and other paper of a party represented by an attorney be signed by the attorney. Please be sure to date the pleadings, attach a certificate of service, and include the address and phone number of counsel. It is not necessary to send a cover letter when filing routine pleadings. However, if you are filing a pleading which requires special attention please include a cover letter.

A. Copies

For filing, we need an original of all motions, memoranda and briefs. We suggest you do not combine pleadings but file a separate pleading for each action you want resolved. When filing individual pleadings, it is easier and more efficient for the judge to have the option to sign an order ruling on the individual pleading rather than have to prepare an order.

It is important that pleadings be assembled with all documents in support thereof attached in sets. This ensures proper filing and also enables the judge to have complete sets. In order to assist the Clerk's Office, we request that you punch holes and insert fasteners at the top of these sets. Note: The Clerk's Office does not date stamp copies of pleadings unless accompanied by self-addressed, stamped envelopes.

B. Certificate of Service

When filing pleadings, it is necessary to attach a certificate of service indicating the names of all counsel and/or parties you have served. Many times, certificates are not filed, signed or dated.

C. Third-Party Complaint

Leave of court is not necessary to file a third-party complaint if it is filed by the defendant within 10 days after service of the original answer to the complaint. However, leave of court is necessary if the defendant files the third-party complaint after the expiration of 10 days of the filing of the answer. Counsel must file a Motion for Leave to File a Third-Party Complaint, together with a memorandum, proposed order and the proposed third-party complaint. When the judge signs the order, the clerk will process the complaint. (See Rule 14, Federal Rules of Civil Procedure)

D. Sealed Pleadings

Include a cover letter identifying the contents of the envelope and information pertaining to the sealing of the document and/or case. If a document is being filed and sealed pursuant to a protective order or other order, refer to the sealed document in your cover letter. Please include the word "sealed" near the top margin of the letter to alert the person opening the mail to be cautious in processing the envelope.

E. Pleadings that are NOT Filed

The following pleadings are not filed pursuant to Local Rule 24 - Discovery: (1) Request for Production of Documents; 2) Request for Admissions; 3) Interrogatories; 4) Answers to Interrogatories; 5) Notice of Deposition; and 6) Depositions.

IV. MOTIONS

An application to the court for an order (unless made during a hearing or trial) will be made in writing, will state with particularity the grounds therefor, and will set forth the relief sought. (See Federal Rule of Civil Procedure 7(b)(1) and Local Rule 20(a).)

All motions shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation. (See Federal Rule of Civil Procedure 10(a).)

Motions must be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion. Every motion shall be accompanied

by a form of order which, if approved by the court, would grant the relief sought by the motion.

Every motion and proposed order of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his motion and proposed order and state his address as indicated. (See Federal Rule of Civil Procedure 7(b)(3).)

A brief in opposition to the motion, together with such answer or other response as may be appropriate, is required if the served party opposes the motion.

The response to the motion must be made within 10 days after service of the motion and supporting brief. (See Federal Rule of Civil Procedure 12(a) and Local Rule 20(c).) However, an additional three days is allowed if service is by mail. (See Federal Rule of Civil Procedure 6(e) and Local Rule 20(C).)

V. SUMMONS

Summonses shall be prepared by counsel. (**Appendix D**). At the time of the filing of a complaint, all summonses shall be submitted to the Clerk of Court's office for signature and seal. Defendant's name(s) as they appear on the complaint (without their addresses) are to be typed on one summons only and submitted to the deputy clerk. The original and sufficient copies for each defendant will be returned to counsel. To issue a second summons, file a Praecipe to Issue Alias Summons, naming the defendant(s).

VI. JURISDICTION

The Eastern District of Pennsylvania includes the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, and Schuylkill.

Court for the Eastern District is held at Philadelphia, Reading, Allentown and Easton. When it appears from the designation form filed by counsel, or from the complaint, petition, motion, answer, response, indictment, information or other pleading in a civil or criminal case, that a plaintiff or defendant resides in or that the accident, incident, or transaction occurred in the counties of Berks, Lancaster, Lehigh, Northampton, or Schuylkill, said case shall be assigned or reassigned for trial and pretrial procedures to a judge stationed in Reading, Allentown or Easton.

All other cases, unless otherwise directed by the court, shall be tried in Philadelphia, and as each case is filed,

it shall be assigned to a judge, who shall thereafter have charge of the case for all purposes. (Local Rule 3)

VII. SUBPOENAS - (Rule 45, Federal Rules of Civil Procedure as amended December, 1991 and Rule 17, Federal Rules of Criminal Procedure)

A. Civil

Under Rule 45 of the Federal Rules of Civil Procedure, attorneys are authorized to issue subpoenas in the name of any court in which they are authorized to practice, and in the case of a deposition or a production of documents taking place in another district, in the name of the court where the deposition or the production is to take place. Attorneys issuing subpoenas must comply with the appropriate Federal Rules and with Local Rules.

Although it is no longer necessary that subpoenas be issued by the Clerk, the Clerk still has the authority to do so. In those instances in which counsel elects to have the Clerk of Court issue the subpoena, an original and one copy is needed for each witness to be served. All subpoenas, except foreign deposition subpoenas, are: 1) completed by counsel and 2) signed by the Clerk of Court. The requirement that a subpoena be issued under seal has been abolished. For a foreign deposition (deposition being taken in a state other than Pennsylvania), subpoenas are issued in blank by the Clerk's Office, completed by counsel, and mailed to the state where the deposition is being taken. They are not signed by the court where the original notice to take the deposition is filed.

All subpoenas may be served by a person who is not a party and is not less than 18 years of age. There is no provision in the rules for subpoenas to be served by mail.

Pursuant to F.R.C.P. 45 (b)(2), a subpoena may be served anywhere within the district. However, subpoenas may only be served outside the district if they are within 100 miles of the place designated in the subpoena for the deposition, trial, production of documents, hearing, or inspection. The federal rules also permit the service of a subpoena that is outside of the district but within the state if certain conditions are met. See, F.R.C.P. 45(b)(2). All subpoenas must be accompanied by a check made payable to the witness for the witness fee ($40) and mileage (25 cents per mile, round trip).

A copy of the subpoena is left with the witness, together with the witness fee and mileage. The original subpoena is returned to counsel.

B. Criminal

Under Rule 17 of the Federal Rules of Criminal Procedure, the Clerk of Court or the Magistrate Judge hearing the matter shall issue subpoenas. An original and one copy is needed for each witness to be served. All subpoenas issued by the Clerk are: 1) completed by counsel; 2) signed by the Clerk of Court; and 3) have the seal of the court over the name of the Clerk of Court before being served on the witness.

For a deposition to be taken in a district other than the Eastern District of Pennsylvania, subpoenas are issued in blank by the Clerk's Office, completed by counsel, and mailed to the district where the deposition is being taken. An order to take a deposition authorizes the Clerk of the district in which the deposition is to be taken to issue a subpoena.

All subpoenas may be served by a person who is not a party and is not less than 18 years of age. There is no provision in the rules for subpoenas to be served by mail.

All subpoenas must be accompanied by a check made payable to the witness for the witness fee ($40.00) and mileage (25 cents per mile, round trip) unless the subpoena was issued on behalf of the United States or the court has determined upon an ex parte motion that the defendant is financially unable to pay.

A criminal subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States. Subpoenas which are directed at witnesses in a foreign country shall be issued in accordance with 28 U.S.C. §1783.

VIII. FOREIGN SUBPOENAS (Rule 45, Federal Rules of Civil Procedure)

A foreign subpoena is one issued out of a court other than where the original case is pending. For example, a case is pending in California but counsel would like to take the deposition of someone in the Eastern District of Pennsylvania.

A. Filing

File the original notice to take deposition in the district where the case is pending and request a stamped copy acknowledging filing of the notice in that district. File the copy of the notice to take the deposition in the state where the deposition is to be taken. Our practice is to provide counsel with signed, sealed, but otherwise blank deposition subpoena forms that they in turn complete and cause to be served pursuant to the local rules.

B. Copies

You need an original and one copy of the deposition subpoena (which should not have the name of the clerk stamped) when filing the copy of notice in out-of-state court. The signature of the deputy, not the seal of the court, should be affixed at the time of filing in the out-of-state Clerk's Office. The Clerk's Office will issue deposition subpoenas, signed and sealed (but otherwise blank), upon the filing of a proof of service of a notice of taking the deposition.

C. Filing Procedure in Out-Of-State Court

Counsel should complete the subpoena forms, attach a check for the witness fee and mileage in the sum of $40.00 plus 25 cents per mile, round trip, and send them, together with the stamped copy of the notice to take the deposition, to the United States District Court nearest where the deponent resides. The referring court will stamp the name of the clerk, have the form signed by a deputy and affix the seal of its court over the signature.

D. Service

Service of the deposition subpoena must be by process server. There is no provision for service by mail. The copy of the subpoena is left with the witness, together with the witness fee. The original is returned to counsel. Counsel should make arrangements with a special process server for serving the subpoena.

E. To Contest

To contest a foreign (deposition) subpoena, file a motion to quash the deposition subpoena in the district where the subpoena was issued. File an original with the court. The case is filed as a miscellaneous case.

F. Attendance

A person to whom a civil subpoena for the taking of a deposition is directed may be required to attend at any place within 100 miles from the place where the person resides, is employed or transacts business in person, is served, or at such other convenient place as is fixed by an order of court.

IX. DISCOVERY

In accordance with Local Rule 24, discovery material is not filed with the court. The party serving the discovery material or taking the deposition shall retain the original and be the custodian of it.

Every motion governing discovery shall identify and set forth, verbatim, the relevant parts of the interrogatory, request, answer, response, objection, notice, subpoena or deposition. Any party responding to the motion shall set forth, verbatim, in that party's memorandum any other part that the party believes necessary to the court's consideration of the motion.

X. TEMPORARY RESTRAINING ORDER

The assigned judge will set a time (usually the same day you file the T.R.O.) to meet with you and opposing counsel, if any. File the case in the Clerk's Office and give the clerk sufficient time to assemble the case for the judge and prepare the docket. If the judge grants the temporary restraining order, it is the responsibility of counsel for plaintiff to make service of the T.R.O. on the defendant(s).

We suggest you call Robert E. Gohery, the Operations Manager, at 597-7011 with any questions.

XI. WRITS OF GARNISHMENT, ATTACHMENT AND EXECUTION

Writs of Garnishment and Attachment are prepared by counsel, filed with the Clerk's Office for processing and served by the U.S. Marshal. Counsel is responsible for Notice to opposing counsel. Notice must be given to all Owners of the Property. (**Appendix E**).

You must wait 10 days before you can execute on a judgment, unless a Motion to Vacate, Motion to Stay, Motion for Reconsideration, or Motion for a New Trial is pending. If counsel insists, we will process the Writ of Garnishment or Execution immediately, referring the matter to the assigned judge, if available, or to the judge's chambers for guidance. (**See, Rule 62, Federal Rules of Civil Procedure**)

XII. FILING OF JUDGMENT BY DEFAULT

A. Rule 55(a), Federal Rules of Civil Procedure

You must file a request with the Clerk for the entry of a default for want of answer or other defense. Set forth the following information: (1) defendant was properly served on a particular date; (2) the time for defendant to file an answer to the complaint has expired; (3) that as of the date of the filing of the request for entry of the default, no answer (or motion to dismiss or motion for summary judgment) has been filed; (4) instruct the Clerk to enter a default against the defendant (name the defendant if more than one in a case) for want of answer or other defense.

If the defendant is an individual, be sure he/she was served by either special process server, certified mail, or regular mail (notice and acknowledgment). If served by certified mail, be sure the individual has personally signed the "green" certified mail receipt.

B. Rule 55(b), Federal Rules of Civil Procedure

To file a request for judgment by default for an individual, file an affidavit indicating (s)he is (1) not an infant; (2) not incompetent; (3) not in the military; (4) amount due and owing; and (5) form of judgment.

To file a request for judgment by default for a corporation, file only an affidavit of amount due. If the amount asked for in the complaint differs from that asked for in the proposed judgment, the affidavit of amount due should explain the discrepancy.

XIII. MULTI-DISTRICT LITIGATION

Due to the volume of litigation and the complexity of procedural requirements, those cases that are classified as being multi-district litigation are governed by a separate and unique set of procedural rules. These rules are contained in the Procedural Manual for Multi-district Litigation. Counsel may review this manual in the Clerk's Office, Room 2609, or may purchase copies from the Multi-district Litigation Panel in Washington, D.C. Specific requests for information and related inquiries should be directed to Mrs. Patricia Howard, Multi-district Litigation Panel, 1120 Vermont Avenue, N.W., Suite 1002, Washington, D.C. 10005.

In multi-district litigation matters, local rules are applicable. Particularly, counsel's attention is directed to the fact that Local Rule 13, Associate Counsel, is waived in order to allow counsel from other districts to participate in these cases.

The deputy clerk with general responsibility for local involvement in multi-district litigation matters is Mary McKenna at 597-5534.

On July 29, 1991, the Judicial Panel on Multi-District Litigation entered an opinion and order transferring all asbestos cases that were not in trial and were pending outside the Eastern District of Pennsylvania to this Court and assigning them to the Honorable Charles R. Weiner for coordinated or consolidated pre-trial proceedings pursuant to 28 U.S.C. §1407, MDL - 875, In Re Asbestos Product Liability Litigation. The deputy clerk with general responsibility is Sheila Jeffers at 597-8997.

XIV. ARBITRATION

Our arbitration program provides litigants with a more prompt and less expensive alternative to the traditional courtroom trial. It has been in operation for more than eight years and includes all civil cases (except social security cases, cases in which a prisoner is a party, cases alleging a violation of a constitutional right and cases where jurisdiction is based on 28 U.S.C. §1343) where money damages are sought in an amount not exceeding $100,000. Counsel are advised to refer to Local Rule 8 for the specific types and categories of cases that are considered to be eligible for arbitration.

A. Procedure for Cases Eligible for Arbitration

When the plaintiff files his complaint, our local rule provides that damages are presumed to be not in ~~excess~~ of $100,000 unless counsel certifies that the damages exceed that amount. Immediately after the answer is filed, the attorneys receive a letter from the Clerk's Office advising them of the date for the arbitration hearing and also notifying them that discovery must be completed within 90 days. The clerk schedules the arbitration hearing for a specific day, usually a date about four months after an answer has been filed. In the event a party files a motion for judgment on the pleadings, summary judgment, or similar relief, our local rule provides that the case may not be heard until the court has ruled on the motion. However, the filing of a motion after the judge designates the arbitrators who will hear the case (usually about 30 days prior to the arbitration hearing) shall not stay the arbitration unless the judge so orders.

B. Trial Procedure

Although the Federal Rules of Evidence are designated as guides for the admissibility of evidence at the arbitration hearing, copies or photographs of exhibits must be marked for identification and delivered to the adverse party at least ten days prior to arbitration. The arbitrators shall receive such exhibits in evidence without formal proof unless counsel has been notified at least five days prior to the hearing that his/her opponent intends to raise an issue concerning the authenticity of the exhibit. The arbitration hearing is not recorded unless a party at his/her own expense arranges for a recording. All arbitration hearings take place in a courtroom in the Federal Courthouse. The arbitrators are authorized to change the date of the arbitration hearing, provided it takes place within 30 days of the date originally scheduled.

C. Arbitrators

We now have more than 1,300 lawyers certified as arbitrators. In order to qualify for certification, the lawyer must be admitted to practice before our court, be a member of the bar for at least five years, and be determined by our Chief Judge to be competent to perform the duties of an arbitrator. An arbitrator receives only $100 for each case arbitrated, ~~since~~ it is considered a ~~pro bono-type~~ service. Three arbitrators are appointed for each case. They are randomly selected by the clerk and each panel of three arbitrators is composed of one whose practice is primarily representing plaintiffs, one whose practice is primarily representing defendants, and one whose practice does not fit either category. The arbitrators are scheduled for hearing dates several months in advance. However, it is not until the judge signs the order designating the arbitrators who will hear the case (approximately 30 days prior to the arbitration hearing) that counsel learn the identity of the arbitrators and the arbitrators become aware of the three cases assigned to them.

D. Arbitrators' Award

~~Immediately after the hearing, the arbitrators~~ make a ~~very simple~~ award, e.g., "Award in favor of defendant" or "Award in favor of the plaintiff in the amount of $ _____ against [naming one or more defendants]." The arbitrators are instructed that they should not file findings of fact, conclusions of law or opinions ~~of~~ any kind. ~~The arbitrators'~~ award shall be entered as the final judgment of the Court, unless within 30 days of the filing of the award a party demands a trial de novo.

E. Demand for Trial de Novo

Upon the filing of a demand for trial de novo, the case proceeds as if it had never been heard by the arbitrators. The party who demands a trial de novo (except the United States) must pay into the court the $100 fee paid to each arbitrator (a total of $300) unless the court signs an order permitting the party to proceed in forma pauperis. The arbitrators' fee so deposited will be returned in the event the party demanding the trial de novo obtains a final judgment, exclusive of interest and costs, more favorable than the arbitrators' award. Otherwise, the sum so deposited is forfeited to the United States.

XV. MEDIATION

The mediation program was instituted in an effort to reduce the cost and delay of litigation in the federal courts. The Court-Annexed Mediation program was instituted on January 1, 1991. The mediation program includes all "odd" numbered cases

except social security cases, cases in which a prisoner is a party, cases eligible for arbitration, asbestos cases, and any case which a judge determines is not suitable for mediation. Counsel are advised to refer to Local Civil Rule 15 for the specific types and categories of cases that are considered to be eligible for mediation.

A. Procedure For Cases Eligible For Mediation

In all cases determined eligible for mediation, immediately after the first appearance of the defendant is filed, notice of the mediation conference is sent to all counsel and any unrepresented parties. The notice shall set forth the date, time and place of the mediation conference and the name, address, and telephone number of the mediator. The date of the Mediation Conference will be set within thirty (30) days of the filing of the first appearance of the defendant.

A mediator will be randomly selected from the list of lawyers who are certified as mediators. The Mediation Clerk will forward copies of the complaint and any other pleadings filed as of the date the notice was mailed. The Mediator is authorized to change the date and time of the mediation conference provided the conference occurs within fifteen days of the original date. Any continuance beyond this additional fifteen days must be approved by the judge assigned to the case. Mediators shall disqualify themselves for bias or prejudice as provided by 28 U.S.C. §144 and shall disqualify themselves in any action in which they would be required under 28 U.S.C. §455 if they were a justice, judge or magistrate judge.

B. Mediation Conference Procedure

The mediation conference shall take place in a courthouse, a courtroom in the United States Customs House, or at such other place designated by the Mediation Clerk. All Counsel and any unrepresented parties shall attend the mediation conference. Counsel shall make arrangements that all parties are available by telephone or in person to discuss settlement. All parties at the mediation conference shall be prepared to discuss all liability issues; all damages issues; all equitable and declaratory remedies, if requested; and the position of the parties relative to settlement. Willful failure to attend the mediation conference shall be reported to the court and may result in the imposition of sanctions.

Nothing stated in the mediation conference shall be held to be an admission or reported to the court. No party shall be bound by any statements made in the mediation conference unless a written statement is reached and signed by the parties or their counsel.

C. Disposition

A report of the final outcome of the mediation conference shall be sent by the mediator to the mediation clerk and the judge assigned to the case. In the event that a settlement is reached, notification of the settlement should be included in the report. If the mediator determines that a settlement is not likely to occur in the mediation conference, the mediator shall terminate the conference and include in the report to the mediation clerk and the judge assigned that there has been compliance with the rule, but that no settlement was reached.

D. Certification of Mediators

Any individual may be certified as a mediator if they have been a member of the Bar of the highest court of a state or the District of Columbia; are admitted to practice before this court; and is determined by the Chief Judge to be competent to perform the duties of a mediator. Mediators do not receive compensation for their services, nor any reimbursement for expenses. The services of a mediator are considered a pro bono service in the interest of providing litigants with a speedier and less expensive alternative to the traditional courtroom trial. Currently, there are 475 mediators certified.

XVI. APPEALS

A. Civil

In civil cases, you have 30 days to file an appeal, unless the government is a party, in which case you have 60 days. The time commences from the date the order or judgment is entered on the docket (calendar days, not working days). A cross appeal should be filed 14 days from the filing of the first appeal.

You need an original notice of appeal, one copy for each counsel of record, and one copy for the Third Circuit Court of Appeals.

B. Criminal

In criminal cases you have 10 days to file an appeal. Cross appeals should also be filed within 10 days.

You need an original notice of appeal, one copy for all counsel of record, and one copy for the Third Circuit Court of Appeals. You also need the Clerk's Information Sheet concerning criminal cases in which a notice of appeal is filed.

If the attorney is court-appointed, pursuant to the provisions of the Criminal Justice Act, a filing fee is not required.

C. Report and Recommendation of U.S. Magistrate Judge

A party has 10 days to file objections. An original and one copy is required.

D. Bankruptcy

A party has 10 days to file a bankruptcy appeal to the District Court. An original and copies for all counsel of record are required. Counsel must file designation of record on appeal. (Bankruptcy Rule 8002).

E. Patent, "Little Tucker Act" and Claims Court Transfer Cases

Appeals in patent and "Little Tucker Act" cases (28 U.S.C. §§ 1295 (a)(1)-(2), from certain interlocutory orders in these cases (28 U.S.C. §1295(c), and from orders transferring or refusing to transfer cases to the United States Claims Court (28 U.S.C. §1292 (d)(4)(B), go to the United States Court of Appeals for the Federal Circuit. Federal Circuit Rules, practice notes, and appendix of forms are found in the Rules of Practice before the United States Court of Appeals for the Federal Circuit, available from the Clerk of that Court upon request. Call (202) 633-6550 or write to 717 Madison Place, N.W., Washington, DC 20439

F. Service

Appellate Rule 3(d) outlines the procedures for service of the notice of appeal.

The Clerk of Court is responsible for serving a copy of the notice of appeal by mail to counsel of record other than the appellant. The date the notice of appeal was filed is noted on each copy served. A notation is made on the docket by the clerk of the names of the parties to whom copies are mailed and the date of mailing.

G. Filing Fee

The $5 filing fee for the notice of appeal and the $100 docket fee for the Court of Appeals are tendered to the Clerk of Court at the time of filing the notice of appeal. If the fee is not paid within 14 days after docketing, the clerk is authorized to dismiss the appeal.

H. Preparation of the Record on Appeal

Rules 10 and 11 of the Federal Rules of Appellate Procedure provide for certification and transmittal of the original district court records file and exhibits to the Court of Appeals. However, the United States Court of Appeals for the Third Circuit has initiated an experimental program for retention of records in the district courts. In order to monitor record and case management, the district courts have been directed to retain the court records and to transmit to the Court of Appeals a certified copy of the docket entries in lieu of the entire record.

However, Rule 14 of the Third Circuit Rules provides that all reinstated parts of the record are to be transmitted if any party or the court requests such at any time during the pendency of the proceeding.

Rule 10(b) requires the appellant within 10 days after filing of the notice of appeal to order from the court reporter a transcript of the proceedings not already on file that he deems necessary for inclusion in the record. (**Appendix F**) Rule 15 of the Third Circuit Rules also requires that a deposit be made with the court reporter of the estimated cost of transcript.

Any questions you may have concerning appeals should be directed to Chris Campoli, Appeals Clerk, 597-9040.

XVII. CERTIFICATION OF JUDGMENT (AO 451)

Check Appellate Rule 4(a)(4) before issuing an AO 451. Also check the docket sheet for any post-judgment motions which may have the effect of "staying" the execution on the judgment.

The clerk does not have the authority to issue an AO 451 if a Motion to Vacate the Judgment, Motion for Reconsideration, or Motion to Stay is pending or unless the "appeal time" has expired except when ordered by the court that entered the judgment for good cause shown. (28 U.S.C. §1963, as amended). The appeal time commences to run from the date the judgment is entered on the docket, unless otherwise ordered by the Court. The clerk is not authorized to issue an AO 451 before the expiration of the appeal time because the case may be "reversed" on appeal and result in substantial loss to plaintiff because of the executions on the property of the defendant.

Normally, all civil cases may be appealed within 30 days from the date of entry of the final judgment on the docket. The United States always has 60 days within which to file an appeal. Be sure to attach a certified copy of the judgment to the AO 451 form.

XVIII. REFERRAL TO UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. §636(c) and Local Civil Rule 7, U.S. Magistrate Judges may conduct, upon consent of all the parties in a civil case, any or all proceedings, including a jury or non-jury trial, and order the entry of a final judgment.

Your decision to consent, or not to consent, to the referral of your case to a U.S. Magistrate Judge for disposition is entirely voluntary and should be communicated solely to the Clerk of Court. Appropriate consent forms for this purpose are available from the Clerk's Office. **(Appendix G)**

Only if all the parties in the case consent to the referral to a magistrate judge will either the district court judge or the magistrate judge be informed of your decision. The judge will then decide whether or not to refer the case to a magistrate for disposition, but no action eligible for arbitration will be referred by consent of the parties until the arbitration has been concluded and trial de novo demanded pursuant to Local Rule 8. The court may, for good cause shown on its motion, or under extraordinary circumstances shown by any party, vacate a referral of a civil matter to a magistrate.

When a case is referred to a magistrate judge for all further proceedings, including the entry of final judgment, the final judgment may be appealed directly to the Court of Appeals for the Third Circuit, unless the parties elect to have the case reviewed by the appropriate district judge (in which event any further appeal to the Court of Appeals would only be by petition for leave to appeal). Accordingly, in executing a consent form, you will be asked to specify which appeal procedure you elect. (See Local Civil Rule 7)

XIX. POST JUDGMENT INTEREST RATE

In accordance with 28 U.S.C. §1961 and 40 U.S.C. §258, interest shall be allowed on any money judgment in a civil case recovered in a District Court at a rate equal to the average accepted auction price of 52-week Treasury Bills.

XX. TAXATION OF COSTS

A. Role of the Clerk of Court

Rule 54(d) of the Federal Rules of Civil Procedure states that judgment costs shall be allowed as of course to the prevailing party unless the court otherwise directs and that costs may be taxed by the Clerk on one day's notice.

B. Determination of Amounts

The filing required to initiate taxation of costs is the Bill of Costs form (**Appendix H**), copies of which may be obtained from the Clerk's Office. The form sets forth the type of costs incurred that may be taxed, statutory form of affidavit, and form of certificate of service. Whenever possible, the Bill of Costs should include a breakdown of the general cost items sought (e.g., court reporters' fees, witness fees, deposition fees, etc.) in sufficient detail to facilitate prompt processing and reimbursement. This breakdown may be provided on the back of the standard form, or appended exhibits may be required.

The original Bill of Costs is filed with the Clerk of Court and a copy is served upon counsel for the opposing party. Written objections to the Bill of Costs may be filed by opposing counsel to the taxation of any or all items or counsel may await the time set for the taxation hearing and then submit objections orally or in writing. The Clerk has the duty to make a determination of the costs allowable and taxable.[1]

C. Statutory Regulation

Title 28 U.S.C. §1920, Taxation of Costs, states:

A judge or clerk of any court of the United States may tax as costs the following:

1. Fees of the clerk and marshal;
2. Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
3. Fees and disbursements for printing and witnesses;
4. Fees for exemplification and copies of papers necessarily obtained for use in the case; and,
5. Docket fees under §1923 of this title.

A Bill of Costs shall be filed in this case, and upon allowance, included in the judgment or decree. Further explanation of the specific costs allowable is provided in the following sections of the Code:

Section 1921 - United States Marshal's Fees
Section 1922 - Witness Fees Before United States Commissioners
Section 1923 - Docket Fees and Costs of Briefs
Section 1924 - Verification of Bill of Costs
Section 1821 - Per Diem and Mileage Generally; Subsistence
Section 1825 - Payment of Fees

D. **Hearing Procedure**

Upon receipt of the Bill of Costs, the Office of the Clerk of Court will contact counsel for both parties and schedule a hearing date. At the hearing, counsel may present written or oral argument in support of, or in opposition to, the Bill of Costs. After a determination of taxation is completed by the Clerk of Court, a written opinion will be prepared to substantiate the decision, and it will be distributed to counsel for both parties.

E. **Clerk's Standards for Taxation of Costs**

1. Depositions. See, 28 U.S.C. §1920(2).

The cost for the original of a deposition is taxable when it was reasonably necessary to the development of the case at the time it was taken.[2] Costs for copies of depositions are taxable at the discretion of the clerk.[3] In the absence of any objection by the adverse party, the clerk may presume that the deposition was reasonably necessary to the development of the case when taken and that it does not contain unreasonably prolonged or irrelevant examination.[4] Pursuant to Local Rule 24(B)(1), depositions shall no longer be routinely filed with the court; the clerk may presume that a deposition copy was reasonably necessary to the development of the prevailing parties' case and hence the cost of a deposition copy is taxable in favor of the non-deposing party.[5] Counsel's fees and expenses in arranging for and in attending depositions are not taxable,[6] except as provided by statute, rule, or order of the court. Fees, mileage, and subsistence for a deponent are taxable at the same rate as for attendance at trial where the deposition is taxable under this subsection.[7]

2. Trial Transcript. See, 28 U.S.C. §1920(2).

The cost of the original of a trial transcript, a daily transcript, and a transcript of matters prior to and subsequent to trial is taxable when necessarily obtained for use in the case, authorized in advance or requested by the court; acceptance by the court is not sufficient.[8] When a transcript is obtained for purpose of appeal, the cost of the original is taxable as a matter of course if the appeal is successful.

3. Exemplification and Copies of Papers. See, 28 U.S.C. §1920(4).

In order for the cost of exemplifications or copies of papers to be taxed in favor of a prevailing party, counsel shall demonstrate that such exemplifications or copies were necessarily obtained for use in the case.[9]

4. Witness Fees. See, 28 U.S.C. §§1821(b), 1920(3).

Witness fees are taxable when the witness actually testified or is necessarily in attendance at the trial,[10] and whether or not the witness attends voluntarily or is under subpoena.[11] No party shall receive witness fees for testifying in his own behalf.[12] Witness fees for officers of a corporation are taxable if the officers are not defendants and recovery is not sought against the officers individually.[13] Fees for expert witnesses in excess of the statutory amount are not taxable.[14]

5. Mileage for Witnesses. See, 28 U.S.C. §1821(cc).

The "100-mile rule," which limits the total taxable mileage of a witness to 200 miles,[15] generally will not be applied where the party seeking costs for a witness' mileage in excess of 200 miles demonstrates that the witness' testimony was relevant and material and had bearing on essential issues of the case.[16]

6. Subsistence. See, 28 U.S.C. §1821(d).

Subsistence to the witness is allowable if the distance from the court to the residence of the witness is such that mileage fees would be greater than subsistence fees, if the witness were to return to his residence from day to day.[17]

Footnotes to the Clerk's Standards for Taxation of Costs (**Appendix I**)

XXI. COURTROOM DEPUTY CLERKS

Each judge is assigned a courtroom deputy clerk who is responsible for scheduling and monitoring cases on the judge's calendar. The courtroom deputy clerk acts as a liaison between the judge and counsel, scheduling dates and times for hearings on motions, pretrial hearings and trials, and conferring with attorneys on any special trial procedures.

A. Filing A Case

The Eastern District of Pennsylvania operates on an individual calendar system, as opposed to a master calendar system, which means that the assigned judge is responsible for all cases assigned to him/her from filing to disposition.

After a case is filed, the courtroom deputy clerk checks the docket for timely service of process and the filing of an answer. If service has not been made within 90 days, a letter will be sent by the courtroom deputy clerk asking that service be made by the 120th day. If service has been made but the complaint has not been answered, again a letter will be sent by

the courtroom deputy requesting counsel to motion for judgment by default. Please do not ignore these notices. If you do, it could result in dismissal of the case for lack of prosecution. (See Federal Rule of Civil Procedure 12(a)).

Counsel may receive a status request form by contacting the courtroom deputy to the judge to whom the case is assigned. This form contains questions relating to the scheduling of the case, such as, length of time needed for discovery and estimated length of time for trial.

B. **Pretrial Practices**

After a complaint is filed, service has been made, and an answer is filed, an order is prepared which sets forth a discovery schedule. The order will specify a date by which all discovery must be completed and schedules a final pretrial conference, generally four to six weeks after the discovery deadline. Usually the case is put in the civil pool for trial in one month. However, not all judges follow the same pretrial practices. If you have any questions, call the courtroom deputy clerk of the judge to whom the case is assigned.

C. **Scheduling Cases**

When discovery has been completed and pretrial conferences have been held, there are three ways in which a case can be scheduled for trial:

1. Civil Trial Pool - Most judges have the majority of cases in this pool.

2. Date Certain - This is a target date set weeks or months in advance and depends on the judge's calendar and availability of attorneys for the date to be met.

3. Special Listing - An agreement exists between the District Court judges and the State Court judges in the five-county area of Bucks, Chester, Delaware, Montgomery and Philadelphia (**Appendix J**). These special listings take precedence over all other trial engagements provided the following requirements are met:

(a) the listing is established 30 days in advance by notice to counsel involved and all active judges;

(b) all district court judges and the judges in the 5-county area are notified at least 30 days in advance of counsel involved and of probable duration of trial;

(c) that not more than one such special listing shall be granted by the same judge to one lawyer in a six-month period, except for good cause.

The notice which is sent to district court judges and to court administrators in other courts must contain the name of the case, the date the case is scheduled, name of counsel, and the approximate amount of time required for trial.

D. Trial List

Each judge maintains a trial list of cases generally ready for trial. The federal trial list is published in the Legal Intelligencer each Monday through Friday. Here is a sample:

BECHTLE, CH. J.
Courtroom 17B
Deputy Clerk: Marion Scarengelli
Phone: 597-9305
Criminal Jury Trial
10 A.M.

CR-334-24 M.McClellan;
T. Rueter
USA v. Hernandez
J. Briskin

Pool
90-6715 N. Pausto
Downing V. Reilly
R. Gordon

90-3394 J. Restifo
Schoultz v. Amaker
J. McHaffie

90-3901 I. Paul
Pruss Environmental v. American Demolition
J. Bernard

As you can see by the sample above, the judge's name and courtroom number are listed with the courtroom deputy's name and phone number directly below it. This is followed by the day, date, and time of the case listed for a date certain or special listing. Then the case number, attorney for plaintiff, caption of the case, and attorney for defendant(s) are listed.

Underneath this section will be the cases listed in the trial pool. Being in the trial pool does not mean that you will

be called that date for trial, or that the cases will be called in the order in which they appear. The following notice as published each day in the Legal Intellingencer explains the policy of the Judges of the United States District Court for listing cases in the Eastern District of Pennsylvania.

> 1. Counsel shall promptly notify the deputy clerk to each judge before whom he/she has a case listed upon becoming attached for trial in another court. To be accorded recognition, a busy slip, using the designated form, MUST be filed in Room 2609 before 1:00 p.m. on the day after counsel becomes attached.
>
> 2. Cases in the trial pools do not necessarily appear in the order in which they will be called. Counsel should therefore be ready to begin trial upon receiving telephone call notice, subject to the following:
>
> (a) Counsel whose cases are in the pools will be given 48 hours notice, if feasible, but not less than 24 hours notice to be ready for trial with witnesses.
>
> (b) It is counsel's responsibility to check with each judge's deputy clerk on the status and movement of criminal and civil cases in the judge's pool.
>
> (c) Counsel will not be required to commence trial less than 24 hours after completing trial of another case.

If you have any questions on scheduling, please contact the courtroom deputy at the number listed.

E. Busy Slips

It is important that busy slips (**Appendix K**) be filed promptly so that cases can be properly scheduled. Busy slips can be obtained at the front counter of the Clerk's Office, Room 2609, and should be filed in the Clerk's Office by 1:00 p.m. the day after counsel becomes attached. If a conflict arises before a particular judge, priority is given to the oldest case by date of filing. Please advise the courtroom deputy when the attorney is again available, or if the case was settled.

F. Attachments for Trial

Attorneys can only be attached three business days prior to a date of trial and can only be held for attachment for three business days.

G. Continuances - Criminal Cases

The Speedy Trial Act requires that defendants be brought to trial within a 70-day period after indictment or initial appearance before a judicial officer. This 70-day period can be extended only by a judge for specific reasons set forth in the Speedy Trial Act Plan which is on file and available for inspection in the Clerk's Office.

H. Motions

When filing a motion, please include a proposed order for the judge's signature. Since courtroom deputies are responsible for tracking motions, it is important that a certificate of service be attached to the motion so that they can calculate the date the response is due. If the parties have reached an agreement, notify us by stipulation. If a motion has been filed and the parties have settled their dispute, let the courtroom deputy know as soon as possible.

I. Exhibits

At the completion of trial, the courtroom deputy clerk will keep exhibits until all appeals are exhausted or the appeal time has expired. At that point, exhibits will be returned to counsel. If the exhibits are too large or too bulky to mail, the courtroom deputy will send a letter to the attorney requesting that the exhibits be picked up. If the exhibits are not picked up, they will be deemed abandoned and will then be destroyed. (See Local Civil Rule 39)

J. Other Duties

Some additional duties performed by courtroom deputy clerks are:

1. Noting the appearance of counsel in matters before the court;

2. Impanelling the jury and administering oaths to jurors; providing liaison with the jury clerk as to ordering and cancelling of juries; and keeping required records on other jury matters;

3. Administering oaths to witnesses, interpreters, attorneys on admission, and oaths of allegiance to applicants for citizenship;

4. Recording proceedings and rulings for minutes of the court; filing, marking, storing, and returning exhibits; and composing minute orders to carry out expressed intention of the judge;

5. Preparing verdict forms and judgments;

6. Advising the financial section of the Clerk's Office on matters affecting that section, particularly the imposition of fines and order of restitution by the judge in criminal cases.

Courtroom deputy clerks are listed below according to the judge to which they are assigned, along with their room and telephone numbers:

Judge	Courtroom Deputy	Telephone
Louis C. Bechtle Chief Judge Courtroom 17B	Marion Scarengelli Room 17421	597-9305
Edward N. Cahn Courtroom 17A	Dale Smith Room 17422	597-4994
Norma L. Shapiro Courtroom 10A	Madeline Ward Room 10430	597-4059
James T. Giles Courtroom 8B	Earl Jones Room 8429	597-7575
Thomas N. O'Neill, Jr. Courtroom 14B	Charles Ervin Room 14429	597-8965
James McGirr Kelly Courtroom 8A	Arlene Quinn Room 8430	597-9649
Marvin Katz Courtroom 13B	Elizabeth Purnell Room 13421	597-3902
Edmund V. Ludwig Courtroom 12A	Kathryne Crispell Room 12614	597-0241
Robert F. Kelly Courtroom 11B	Thomas Garrity Room 11429	597-7902
Franklin S. Van Antwerpen Courtroom 7A	Dennis Hartman Room 7614	597-6272

Robert S. Gawthrop, III Courtroom 7B	Charles Mapp Room 7613	597-6271
Lowell A. Reed, Jr. Courtroom 11A	Harry Grace Room 11430	597-6950
Jan E. Dubois Courtroom 12B	George Wylesol Room 12429	597-5450
Herbert R. Hutton Courtroom 3A	Michelle Butler Room 3810	597-5693
Jay C. Waldman Courtroom 3B	Carole Conroy Room 5712	597-9647
Ronald L. Buckwalter Courtroom 5D	Matthew Higgins Room 5310	597-4423
William Yohn, Jr. Courtroom 5C	Linda Martinez Room 3317	597-4230
Harvey Bartle Courtroom	Kathy Gallagher Room 5312	597-3174
Stuart Dalzell Courtroom	Jacqueline Knoll Room 5710	597-1477

Senior Judges

John P. Fullam Courtroom 15A	Lucy Chin Room 15422	597-9559
Charles R. Weiner Courtroom 6B	Mindy Velasco Room 6429	597-7302
E. Mac Troutman The Madison Building 400 Washington Street Reading, PA 19601	Karl Romberger	372-7434
Donald W. VanArtsdalen Courtroom 14A	Marguerite McCaffrey Room 14430	597-9646
Daniel H. Huyett, 3rd The Madison Building 400 Washington Street Reading, PA 19601	Leslie Stott	1-320-5205
J. William Ditter, Jr. Courtroom 6A	Edward Polinski Room 6430	597-9615

Raymond J. Broderick Courtroom 10B	Joan Watson Room 10429	597-7502
Clarence C. Newcomer Courtroom 13A	Thomas Clewley Room 13422	597-2894
Clifford Scott Green Courtroom 15B	Michael Owens Room 15421	597-9519
Joseph L. McGlynn, Jr. Courtroom 16A	Margaret Gallagher Room 16614	597-9569
Louis H. Pollack Courtroom 16B	Donna Whittington Room 16429	597-2576

Magistrate Judges

Tullio Gene Leomporra	Thomas Bellwoar, Jr.	597-9455
Richard A. Powers, III	Carol Biedrzycki	597-2733
Edwin E. Naythons	Bernadette Suplick	597-7833
Peter B. Scuderi	Dolores McCleary	597-2093
William F. Hall, Jr.	Patricia Smeykal	597-1207
James R. Melinson	Vanessa Boens	597-5316
M. Faith Angell	Margo Brenner	597-6079
Arnold C. Rapoport 532 Walnut Street Allentown, PA 18105		1-434-5267

XXII. STANDING ORDER RE: SENTENCING REFORM ACT OF 1984

In accordance with the resolution approved by the Judges of this court on January 19, 1988, a standing order was adopted for use in criminal cases in which sentences are imposed under the Sentencing Reform Act of 1984 (Chapter II of the Comprehensive Crime Control Act, Public Law No. 98473, 98 Stat. 1837, 1976 (enacted October 12, 1984). (**Appendix L**).

XXIII. AFTER-HOURS DEPOSITORY

A deputy clerk is on duty in the Clerk's Office each weekday from 5:00 to 5:30 p.m. Attorneys who wish to contact the United States District Court for the Eastern District of Pennsylvania during the evenings after 5:30 p.m. or on weekends may do so by calling (215) 596-1603, 597-0366, or 597-0369. These numbers connect with the office of the Federal Protective Service

which is manned 24 hours a day, 7 days a week. Attorneys who call these numbers will be referred to the clerk or a deputy clerk on duty. This service is available for attorneys who have to file an injunction, ship attachment, or other emergency business during non-business hours.

An After Hours Filing Depository is provided inside the Market Street entrance to the courthouse and is able to receive documents for filing after 5:00 p.m. A time recorder is affixed to the depository which enables the person submitting documents for filing to note the time and date the documents are placed in the depository. If the documents are submitted after the doors are locked, access to the building may be gained by activating the buzzer adjacent to the main entrance on Market Street. A Federal Protective Service officer is on duty in the Regional Control Center, Room 1215 U.S. Courthouse.

XXIV. OPINIONS/CORRESPONDENCE CLERK

Mary Wood and Marcella Mitchell are responsible for distributing the judges' opinions and answering general correspondence. They can be reached at 597-7705.

The Opinions/Correspondence Clerk is the person to contact if you need a case file from the Clerk's Office or the Federal Records Center. We maintain case files for calendar years 1986 through 1991, in addition to all open cases, in the Clerk's Office. Files for previous years are stored at the Federal Records Center. Send a letter to Ms. Wood or Ms. Mitchell specifying the case number of the file you need and the documents in which you are interested. They will obtain the file and send you a copy of the papers that you need at a cost of $.50 per page. There is an additional fee of $5 for a certified copy.

Any inquiries to search the index for case numbers, judgment, decrees, etc. will be handled by Ms. Wood or Ms. Mitchell. The fee is $15 per name searched.

XXV. HOW TO FIND A CASE NUMBER

Cases are indexed using the microfiche system. At the front counter in the Clerk's Office, you will find printed explanations on the procedure to locate a case number in order to find the docket sheet for that case. Every microfiche index is labeled with the filing time frames for each category. Information on cases filed prior to the specified time frames may be obtained from the File Room.

XXVI. CLERK'S INDEX FILE BY NATURE OF SUIT

The Clerk's Office makes this service available at no cost. It is an Index to Civil Actions by Subject and is arranged under these main topics: Persons, Property, Contract, Torts & Other Statutes. Subject headings are exactly the same as those specified on the Civil Cover Sheet.

Refer to the Table of Contents under the appropriate main heading and find the page number on which reference is made to civil actions on the desired subject. Copy down the case number(s) shown and draw the case file jackets or docket sheets to see if the cases listed are helpful.

XXVII. COPYWORK

Adjacent to Room 2609 is the Xerox Room. To have copies made, you must complete a request form and prepay the cost either in person or by mail.

It is possible to obtain copywork the same day. However, it depends on the urgency of the request, the quantity of work, and the time constraints of the Xerox operator, James Scheidt, 597-7725.

XXVIII. FILE ROOM

Adjacent to the Xerox Room is the File Room where all files for civil and criminal cases are maintained for the calendar years 1986 through 1991. Individual files and papers may be inspected in this area by the general public. Files are available from the Federal Records Center through our office. There is a $25 fee for this service. If you have questions, you may contact the file room (Work Leader - Rich Struble) at 597-7721.

XXIX. CREDIT CARD COLLECTION NETWORK

In September of 1987, the Department of Treasury established a government credit card collection network to enable federal agencies to accept credit cards (Visa and Mastercard) for the collection of receipts due the government.

Credit cards are accepted as payment for the following transactions in the Clerk's Office:

*filing fees
*copywork (docket sheets, opinions, etc.)
*copies of ESR-taped proceedings
*attorney admission fees
*local rules binders
*searches and certifications
*retrieval fees for case files maintained at the Federal Records Center and
*arbitration fees

1. Counter Transactions. Submit the charge card at the counter for recording, validating, and imprinting onto a bank charge slip. The amount of the charge, transaction code, date and time appear on the bank charge slip and cash register receipt. The original cash register receipt and bank charge slip

are given to the customer, and the copies are kept on file in the Clerk's Office.

2. Telephone Requests. Give your name, credit card number and its expiration date to the Clerk's Office receptionist. Your requested work will be returned to you with a cash register receipt and a bank charge slip, which will have the words "TELEPHONE REQUEST" inserted in the signature block.

3. Mail Requests. The following information must be provided in your request letter: credit card number, expiration date, and specified amount to be charged. The letter must be signed by the same person whose signature appears on the credit card. You will receive a cash register receipt and a bank charge slip, which will have the words "MAIL REQUEST" inserted in the signature block.

For those law firms which are concerned with the safekeeping of the actual credit card, the Clerk's Office will issue numbered identification cards bearing the firm's credit card number, expiration date, and the signature of one of the firm's partners. These cards will be issued after completion of an authorization form. (**Appendix M**) The courier will simply show this card to the cashier and the transaction will be processed. On the bank charge slip, "AUTHORIZATION ON FILE" would appear in the signature block.

XXX. DEPOSITING/WITHDRAWING MONIES

The Fiscal Department is responsible for coordinating all financial transactions involving the district court. All court-related fees are paid and disbursements made through this department. In order to deposit or withdraw monies from the registry, you must submit a proposed order. Please call John Zingo, Financial Administrator, at 597-7737 with any questions on this procedure.

A. Deposits

All checks should be made payable to Clerk, U.S. District Court. This is the only form of check that will be accepted. It is recommended that all deposits made into the registry of the court for subsequent disbursement be accomplished by treasurers' check or certified check in order to allow for prompt disbursement.

B. Registry Fund, Deposit Fund, Interest-Bearing Accounts

Disbursements are made from the registry fund upon order of the court only. The case docket is reviewed to determine if disbursement is appropriate, then the financial ledger

sheet is pulled from the registry binder and compared with the court order. A voucher is prepared by the financial deputy and a check is drawn and mailed to the payee.

As a result of a new appropriation authority approved by the Judicial Conference, a fee in the amount of 10% of the annual interest has been established to cover the costs to the Judiciary for handling registry funds placed in interest-bearing accounts. The fee shall apply to all money and property held in the Court's registry and invested in interest-bearing accounts, except unclaimed moneys held in accounts for individuals or persons whose whereabouts are unknown. Assessment of this fee will commence on all case payments (withdrawals) from the registry of the Court made on or after December 1, 1988. However, fees will be assessed only for the holding of funds after September 30, 1988. As to previously existing accounts, September 30 will be considered the original date of deposit with respect to the starting case balance and the number of days held. The fee will be computed at the time of withdrawal from the date of receipt into the registry through the date of withdrawal based on the average daily balance in the account. Payment of the fee will be deducted from the balance on deposit at the time of distribution.

Disbursements from the deposit fund, i.e., court-appointed counsel fees, are accomplished by preparing a voucher and forwarding it to the certifying officer. When the certified voucher is returned, a check is drawn on the voucher and mailed to the payee.

Upon order of the court, an interest-bearing account is closed with the local bank and deposited into the registry fund as a bank transfer. A U.S. Treasury check is drawn and handled the same as a registry disbursement.

XXXI. FINES

Fine payments received through the mail are checked for the case number. If the individual is on probation, the receipt for payment is processed and sent to the Probation Office to credit the proper account. If the individual is not on probation, the payment is checked against the Case Master File to assure the proper amount is received without any overpayment.

Overpayment is discouraged and the Probation Office is made aware of overpayment and asked to have the correct amount resubmitted. When it is impossible to have the check reissued for the correct amount, the overpayment is deposited into the Deposit Fund and disbursed at a later time to the probationer.

After the payments are verified as correct, a receipt is issued. The money is deposited into the U.S. Treasury (General and Special Fund) and postal fines are deposited into the deposit fund and disbursed quarterly. The original receipts are forwarded to the Probation Office.

Fines to be paid in person are sent to the Fiscal Department, where the Fine Case Account is checked. The financial deputy fills out a form indicating the case caption and number, the account number (FUND), and the amount to be paid. The form is given to the individual, who is sent to the cashier for issuance of a receipt.

Fines received from the Probation Office are hand-delivered by probation personnel. If the fine is a first payment, a letter is attached stating the defendant's name, case number, and the amount to be paid. The criminal or magistrate docket is checked to obtain the total amount and a new account is set up on the automated financial system. If a check is made payable to the U.S. Probation Office, it can be endorsed by the Chief Probation Officer or Chief Deputy Probation Officer only.

If there was a prior payment, the Probation Office attaches a card with the payment, indicating the case number.

XXXII. CENTRAL VIOLATIONS BUREAU (CVB)

In the district courts, the CVB provides a case management system for petty offenses (and some misdemeanors) which originate with the filing of a violation notice sent by the issuing government agency directly to the CVB. If collateral is forfeited to the CVB within the specified time, the date and amount is entered and the case is closed. In cases which are not disposed of through forfeiture of collateral, the CVB schedules a hearing before a magistrate, notifies the defendant, and records the magistrate's disposition of the case.

XXXIII. BAIL BONDS

A. Determination by Court

Bail is generally set by the court from one of the following categories:

1. Own Recognizance - In this instance, the defendant signs an Appearance Bond (**Appendix N**) in the amount fixed by the court without posting any security.

2. In An Amount Equal to 10% of Total Amount of Bond - In this instance, the defendant or someone on his/her behalf deposits 10% of the amount of the bond. If it is the defendant's

cash, only the defendant signs the appearance bond. If it is the surety's cash, then both must sign. Local Civil Rule 46(a) states that "no attorney, or officer of this court shall be acceptable as surety bail, or security of any kind in any proceeding in this court."

3. In An Amount with Good Security - In this instance, both the defendant and the surety must sign the appearance bond with acceptable security being posted. Security may be one of the following:

(a) cash - only cash, certified or cashiers check, or money order are acceptable.

(b) corporate surety - with power of attorney.

(c) individual sureties -

Real Estate - explained on sample form "Bail Bond Secured by Property or Real Estate Bail" (**Appendix O**).

Securities - only negotiable securities are acceptable.

XXXIV. ATTORNEY ADMISSIONS

Application for admission to the bar of our court may be obtained at the front counter of the Clerk's Office or you may apply for admission by mail (**Appendix P**). Admission ceremonies are held once a week. For further information on attorney admissions, refer to Local Civil Rule 11 or call the Attorney Admissions Clerk, Carole Sampson, at 597-5147.

XXXV. PHOTOGRAPHIC IDENTIFICATION CARDS

Attorneys who are admitted to practice before our court should apply for a photographic identification card which will enable them to enter the courthouse without passing through the magnetometer. An application is included in your attorney admission package or call Carol Sampson at 597-5147.

In addition to the completed application, you need two color I.D. pictures approximately 1-1/4" x 1". (Photo studios that can perform this service are listed on the back of the application.) You can sign and pick up your identification card in Room 2625, Monday through Friday between 9:00 a.m. and 5:00 p.m. If you live outside the Philadelphia area, you may request to have your photo I.D. Card mailed to you.

This identification card is not transferable or usable by any other person.

XXXVI. COURT REPORTING SERVICES

Orders for transcript produced by court reporters can be accomplished through the Court Reporter Supervisor, Mrs. Phyllis Frazier, by means of a Transcript Purchase Order Form (**Appendix Q**). She can be reached at 597-2900.

Orders for transcript produced by electronic sound recording can be accomplished through the ESR Coordinator by means of a Transcript Purchase Order Form (**Appendix Q**). Orders for tapes produced by ESR can be accomplished by means of Tape Order Form (**Appendix R**). The ESR Coordinator is Michael Hearn, who can be reached at 597-6982.

XXXVII. VIDEOTAPE SERVICES

The Clerk's Office has a videotape studio for the taking of depositions of witnesses. To request videotaping of witnesses, contact Edward Morrissey at 597-7252. There is no charge for the use of the videotape facility, but counsel is required to supply the necessary videotapes.

Counsel is required to give notice to the opposing party as to their intention to utilize the videotape procedure.

XXXVIII. JURY SELECTION

The Jury Section is responsible for selecting and maintaining a pool of citizens qualified to serve as grand and petit jurors in this district and summoning these individuals for jury service. Jurors are selected pursuant to the Plan of the Random Selection of Grand and Petit Jurors of 1968 for the Eastern District of Pennsylvania. A copy of this plan is available for inspection in the Office of the Clerk of Court. The Jury Section is also responsible for preparation of vouchers and documentation required to reimburse jurors for their service.

A. Term of Jury Service

In our district, jurors are called for a two-day/one trial term of service. If selected for a case where the trial extends beyond one week, jurors are required to serve until the completion of the trial.

B. Excuse from Jury Service on Request

In addition to members of groups and occupational classes subject to excuse from jury service pursuant to 28 U.S.C. §§1863(b)(5) and (7), any person summoned for jury service may, on request, be excused temporarily by a judge of this court. The person must show undue hardship or extreme inconvenience by reason of great distance, either in miles or travel time, from

the place of holding court, grave illness in the family or any other emergency which outweighs in urgency the obligation to serve as a juror when summoned, or any other factor which the court determines to constitute an undue hardship or to create an extreme inconvenience to the juror. Additionally, in situations where it is anticipated that a trial or grand jury proceeding may require more than thirty days of service, the court may consider, as a further basis for temporary excuse, severe economic hardship to an employer which would result from the absence of a key employee during the period of such service.

The period for which such prospective jurors may be excused shall be the period of time which the judge deems necessary under the circumstances, which shall be fixed in the order granting the excuse. At the expiration of the period so fixed, such persons shall be summoned again for jury service within a reasonable time.

C. Payment

Jurors receive $40 for each day in attendance, plus 25 cents per mile as measured from their residence to the courthouse (round trip). The court calculates the computation of this fee. If a juror lives more than 50 miles from the courthouse and remains overnight, he/she will be reimbursed for room and living expenses. Subsistence allowance is $123 per night in Philadelphia, $84 per night in Allentown, $90 per night in Easton, and $77 per night in Reading.

If you have any questions regarding jury matters, you may call 597-1093.

XXXIX. PACER - PUBLIC ACCESS TO COURT ELECTRONIC RECORDS

The PACER system provides improved access to court records for attorneys and other members of the public. This electronic access system will allow any member of the public to access information contained in the court's CIVIL data-base via modem. The user dials in from a remote terminal to the court's computer and is able to access a search of information either through a case name or a case number and can request docket reports. The information is either saved on the user's PC terminal or the report is printed during online access.

All pending civil cases filed after January 1, 1990 except asbestos, and prisoner filings are contained on CIVIL. The PACER system will allow the remote end-user to search a case by name or number and print the docket report from their printer. In addition, the PACER system, will allow an end-user to check recent activity. If there has been no recent activity, the PACER system will confirm that fact in seconds.

To obtain access to the PACER system, an application must be obtained form the Clerk's Office. (**Appendix S**). Upon receipt of a completed application, the deputy clerk will provide the end-user with a log-in and password. In addition, the deputy clerk will provide the end-user with detailed instructions on the operation of the PACER system and technical specifications.

The PACER system will be available 24 hours a day except for 2 and ½ hours a day for system maintenance. The PACER system runs on its own personal computer system. This will provide users with faster service, but will also cause a penalty in information currency. As a result, case filings and updates to the docket will not appear on the PACER system until the day after they are entered.

XL. ELECTRONIC FILING OF DOCUMENTS

Electronic filing of documents is available for certain documents filed in the Eastern District of Pennsylvania. All civil documents will be accepted for electronic submission, except complaints, notices of removal and notices of appeal. The legal agency or law firm utilizing electronic filing must first submit an application to the clerk's office which explains the equipment specifications needed to transmit electronically.

The documents electronically transmitted are in lieu of paper submissions. The attorney making the electronic submission should not transmit a document electronically and also submit the same document in paper form. An application can be obtained from the Clerk's Office. (**Appendix T**). Also attached is a directory of automated services which are available. **(Appendix U)**.

A. Signature Documents

Each attorney with an electronic filing account must submit a sufficient number of original signature documents to the Clerk of Court to append to each electronic submission. The attorney is responsible for providing an adequate number of signature documents. Any electronic document that does not have a signature document on file will be returned to the attorney. In addition, the attorney must submit a Signature Document Authorization Statement with each electronic submission.
The Signature Document Authorization Statement will authorize the Clerk to append the signature document. The Authorization Statement should state: I hereby authorize the Clerk of Court to append my signature document, on file in the Clerk's Office, to this electronic submission.

B. Equipment

The electronic submission of documents requires the use of a terminal, a 2400 baud modem, and a computer capable of

processing ASCii or XMODEM or Word Perfect 5.0. At the present time, these are the only acceptable means to transmit documents electronically to the district court.

XLI. LOCAL RULES

The local rules of court -- civil, criminal, admiralty, and bankruptcy -- are available from the Clerk's Office. Inquiries should be directed to Carol Sampson, 597-5147, Room 2625. Bound copies are $3; unbound copies are free of charge.

BANKRUPTCY DIVISION

I. THE BANKRUPTCY COURT AUTOMATION PROJECT (BANCAP)

The Bankruptcy Court for the Eastern District of Pennsylvania utilizes a computer system called **BANCAP.** For purposes of this automated docketing and case management system, it is essential that counsel use the Bankruptcy Cover Sheets when filing new petitions and adversary matters. BANCAP has the capacity to:

*Automate the production of the case docket, notices, orders, case and party indexes;

*Enable the court to docket an event to a case and its related cases simultaneously;

*Provide case status, document and deadline tracking;

*Access case information for use by the court, the litigants, and the public.

BANCAP has the capability to capture the list of creditors (matrix) through use of an Optical Character Reader (OCR). The OCR reads typewritten lists which are prepared in a prescribed format, using only Courier 10, Prestige Elite and Letter Gothic typefaces. Lists should be typed on a single page in a single column, with each name/address consisting of no more than five lines. **The OCR will not read lists that deviate from the prescribed format.** Counsel are required to include their complete address, telephone number and State Bar identification number on all filings.

BANCAP may be accessed to obtain the complete electronic history of all cases contained on the docketing system. Any member of the bar or public with a computer and modem may access BANCAP via the PACER system. See **Appendix U.**

II. FILING A BANKRUPTCY PETITION

All bankruptcy petitions filed within the Eastern District of Pennsylvania (regardless of county) are filed in the Philadelphia office of the United States District Court, Bankruptcy Division, Room 3726, between the hours of 8:30 a.m. and 5:00 p.m. The costs for filing bankruptcy petitions are listed on **Appendix V.** Payment may be made by cash, money order, attorney's credit card, check of debtor's attorney, or certified check of the debtor. Checks should be made payable to Clerk, U. S. District Court Bankruptcy Division. Installment filing fees should be accompanied by an Application and Order, and filed with the petition.

Bankruptcy petitions may also be filed by mail. The mailing address is:

United States District Court
Bankruptcy Division
3726 United States Courthouse
601 Market Street
Philadelphia, PA 19106

All subsequent pleading material is filed in the Clerk's Office where the presiding judge assigned to your case resides.

The **Philadelphia Division of the Clerk's Office** handles Philadelphia, Delaware and Montgomery counties.

The **Reading Division of the Clerk's Office** handles Berks, Bucks, Chester, Schuylkill, Lancaster, Lehigh and Northampton counties.

The address of the Reading Clerk's Office is:

4104 East Shore Office Building
45 South Front Street
Reading, PA 19602

If you have any questions for the Reading office, you may call Carol Emerich, Deputy-in-Charge, at 320-5255.

III. PREPARATION OF PAPERS FOR FILING

All papers submitted to the Clerk for filing should measure 8-1/2" x 11" and be stapled or fastened to keep them intact.

IV. REFILING CASE(S) PREVIOUSLY DISMISSED

Selection 109(f)(1) of the Bankruptcy Code provides that no individual may be a bankruptcy debtor if, within the preceding 180 days, a previous bankruptcy petition filed by that individual was dismissed by the court for willful failure to abide by the orders of the court or to appear before the court in proper prosecution of the case.

If the court records in your previous bankruptcy case indicate that the case was dismissed by a court order which states that there was a willful failure on your part, and which prohibits you from filing another bankruptcy for 180 days, the Clerk's Office cannot accept your bankruptcy petition for filing.

If you believe that the court order which dismissed your earlier case was entered in error because you did not

willfully fail to abide by orders of the court, or appear before the court in proper prosecution of the case, you may file a motion in the earlier bankruptcy case requesting that the court grant you relief from the order which dismissed the case. (Bankruptcy Rule 9024) If the court grants your motion and modifies its prior order, you will be permitted to file another bankruptcy petition.

V. EFFECT OF FEE INCREASES ON REOPENED CASES (Exclusive of the quarter payments to the U.S. Trustee)

A. Reopened Bankruptcy Code Cases

Filing fees prescribed by 28 U.S.C. 1930(a)(1) through (5) must be collected when a bankruptcy code case is reopened, unless the reopening is to correct an administrative error or for actions related to the debtor's discharge. If a bankruptcy code case is reopened for any other purpose, the appropriate fee to be charged is the same as the filing fee in effect for commencing a new case on the date of the reopening.

The filing fees for reopening a bankruptcy code case are as follows:

For a Chapter 7 or 13 case reopened after October 18, 1986	$ 90.00
For a Chapter 9 case reopened after October 1, 1979	300.00
For a Chapter 11 case that does not involve a railroad reopened after October 1, 1979 but before November 26, 1986	200.00
For a Chapter 11 case concerning a railroad reopened on or after November 26, 1986	1,000.00
For a Chapter 12 case reopened after November 26, 1986	200.00

B. Reopening Bankruptcy Act Cases

The amount of the fee to be collected when a Bankruptcy Act case (filed prior to October 1, 1979) is reopened is the same as the filing fee that was collected when the case was originally commenced.

The only exception to this policy is set forth in the new bankruptcy legislation which specifies the amount of the fee to be collected ($400) when a Chapter 7 or Chapter 13 case converts at the request of the debtor to Chapter 11 after November 26, 1986. (Section 117, P.L. 99-554)

C. Filing fees in Converted Bankruptcy Code Cases

For a case commenced under Chapter 7 or 13 prior to October 18, 1986 and converted to a Chapter 7 or 13 thereafter.	$ 30.00
For a case commenced under Chapter 7 or 13 prior to October 18, 1986 and converted to Chapter 11 prior to November 26, 1986.	140.00
For a case commenced under Chapter 7 or 13 on or after October 18, 1986 and converted to Chapter 11 prior to November 26, 1986	110.00
For a case commenced under Chapter 7 or 13 and converted to Chapter 11 after November 26, 1986 at the request of the debtor.	400.00
For a case commenced under Chapter 7 or 13 on or after November 26, 1986 and converted to Chapter 11, at the request of someone other than the debtor . .	410.00
For a case commenced under Chapter 7 or 13 prior to October 18, 1986 and converted to Chapter 12	140.00
For a case commenced under Chapter 7 or 13 on or after October 18, 1986 and converted to Chapter 12. . .	110.00
For a case commenced under Chapter 12 and converted to Chapter 11	300.00

VI. EXPEDITED HEARINGS, T.R.O., PRELIMINARY INJUNCTIONS

A. Stipulations Requiring Immediate Consideration and Requests for Expedited Hearing Dates

The title of the motion or stipulation should indicate that the movant seeks expedited consideration (e.g., "Motion to Sell Real Estate Free and Clear of Liens" and for Expedited Hearing Date) or there should be a separate motion for expedited consideration. The movant should set forth with particularity the reasons why expedited consideration is necessary.

When the movant seeks to shorten the time period for the scheduling of a hearing, all interested parties should be served immediately with the request for expedited consideration and there should be a certification of service filed along with the request for expedited consideration.

If the movant is requesting a hearing date within seven days or less, the moving party is expected, whenever feasible, to give all interested parties notice of the request for an

expedited hearing date prior to filing. The movant shall file a certification of such service or an explanation why prior service could not be made.

After considering the reasons given for expedited consideration, the court may, in its discretion, act on the request without waiting for a response.

If the motion or stipulation needs to be seen by the judge that day, the individual filing the papers should inform the clerk that the matter needs immediate consideration. The clerk will make arrangements for the papers to be brought to the judges' chambers.

If the motion or stipulation does not need to be seen by the judge that day, counsel may safely assume that, absent unusual circumstances, the papers will be docketed and presented to the judge within 48 hours of filing.

If counsel needs to know whether a particular matter has been seen and decided by the judge, counsel should check with the Clerk's Office.

B. Scheduling Hearings for T.R.O. or Preliminary Injunction

Prior to filing the motion, counsel should attempt to call all interested parties to ascertain their availability for an emergency hearing in court or by telephone conference.

Counsel should then call the judge's courtroom deputy clerk to advise her/him that an emergency motion is going to be filed and to ascertain when the judge is available to hear the motion.

Counsel shall then promptly give notice to all interested parties of the date and time that the judge will consider the emergency motion. If necessary, the judge will conduct a telephone conference to allow all interested parties to participate.

Counsel should file all motions and memoranda on which it relies before the hearing. If there is insufficient time for the papers to be docketed and brought to chambers or the courtroom, counsel should bring extra copies for the judge and should advise the judge that the originals have been filed.

VII. MOTIONS

An application to the court for an order shall be by motion. The title of each motion shall identify the person filing the motion and the nature of the relief sought. The

answer to each motion shall identify the person filing the answer and the motion being answered.

A. Papers to Accompany Motions

Each motion shall be accompanied by the following papers:

(1) A proposed form of order which, if entered by the court, would grant the relief sought by the motion.

(2) A proposed order and form of notice, substantially in the form of Local Bankruptcy Form 9014.1A, requiring the filing of a response and identifying all interested persons to be served, or if notice of the motion is proposed to be mailed by the clerk, a form of notice. (**Appendix W**)

(4) A non-adversary cover sheet, substantially in the form of Local Bankruptcy Form 9014.1B. (**Appendix X**)

B. Hearing Date

At the time of the filing of the motion, the clerk shall fix a time and date for a hearing on the motion and advise counsel for the movant thereof. If you need any information, the dates and times of the hearings are listed daily in the Legal Intelligencer. Please refer to this listing before calling the Clerk's Office.

C. Service of Motion and Order to File Answer

(1) Movant or counsel for the movant shall serve a copy of the Motion and Notice of Hearing to Consider Motion upon all interested parties within three (3) business days of receipt of the completed notice from the clerk.

(2) Movant or counsel for the movant shall serve a copy of the Order Requiring Answer upon all interested parties within three (3) business days of receipt of the order from the clerk.

(3) Service upon interested persons shall be made by service on such interested persons' counsel of record, if any, except that a debtor shall be served in addition to his counsel.

(4) The clerk shall maintain a service list identifying the names and addresses of the debtor, any trustee, any committee, and all creditors and equity security holders who have filed requests that all notices be mailed to them pursuant to Bankruptcy Rule 2002(i).

D. **Answer**

If order by the court, any person who opposes the motion must file an answer to the motion together with a proposed form of order and serve a copy on counsel for the movant and all others served by the movant within 15 days.

E. **Certificate of Service**

A certificate of service shall be attached to each served document stating the name and address of each person served and the date and manner of service.

F. **Expedited Disposition**

If the relief requested in a motion is deemed to require expedited consideration, counsel shall set forth the reasons why expedited consideration is necessary with particularity, either in the pleading or in a separate motion, accompanied by a certificate of service. All interested parties shall be served with the request for expedited consideration prior to its filing. If possible, the proponent shall arrange the hearing date with the interested parties prior to filing. In all instances, a hearing date shall be suggested and an order setting forth the date and proposed manner of service shall be submitted. (See Local Bankruptcy Rule 9014.2)

G. **Uncontested Motions**

In the event that all interested persons consent to the grant of relief requested by the movant, or have advised movant that they do not oppose the granting of such relief, and movant so certifies, or have failed to file a response within the time set by the court, movant may advise the court that the motion is uncontested. An uncontested motion will be determined promptly by the court.

H. **Motion to Limit Notice or to Permit Counsel to Give Notice**

Motions to limit the persons to receive notice or motions to permit counsel to give notice do not need to be served until the court has acted on the motion. These motions shall be served with the motions to which they apply.

VIII. UNNECESSARY COURTROOM APPEARANCES

In an effort to reduce the need for unnecessary court-room appearances, counsel are requested to report withdrawals, settlements, stipulations and continuances to a date certain by agreement of all parties in interest, as well as matters which

will be non-contested, to the courtroom deputy. The matter will be removed from the courtroom trial list.

Such telephone requests must be followed by the immediate filing of the appropriate stipulations, praecipes or certifications.

Contact Barbara Spinka, Courtroom Deputy to Judge Twardowski, at 483-5255; Pamela Doll, Courtroom Deputy to Judge Scholl, at 597-1642; or Barbara J. Townsend, Courtroom Deputy to Judge Fox, at 597-5196.

IX. ADVERSARY MATTERS

An adversary matter is initiated with the filing of the following papers: Complaint, Summons and Notice, and an Adversary Cover Sheet. A filing fee of $120 is required of all plaintiffs who are not debtors in a Chapter 7 or 13, or a trustee in a Chapter 11, 12 or 13.

The Adversary Clerk will complete the Summons and Notice and return same to plaintiff's counsel, who will serve it on the interested parties along with the complaint. Service is achieved by 1st class mail or hand service. (Service by the Marshal is not required.) A Certification of Service which contains the date and manner of service will then be filed with the Clerk's Office.

X. REMOVALS

Removals are initiated with the filing of a verified application, simply stating the facts which entitle the party to removal.

As of September 1, 1986, removals are treated as an adversarial action, with a $120 filing fee being required of the movant. The proceeding in question is automatically accepted. A hearing is then scheduled to consider any subsequent issues, such as a Motion to Remand or the original contested matter.

XI. CERTIFICATION OF JUDGMENT FOR REGISTRATION IN ANOTHER DISTRICT

Transfer of judgment can be accomplished by the filing of a completed Certification of Judgment form. The clerk then affixes the seal of the court, the signature of the deputy clerk, and attaches a certified copy of the order/judgment.

XII. FEE APPLICATIONS OF PROFESSIONAL PERSONS

The hours expended by each professional person within an organization should be grouped per individual, with a total for that individual at the end of his/her hours. A summary page showing name, date, description of services performed, identifying each service separately, time expended for each service broken into periods of one-tenth of an hour or less, hourly rate and total fee required per person should be included as an exhibit to the application. All costs (reimbursable expenses) should be itemized per category.

If it is an interim fee application, a notice requiring an answer, objection or responsive pleading should be filed with the application. Any previous fees and expenses allowed or requested should be listed in the notice.

XIII. FINAL AUDIT PAPERS

A. Trustee's Final Account

This should be a detailed itemization of monies taken in or disbursed by the trustee since the inception of the case or since the filing of a previous accounting. The receipts should be listed with the date received, description of item (accounts receivable, proceeds of sale, interest earned) and totalled. The disbursements should be listed in the same manner as the receipts. A recapitulation should include the balance from a previous account, if any, total receipts, total disbursements, and the balance on hand. Also included in the final account should be a separate page summarizing the receipts and disbursements from previous accounts and giving a grand total for receipts and a grand total for disbursements and the balance on hand.

B. Application of Trustee for Commissions

There should be an exhibit page showing the percentages used to calculate the amount requested.

C. Application for Fee of a Professional Person

If an accountant, appraiser, etc. was employed and has not been paid to date, a fee application to pay such person should be filed with the final audit papers.

D. Form of Notice of Final Audit

For a final audit, use the preprinted government form which can be obtained from the Bankruptcy Division of the Clerk's Office, Room 3726. The caption and case number should appear on the notice. All persons who have filed an application to be paid

should be listed on the notice by name and amount requested. The grand total of receipts and the grand total of disbursements and the balance on hand should be filled in. In **Comments** on the reverse side, include a statement as to whether the unsecured creditors will receive a dividend or that the costs of administration and/or priority and secured claims will consume the fund.

XIV. ORDER OF PARTIAL OR FINAL DISTRIBUTION

Before preparing an order of distribution, you should contact the asset closing clerk to find out if there are any court costs (charges for notices, claims, complaints, etc.).

The starting figure on the distribution should be the balance in the trustee's account. Any interest earned since the cut-off date on the trustee's account should be set forth as a separate item and the two added together for the balance on hand.

If any creditors are to be paid, refer to Section 507 of the Bankruptcy Code for priority order of payment. The payments to creditors are to be set forth as follows:

Claim Number	Name and Address of Claimant	Amount Allowed	Amount Dividend

If there are any creditors' wages being paid, the deductions for taxes should be shown on the distribution (amount allowed, federal withholding, social security, net amount). Be sure to deduct the employer's share of social security as well as the employee's share.

Ninety (90) days after an order of distribution is entered and the checks are released to creditors, the canceled checks and zero bank statement should be filed with the Clerk's Office. Any outstanding balance in the account should be paid into the Bankruptcy Division of the Clerk's Office accompanied by a list of those creditors who did not cash their checks and the amount due each creditor.

XV. PROOF OF CLAIM FORM

A. Instructions for Completing the Proof of Claim Form (Appendix Y)

Fill in the caption at the top of the form and be sure to insert the debtor's name and case number as shown on your notice. If there is more than one case, file separate claim forms for each person owing you money. In a joint case filed by a husband and wife, only one claim form is necessary.

1. Insert the complete address of the person filing the claim in the paragraph that is applicable. If the claim is

being made by an agent or attorney for the claimant, fill in the paragraphs entitled **"If claim is made by agent"** also.

2. Insert the **exact** amount of the claim. Interest can only be claimed up to the filing date of the bankruptcy petition.

3. Specify the consideration of the debt or ground of liability, such as: goods and services, merchandise, rent, etc.

If your claim is for wages, salary, or commissions, including vacation, severance and sick leave, please request a **Proof of Claim for Wages, Salary or Commissions** from the Bankruptcy Division.

If this claim is a claim for an individual, please state whether or not it arises from the deposit, before the commencement of the case, of money in connection with the purchase, lease or rental of property, or the purchase of services, for the personal, family or household use of such individuals, that were not delivered or provided.

4. Attach a statement of account or some proof of debt to the reverse side of the claim form, or attach a statement as to why same cannot be attached (also see #9). Such as: open account statement, promissory note, lease, deed to secure debt, judgment, etc. **(Copies only -- do not send original notes, etc.)**

5. Complete as indicated, if appropriate.

6. If you have obtained a judgment on this debt, identify same here. If no judgment was obtained, show **"NONE."**

7. Upon completion of this claim form, you are certifying that this statement is true.

8. Do nothing unless there has been an offset. If there has, explain same and indicate that it has already been subtracted from the balance due as shown in paragraph 2 above.

9. **IMPORTANT IF YOU HAVE SECURITY.** State a very brief description of what the security is and what property it is on and attach a copy of the security agreement and the financing statement, if any, show the date and place of record of same.

10. Say nothing unless there is a priority claim.

11. Circle your type of claim.

Be sure to date the claim form and place <u>original signature</u> of the claimant or person making the claim for the

creditor where indicated at the bottom of the claim form. Please type or print name of individual under the signature.

All items on the claim form must be answered. If not applicable, so state.

The original Proof of Claim, with all attachments, must be filed: (a) for Chapter 7 and Chapter 13 claims, within 90 days after the first date set for the 341 meeting; (b) for Chapter 11 claims, if the amount listed on the debtors' schedule is disputed and/or before the Court sets a bar date.

Proof of Claim Forms (with attachments, if any) may be mailed or hand-delivered to the Bankruptcy Division of the Clerk's Office. The original is required for Chapter 7, 11 and 12 cases; the original and one copy are required for Chapter 13 cases.

XVI. **ASSISTANT UNITED STATES TRUSTEE**

James J. O'Connell
U.S. Customs House
200 Chestnut Street
Room 600
Philadelphia, PA 19106

XVII. **STANDING CHAPTER 13 TRUSTEES**

Philadelphia - Edward Sparkman, Esquire
Public Ledger Building
Suite 1229
6th & Chestnut Streets
Philadelphia, PA 19106
(215) 627-1377

Reading - Frederick L. Reigle, Esquire
P. O. Box 4010
3506 Perkiomen Avenue
Reading, PA 19606
(215) 779-8000

On the following pages are the office directories for the Clerk's Office and other offices in the courthouse, as well as filing and miscellaneous fees set by the Judicial Conference.

PERSONNEL - CLERK'S OFFICE - ROOM 2609
Information Desk - Deana Drobonick - 597-7704

Clerk of Court	
Michael E. Kunz	597-7704
Maureen Mattern, Secretary	597-5041
Janet Puderbach	597-6904
Taxation of Costs	
Kevin Dunleavy	597-0725
Personnel	
Donna Diaz	597-8299
Margaret O'Neill	597-7497
Fiscal	
John Zingo	597-7737
Jeanette Wren	597-9396
Sandy Matos	597-9408
Joseph Hall	
CJRA Attorney	
Ken Wilson	597-5724
Chief Deputy Clerk	
Joseph Benedetto	597-7704
Linda Chiaradio, Secretary	597-7704
Court Reporting Supervisor	
Phyllis Frazier	597-2900
ESR Coordinator	
Michael Hearn	597-6982
ESR Operators	
Dan Baback	597-2927
Rosalind Burton-Lacey	597-9749
Kris Dragotta	776-1809
Robin Fairshter	597-2927
James Finnegan	597-2927
Constantine Flores	597-7676
David Hayes	597-2927
Scott Hoke	252-6522
Kathleen Kane	597-7662
Jerry LaRosa	597-2927
Patricia Lattanzio	597-2927
Patrice Maloney	597-2927
Thomas McCann	597-2927
Lisa McFarland	597-2927
James McGovern	597-2927
Edward Morrissey	597-2927

Andrea Palumbo	597-2927
Terryl Richardson	597-2927
Zachary Robinson	597-2927
Appeals	
Christopher Campoli	597-9040
Pro Se Law Clerks	
Elaine Battle	597-7733
Thomas Pfender	597-7733
Pro Se Writ Clerk	
Marie March	597-5759
Arbitration	
Amelia Fears	597-9332
Burnel Gilliams	597-3917
Mediation	
Patricia Jones	597-5760
Courtroom Deputy Supervisor	
Stephen J. Iannacone	597-3242
Courtroom Deputy Clerks	
Marion Scarengelli (Ch. J. Bechtle)	597-9305
Dale Smith (J. Cahn)	597-4230
Madeline Ward (J. Shapiro)	597-4059
Earl Jones (J. Giles)	597-7575
Charles Ervin (J. O'Neill)	597-8965
Arlene Quinn (J. James Kelly)	597-9649
Elizabeth Purnell (J. Katz)	597-3902
Kathryne Crispell (J. Ludwig)	597-0241
Thomas Garrity (J. Robert Kelly)	597-7902
Dennis Hartman (J. Van Antwerpen)	597-6272
Charles Mapp (J. Gawthrop)	597-6271
Harry Grace (J. Reed)	597-6950
George Wylesol (J. Dubois)	597-5450
Michelle Butler (J. Hutton)	597-5693
Carole Conroy (J. Waldman)	597-9647
Matthew Higgins (J. Buckwalter)	597-4423
Linda Martinez (J. Yohn)	597-4230
Katherine Gallagher (J. Bartle)	597-3174
Jacqueline Knoll (J. Dalzell)	597-1477
Lucy Chin (S.J. Fullam)	597-9559
Mindy Velasco (J. Weiner)	597-7302
Karl Romberger (S.J. Troutman)	483-5195
Marguerite McCaffrey (S.J. VanArsdalen)	597-9646
Leslie Stott (S.J. Huyett)	483-5205
Edward Polinski (S.J. Ditter)	597-9615
Joan Watson (S.J. Broderick)	597-7502

Thomas Clewley (S.J. Newcomer)	597-2894
Michael Owens (S.J. Green)	597-9519
Margaret Gallagher (J. McGlynn)	597-9569
Donna Whittington (J. Pollak)	597-2576
Beverlee Bearman	597-0712

Magistrates' Deputy Clerks

Thomas Bellwoar, Jr. (M. Leomporra)	597-9455
Carol Biedrzycki (M. Powers)	597-2733
Bernadette Suplick (M. Naythons)	597-7833
Dolores McCleary (M. Scuderi)	597-2093
Patricia Smeykal (M. Hall)	597-1207
Vanessa Boens (M. Melinson)	597-5316
Margo Brenner (M. Angell)	597-6079

Operations Manager, Case Processing

Robert E. Gohery	597-7011

Assignment Desk

David Bruey	597-0849
Michael Finney	597-4262

Case Processing Supervisor

Mary Chase	597-6959

Civil Case Processing Clerks

Helen Burkholder (Clerk 1)	597-7001
Ariel Guzman (Clerk 2)	597-7002
Marleen Seccio (Clerk 3)	597-7003
Patricia Horning (Clerk 4)	597-7004
Angela Mickie (Clerk 5)	597-7005
Sharon Carter (Clerk 6)	597-7006
Joan Carr (Clerk 7)	597-7007
Gayle B. Norman (Clerk 8)	597-7008
Kim Williams (Clerk 9)	597-7009
Theresa DePasquale (Clerk 10)	597-7010

Asbestos Coordinator

Jane E. Firestone	597-8061

Asbestos Clerks

Anna Marie Prudente (#1-2)	597-9616
Aida Ayala (#3-4)	597-7662
Dennis Taylor (#5-6)	597-6644
Joyce Yaworski (#7-8)	597-9441
Janice Owens (#9)	597-9749
Sherilynn Marshall (#0)	597-9742

Criminal Case Processing Clerks

Richard Sabol	597-9746
James Hamilton	597-9747

Speedy Trial Coordinator/Magistrates' Docket Clerk	
Mary-Anne Mackiewicz	597-7663
Multi-district Litigation/Grand Jury	
Mary McKenna	597-5534
Prisoners' Docket Clerk	
Susan Carnation	597-9344
Linda Jerry	597-7793
George E. Miller	
Civil Systems Administrator	
Linda Washington	597-0693
Administrative Services Manager	
Joseph Rodgers	597-7734
Opinions/Correspondence Clerk	
Mary Wood	597-7705
Marcella Mitchell	597-9345
Jury Selection	
Delores Johnson	597-7632
Marilyn Pieczkolon	597-7728
Elizabeth Cleek	597-5643
Edward Andrews	597-4626
Carolanne Goss	597-1093
Jean Conboy	597-7728
Ngoc Thach	597-0293
Daniel Spitz	597-0293
Videotape Operator	
Michael Hearn	597-6982
Edward Morrissey	597-7252
Naturalization	
Peggy Martin	597-7731
Attorney Admissions Clerk	
Carol Sampson	597-5147
Files/Records Room	
Rich Struble, Work Leader	597-7721
Fernando Benitez	
Jeffrey Cooke	
Joseph Lavin	
Micrographics Clerk	
John Krayger	
Xerox Operator	
James Scheidt	597-7725

ANTITRUST OFFICE	597-7405
COURT OF APPEALS CLERK	597-2995
PRE-TRIAL OFFICE	597-9661
PROBATION OFFICE	597-7950
U.S. ATTORNEY'S OFFICE	597-2556
U.S. COURT OF APPEALS LIBRARY	597-2009

OFFICIAL COURT REPORTERS

Verthelia Albany	597-0888
Edward Bosta	597-1689
David Ehrlich	597-0903
Philip Feldman	597-0716
Joel Gerstenfeld	925-4655
Florence Jones	597-0720
Barbara Marshall	925-0862
Paul McGowan	925-1918
Nancy Reusing	483-5195
Louis Richardson	597-0864
Sidney Rothschild	597-0894
Rose Tamburri	928-9760
Suzanne White	627-1882
Gregg Wolfe	597-0706

PERSONNEL - BANKRUPTCY DIVISON
PHILADELPHIA

Information Desk - Yvette Ruiz - 597-1644

Deputy-in-Charge	
Joseph Simmons	597-0926
Carolyn A. Bryant, Secretary	
Operations Manager	
Walter Stoertz, Jr.	597-8238
Administrative Analyst	
	597-6512
Automation Analyst	597-5585
Diane Miller	
BANCAP Systems Administrator	
Natalie Scornaienchi	597-8266
Fiscal	
Shervon Leonard	597-5197
Courtroom Deputy Clerks	
Pamela Doll (Judge Scholl)	597-0990
Barbara J. Townsend (Judge Fox)	597-5196
Docket Clerks - All Chapters/Adversary	
Martha Flemming	597-1640
Marie Needham	597-1640
Rosemary Haklisch	597-1641
Florence McElveen	597-1641
Patricia Gurganious	597-1642
Eileen Cook	597-1642
Jeanette Gilmore	597-1640
Nancy Mulvehill	597-1642
Nancy Harvey	597-1642
Bernadette Bush	597-1642
Joan Ranieri	597-1641
Nora Cox	597-1641
Amy Schmidt	597-1642
Virginia DeBuvitz	597-1642
Notice Clerk	
Maureen Doherty	597-1644
Intake Clerks	
Lucille Billups	597-1640
Patricia Pinder	597-1641
Yvette Ruiz	597-1642

Claims Clerks

Christine Jackson	597-1644
Yvonne Nesbitt	597-1643
Rochelle Cottom	597-2927
Anshele Shumsky	597-2927
Colleen Holloway	597-1644

Asset Closing Clerk

Eleanor Kershaw	597-1489
Paula Maury	597-1640

No Asset Closing Clerk

Linda Kehoe	597-1644
Margaret Knoll	597-1644
Stacey Jasinski	597-1644
Elizabeth Terry	597-1644
Edwin Rodriguez	597-1644

341 Meeting Clerk

Jacqueline Campbell	597-1644

Records Clerks

Thomas Doyle	597-1641
Tim Campellone	597-1641
Kevin Taulane	597-1641

ESR Operators

Marie Kalinoski	597-1642
Randi Janoff	597-1642

PERSONNEL - BANKRUPTCY DIVISION
(READING)

Deputy-in-Charge
Carol Emerich 320-5255

Courtroom Deputy Clerk
Barbara Spinka (Judge Twardowski)

Docket Clerks - All Chapters/Adversary
Angela Macklen
Violet Palermo
Joyce Covely
Yolanda Pagan
Barbara Kurtyka

Intake Clerk
Irene Colon

Claims Clerk
Renee Adams-Moser

341/Notice Clerk
Robin Moyer

ESR Operator
Zoe Esslinger

Records Clerk
Robert Gray

No Asset Closing Clerk
Alice Poslosky
Cathleen Peters

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United States District Court

APPENDIX A

FOR THE EASTERN DISTRICT OF PENNSYLVANIA — DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar.

Address of Plaintiff: _____

Address of Defendant: _____

Place of Accident, incident or Transaction: _____
(Use Reverse Side For Additional Space)

Does this case involve multidistrict litigation possibilities? Yes ☐ No ☐

RELATED CASE IF ANY

Case Number: _____ Judge _____ Date Terminated: _____

Civil cases are deemed related when yes is answered to any of the following questions:

1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes ☐ No ☐
2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? Yes ☐ No ☐
3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this court? Yes ☐ No ☐

CIVIL: (Place X in *ONE CATEGORY ONLY*)

A. *Federal Question Cases:*
1. ☐ Indemnity Contract, Marine Contract, and All Other Contracts
2. ☐ FELA
3. ☐ Jones Act—Personal Injury
4. ☐ Antitrust
5. ☐ Patent
6. ☐ Labor-Management Relations
7. ☐ Civil Rights
8. ☐ Habeas Corpus
9. ☐ Securities Act(s) Cases
10. ☐ Social Security Review Cases
11. ☐ All other Federal Question Cases (please specify)

B. *Diversity Jurisdiction Cases:*
1. ☐ Insurance Contract and Other Contracts
2. ☐ Airplane Personal Injury
3. ☐ Assault, Defamation
4. ☐ Marine Personal Injury
5. ☐ Motor Vehicle Personal Injury
6. ☐ Other Personal Injury (Please specify)
7. ☐ Products Liability
8. ☐ Products Liability—Asbestos
9. ☐ All other Diversity Cases (Please specify)

ARBITRATION CERTIFICATION

(Check appropriate category)

I, _____, counsel of record do hereby certify:

☐ Pursuant to Local Civil Rule 8, Section 4(a)(2), that, to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of $100,000 exclusive of interest and cost;

☐ Relief other than monetary damages is sought.

DATE: _____ _____
Attorney-at-Law

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

I certify that, to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: _____ _____
Attorney-at-Law

CIV. 609
(Rev. 5-89)

JS 44
(Rev 07/89)

CIVIL COVER SHEET

APPENDIX B

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS

DEFENDANTS

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)

DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.

V. NATURE OF SUIT (PLACE AN x IN ONE BOX ONLY)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury—Med Malpractice
- ☐ 365 Personal Injury—Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing Accommodations
- ☐ 444 Welfare
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence Habeas Corpus
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Other

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt. Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates, etc.
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions

VI. ORIGIN (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION ☐ UNDER F.R.C.P. 23

DEMAND $

Check YES only if demanded in complaint

JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See instructions)

JUDGE _____ DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES DISTRICT COURT

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-44

Authority For Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) **Plaintiffs - Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved).

(c) Attorneys. Enter firm name, address, telephone number, and attorney or record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)"

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8 (a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction is based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an X in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. **Residence (citizenship) of Principal Parties.** This section of the JS-44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause.

V. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section IV above, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

VI. **Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate's decision.

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS-44 is used to reference relating pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CASE MANAGEMENT TRACK DESIGNATION FORM

	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	NO.

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a Case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants. (See § 1:03 of the plan set forth on the reverse side of this form.) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a case management track designation form specifying the track to which that defendant believes the case should be assigned.

SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:

(a) Habeas Corpus -- Cases brought under 28 U.S.C. §2241 through §2255. ( )

(b) Social Security -- Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits. ( )

(c) Arbitration -- Cases required to be designated for arbitration under Local Civil Rule 8. ( )

(d) Asbestos -- Cases involving claims for personal injury or property damage from exposure to asbestos. ( )

(e) Special Management -- Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court. (See reverse side of this form for a detailed explanation of special management cases.) ( )

(f) Standard Management -- Cases that do not fall into any one of the other tracks. ( )

_____ _____

(Date) **Attorney-at-law**

_____

Attorney for

(Civ. 660)
1/92

Civil Justice Expense and Delay Reduction Plan
Section 1:03 - Assignment to a Management Track

(a) The clerk of court will assign cases to tracks (a) through (d) based on the initial pleading.

(b) In all cases not appropriate for assignment by the clerk of court to tracks (a) through (d), the plaintiff shall submit to the clerk of court and serve with the complaint on all defendants a case management track designation form specifying that the plaintiff believes the case requires Standard Management or Special Management. In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a case management track designation form specifying the track to which that defendant believes the case should be assigned.

(c) The court may, on its own initiative or upon the request of any party, change the track assignment of any case at any time.

(d) Nothing in this Plan is intended to abrogate or limit a judicial officer's authority in any case pending before that judicial officer, to direct pretrial and trial proceedings that are more stringent than those of the Plan and that are designed to accomplish cost and delay reduction.

(e) Nothing in this Plan is intended to supersede Local Civil Rules 3 or 7, or the procedure for random assignment of Habeas Corpus and Social Security cases referred to magistrate judges of the court.

SPECIAL MANAGEMENT CASE ASSIGNMENTS
(See § 1.02 (e) Management Track Definitions of the Civil Justice Expense and Delay Reduction Plan)

Special management cases will usually include that class of cases commonly referred to as "complex litigation" as that term has been used in the Manuals for Complex Litigation. The first manual was prepared in 1969 and the Manual for Complex Litigation Second, MCL 2d was prepared in 1985. This term is intended to include cases that present unusual problems and require extraordinary treatment. See §0.1 of the first manual. Cases may require special or intense management by the court due to one or more of the following factors: (1) large number of parties; (2) large number of claims or defenses; (3) complex factual issues; (4) large volume of evidence; (5) problems locating or preserving evidence; (6) extensive discovery; (7) exceptionally long time needed to prepare for disposition; (8) decision needed within an exceptionally short time; and (9) need to decide preliminary issues before final disposition. It may include two or more related cases. Complex litigation typically includes such cases as antitrust cases; cases involving a large number of parties or an unincorporated association of large membership; cases involving requests for injunctive relief affecting the operation of large business entities; patent cases; copyright and trademark cases; common disaster cases such as those arising from aircraft crashes or marine disasters; actions brought by individual stockholders; stockholder's derivative and stockholder's representative actions; class actions or potential class actions; and other civil (and criminal) cases involving unusual multiplicity or complexity of factual issues. See §0.22 of the first Manual for Complex Litigation and Manual for Complex Litigation Second, Chapter 33.

APPENDIX D

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT	District EASTERN DISTRICT OF PENNSYLVANIA
	Docket No. CIVIL ACTION NO.
	To: (Name and Address of Defendant)

YOU ARE HEREBY SUMMONED and required to serve upon

Plaintiff's Attorney (Name and Address)

an answer to the complaint which is herewith served upon you, within
days after service of this summons upon you, exclusive of the day of service.
If you fail to do so, judgment by default will be taken against you for the
relief demanded in the complaint.

Clerk MICHAEL E. KUNZ	Date
(By) Deputy Clerk	

RETURN OF SERVICE

Service of the Summons and Complaint was made by me[1]	Date
Name of Server	Title

Check one box below to indicate appropriate method of service

Served personally upon the defendant. Place where served _____

Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left:

Other (specify) _____

STATEMENT OF SERVICE FEES

Travel	Services	Total

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date

_____
Signature of Server

_____
Address of Server

1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA APPENDIX E

: CIVIL ACTION

:

:

:

: NO.

PRAECIPE FOR WRIT OF EXECUTION

TO THE CLERK:

ISSUE WRIT OF EXECUTION in the above matter, directed to the United States Marshal for the Eastern District of Pennsylvania, and against _____,

and against _____.
(Name and Address of Garnishee)

garnishee, and index this writ against*_____

_____ and against _____

_____as garnishee, as a lis pendens against real property of the judgment debtor in the name of the garnishee, as follows:

_____

_____

Amount Due $_____

Interest From _____ $_____

_____
Attorney for

Date: _____

*Applicable to real estate only (Rule 3104(c) Pa. R.C.P.).

Civ 637 (3/82)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

:

: CIVIL ACTION NO.

:

WRIT OF EXECUTION

TO THE UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA:

To satisfy judgment, interest, and costs against _____

_____, defendant
(Name of Defendant)

(1) You are directed to levy upon the property of the defendant and to sell his interest therein

(2) You are also directed to attach the property of the defendant not levied upon in the possession of _____ as garnishee.
(Name of Garnishee)

_____
(Specifically Describe Property)

and to notify the garnishee that

(a) an attachment has been issued;

(b) the garnishee is enjoined from paying any debt to or for the account of the defendant and from delivering any property of the defendant or otherwise disposing thereof;

(3) if property of the defendant not levied upon and subject to attachment is found in the possession of anyone other than a named garnishee, you are directed to notify him that he has been added as a garnishee and is enjoined as above stated.

Amount Due	$_____
Interest From _____	$_____
(Cost to be Added)	$_____

MICHAEL E. KUNZ
(Clerk of Court)

Seal of the Court

BY: _____
(Deputy Clerk)

MAJOR EXEMPTIONS UNDER PENNSYLVANIA AND FEDERAL LAW

1. $300 statutory exemption
2. Bibles, school books, sewing machines, uniforms and equipment
3. Most wages and unemployment compensation
4. Social security benefits
5. Certain retirement funds and accounts
6. Certain veteran and armed forces benefits
7. Certain insurance proceeds
8. Such other exemptions as may be provided by law

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

: CIVIL ACTION

: NO.

WRIT OF EXECUTION
NOTICE

This paper is a Writ of Execution. It has been issued because there is a judgment against you. It may cause your property to be held or taken to pay the judgment. You may have legal rights to prevent your property from being taken. A lawyer can advise you more specifically of these rights. If you wish to exercise your rights, you must act promptly.

The law provides that certain property cannot be taken. Such property is said to be exempt. There is a debtor's exemption of $300. There are other exemptions which may be applicable to you. Attached is a summary of some of the major exemptions. You may have other exemptions or other rights.

If you have an exemption, you should do the following promptly: (1) Fill out the attached claim form and demand for a prompt hearing. (2) Deliver the form or mail it to the United States Marshal's office at the address noted.

You should come to court ready to explain your exemption. If you do not come to court and prove your exemption, you may lose some of your property.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

LAWYER REFERENCE SERVICE

(Name)

2nd Floor, Widener Building
1339 Chestnut Street
Philadelphia, Pennsylvania, 19107

(Address)

(215) 686-5698

(Telephone Number)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

: CIVIL ACTION
:
:
:
:
:
:
:
:
: NO.

CLAIM FOR EXEMPTION

To the U. S. Marshal:

I, the above named defendant, claim exemption of property from levy or attachment:

(1) From my personal property in my possession which has been levied upon,

(a) I desire that my $300 statutory exemption be

(i) set aside in kind (specify) property to be set aside in kind):

_____;

(ii) paid in cash following the sale of the property levied upon; or

(b) I claim the following exemption (specify property and basis of exemption):_____

_____.

(2) From my property which is in the possession of a third party, I claim the following exemptions

(a) My $300 statutory exemption: in cash; in kind

(specify property): _____

(b) Social security benefits on deposit in the amount of $ _____

(c) Other (specify amount and basis of exemption): _____

_____

I request a prompt court hearing to determine the exemption. Notice of the hearing should be given to me at _____

_____ . _____

(Address) (Telephone Number)

I declare under penalty of perjury that the foregoing statements made in this claim for exemption are true and correct.

Date: _____ _____

(Signature of Defendant)

THIS CLAIM TO BE FILED WITH THE OFFICE OF THE U.S. MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA:

2110 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania, 19106

(Address)

(215) 597-7272

(Telephone Number)

Note: Under paragraphs (1) and (2) of the writ, a description of specific property to be levied upon or attached may be set forth in the writ or included in a separate direction to the United States Marshal.

Under paragraph (2) of the writ, if the attachment of a named garnishee is desired, his name should be set forth in the space provided.

Under paragraph (3) of the writ, the United States Marshal may, as under prior practice, add as a garnishee any person not named in this writ who may be found in possession of property of the defendant. See Rule 3111(a). For limitations on the power to attach tangible personal property, see Rule 3108 (a).

(b) Each court shall by local rule designate the officer, organization or person to be named in the notice.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Plaintiff	:	
v.	:	CIVIL ACTION NO. _____
_____ Defendant	:	
_____ Garnishee	:	

TO: _____

_____

_____

Date of Notice: _____

IMPORTANT NOTICE

You are in default because you failed to take action required of you in this case. Unless you act within ten days from the date of this Notice, a judgment may be entered against you without a hearing and you may lose your property or other important rights. You should take this Notice to a lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the following office to find out where you can get legal help.

Lawyer Reference Service
One Reading Center
11th Floor
Philadelphia, PA 19107
(215) 238-1701

_____

Attorney for

Civ 641 (9/91)

READ INSTRUCTIONS ON BACK OF LAST PAGE BEFORE COMPLETING

TRANSCRIPT PURCHASE ORDER

APPENDIX F

District Court	Court of Appeals Docket No
	District Court Docket No

Short Case Title _____

Date Notice of Appeal Filed by Clerk of District Court _____

PART I. (To be completed by party responsible for ordering transcript)

A Complete one of the following and serve ALL COPIES.

TRANSCRIPT

- ☐ None ☐ Unnecessary for appeal purposes
- ☐ Already on file in the D.C. Clerk's office
- ☐ This is to order a transcript of the proceedings heard on the dates listed below. (Specify exact dates of proceedings) If requesting only partial transcript of proceedings, specify exactly what portion or what witness testimony is desired

_____

_____

If proceeding to be transcribed was a trial, also check any appropriate box below for special requests, otherwise, this material will *NOT* be included in trial transcripts

Voir dire ☐, Opening statement of plaintiff ☐ defendant ☐,
Closing argument of plaintiff ☐ defendant ☐
Jury instructions ☐

FAILURE TO SPECIFY IN ADEQUATE DETAIL THOSE PROCEEDINGS TO BE TRANSCRIBED, OR FAILURE TO MAKE PROMPT SATISFACTORY FINANCIAL ARRANGEMENTS FOR TRANSCRIPT, ARE GROUNDS FOR DISMISSAL OF THE APPEAL OR IMPOSITION OF SANCTIONS.

B This is to certify that satisfactory financial arrangements have been completed with the court reporter for payment of the cost of the transcript. The method of payment will be

- ☐ Criminal Justice Act (Attach copy of CJA form 24)
- ☐ Motion for transcript has been submitted to DC Judge
- ☐ Private funds

Signature _____ Date _____

Print Name _____ Counsel for _____

Address _____ Telephone _____

PART II. COURT REPORTER ACKNOWLEDGMENT (To be completed by the Court Reporter and forwarded to the Court of Appeals on the same day transcript order is received.)

Date transcript order received	Estimated completion date, if not within 30 days of date financial arrangements made, motion for extension to be made to Court of Appeals	Estimated number of pages

- ☐ Arrangements for payment were made on _____
- ☐ Arrangements for payment have not been made pursuant to FRAP 10(b)

Date _____ Signature of Court Reporter _____ Telephone _____

PART III. NOTIFICATION THAT TRANSCRIPT HAS BEEN FILED IN THE DISTRICT COURT (To be completed by court reporter on date of filing transcript in District Court and notification must be forwarded to Court of Appeals on the same date.)

This is to certify that the transcript has been completed and filed with the District Court today.

_____ Actual Number of Pages _____ Actual Number of Volumes

Date _____ Signature of Court Reporter _____

Copy 1 — Court Reporter's Copy

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

_____ Plaintiff	CIVIL ACTION
v.	
_____ Defendant	NO.

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U.S.C. §636(c), the parties to the above captioned civil proceeding hereby waive their right to proceed before a judge of the United States District Court, and consent to have a United States magistrate (if the judge decides to refer the case to a magistrate) conduct any and all further proceedings in the case, including but not limited to, the trial of the case, and order the entry of final judgment.

It is agreed:

(1) That the final judgment may be appealed directly to the United States Court of Appeals for this Circuit in the same manner as an appeal from any other judgment of the district court.

_____

or

(2) That any appeal shall be to a judge of the district court, with any further appeal to the Court of Appeals subject to the grant of a petition for leave to so appeal.

_____

(Check one, cross out the other).

_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
(Parties)	(Attorneys)	(Date)

(Return this form to the clerk of court *only* if it has been executed by *all* parties and their attorneys in the case).

Civ. 636 (8-80)

APPENDIX H

AO 133
(Rev. 5/81)

BILL OF COSTS

United States District Court

for the

EASTERN DISTRICT OF PENNSYLVANIA

vs. } CIVIL ACTION FILE NO.

Judgment having been entered in the above action on the day of , 19 , against
the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	$
Fees of the marshal	
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	
Fees and disbursements for printing	
Fees for witnesses (itemized on reverse side)	
Fees for exemplification and copies of papers necessarily obtained for use in case	
Docket fees under 28 U.S.C. 1923	
Costs incident to taking of depositions	
Cost as shown on Mandate of Court of Appeals	
Other Costs (Please itemize)	
Total	$

State of
County of } ss:

I certify under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to with postage fully prepaid thereon.
Executed on .
(Date)

(Signature)

Please take notice that I will appear before the Clerk who will tax said costs on , 19 at

Attorney for

Costs are hereby taxed in the amount of $ this day of , 19 , and that amount included in the judgment.

Clerk

By
Deputy Clerk

NOTE: SEE REVERSE SIDE FOR AUTHORITIES ON TAXING COSTS.

Witness Fees (computation, cf. 28 U.S.C. 1821 for statutory fees)

Name and Residence	Attendance Days	Attendance Total Cost	Subsistence Days	Subsistence Total Cost	Mileage Miles	Mileage Total Cost	Total Cost Each Witness
					TOTAL		

NOTICE

Section 1924, Title 28, U.S.Code (effective September 1, 1948) provides:

"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28 which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

Rule 54(d)

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Rule 6(e)

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Rule 58 (In Part)

"Entry of the judgment shall not be delayed for the taxing of costs."

FOOTNOTES TO CLERK'S STANDARDS FOR TAXATION OF COSTS

GENERAL

1. R. Peck, Taxation of Costs in Federal Court, 37 F.R.D. 481.

DEPOSITIONS

2. Hudson V. Nabisco Brands, 758 F.2nd 1237 (7th Cir. 1985).

Women's Federal Savings and Loan Association of Cleveland V. Nevada National Bank, 108 F.R.D. 396 (D. Nevada 1985).

Studiengesellschaft Kohle v. Eastman Kodak Company, 713 F.2d 128 (5th Cir. 1983).

Ramos V. Lamm, 713 F.2d 546, 560 (10th Cir. 1983).

Allen v. United States Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982).

Illinois v. Sangamo Construction Co., 657 F.2d 855, 867 (7th Cir. 1981) (Costs for depositions not used at trial allowable when reasonably necessary to the case.)

Koppinger v. Cullen-Schlitz & Associates, 513 F.2d 901, 911 (8th Cir. 1975) (Depositions not used at trial taxable when reasonably necessary to case and not purely investigative.)

Wahl v. Carrier Manufacturing Co., 511 F.2d 209 (7th Cir. 1975).

Mount Airy Lodge, Inc. v. The Upjohn Company, No. 79-4658, Slip Op. at 4 (E.D. Pa. May 24, 1985).

Scorpio Music Distributors, Inc. v. Trans World Airlines, Inc. and Iberia Airlines, et al., No. 83-4336, Slip Op. at 2 (E.D. Pa. August 1, 1985).

Raio v. American Airlines, Inc., 102 F.R.D. 608 (E.D. Pa. 1984) (Transcript fees incident to the taking of depositions are taxable "when the depositions appear reasonably necessary to the parties in light of a particular situation existing at the times they were taken.").

Kraeger v. University of Pittsburgh, 535 F.Supp. 233 (W.D. Pa. 1982).

George R. Hall, Inc. v. Superior Trucking Co., 532 F.Supp. 985, 994 (N.D. Ga. 1982) (The determination of whether a particular deposition was "necessarily obtained" is a factual one.)

Hill v. BASF Wyandotte Corp., 547 F.Supp. 348, 351 (E.D. Mich. 1982) (Deposition costs not taxable when for investigative purposes or trial preparation.)

Independence Tube Corp. v. Cooperwald Corp., 543 F.Supp. 706, 717 (N.D. Ill. 1982).

Jefferies v. Georgia Residential Finance Authority, 90 F.R.D. 62, 63 (N.D. Ga. 1981).

Neely v. General Electric Co., 90 F.R.D. 627, 630 (N.D. Ga. 1981).

Marcoin, Inc. v. Edwin K. Williams & Co., 88 F.R.D. 588, 592 (E.D. Va. 1980) (If depositions were used by counsel at trial or introduced in evidence, "then it is proper to conclude they were necessarily obtained for use in the case.")

Dasher v. Mutual Life Ins. Co. of New York, 78 F.R.D. 142, 144 (S.D. Ga. 1978).

Action Alliance of Senior Citizens, etc. v. Shapp, 74 F.R.D. 617, 620 (E.D. Pa. 1977).

Alonso v. Union Oil Co. of California, 71 F.R.D. 523, 525 (S.D.N.Y. 1976).

Chemical Bank v. Kimmel, 68 F.R.D. 679, 685 (D. Del. 1975).

Harrisburg Coalition Against Ruining the Environment v. Volpe, 65 F.R.D. 608, 611 (M.D. Pa. 1974).

Semke v. Enid Automobile Dealers Assoc., 52 F.R.D. 518, 519-20 (W.D. Okla. 1971).

Electronic Specialty Co. V. International Controls Corp., 47 F.R.D. 158, 162 (S.D.N.Y. 1969).

Nationwide Auto Appraiser Service, Inc. v. Assoc. of Casualty & Surety Cos., 41 F.R.D. 76, 77 (W.D. Okla. 1966) (Deposition costs taxable where reasonably necessary to party's case in light of existing situation when depositions taken.)

Fleischer v. A.A.P., Inc., 36 F.R.D. 31, 36 (S.D.N.Y. 1964) (Costs for depositions taxable where depositions taken in preparation for, and for possible use at trial.)

Freedman v. Philadelphia Terminals Auction Co., 198 F.Supp. 429, 430 (E.D. Pa. 1961) (Depositions taken in "good faith" and within bounds of discovery rules are "necessarily obtained" under 28 U.S.C. §1920(2) and therefore taxable.)

Bank of America v. Loew's International Corp., 163 F.Supp. 924, 931 (S.D.N.Y. 1958).

Pearlman v. Feldman, 116 F.Supp. 102, 110 (D. Conn. 1953) (Deposition is taxable when its general content was reasonably necessary to the development of the case at the time it was taken. "When a deposition is taken within the proper bounds of discovery as delineated by the Federal Rules, at least one transcript thereof, either that on file in the clerk's office, or if none is on file, that obtained by a party, will normally be found to be necessarily obtained for use in the case, whether or not the deposition is actually offered or used at trial.")

3. Templeman v. Chris Craft Corp., 770 F.2d 245 (1st Cir. 1985).

Hollenbeck v. Falsstaff Brewing Corporation, 605 F.Supp. 421 (E.D. Mo. 1984).

Principe v. McDonald's Corporation, 95 F.R.D. 34 (E.D. Va. 1982).

Lockett v. Hellenic Sea Transports, Ltd., 60 F.R.D. 469, 472 (E.D. Pa. 1973).

4. Yaris v. Special School District of St. Louis County, et al., 604 F.Supp. 914 (E.D. Mo. 1985).

Hollenbeck v. Falsstaff Brewing Corporation, 605 F.Supp. 421 (E.D. Mo. 1984).

Regarding presumption, see Pearlman v. Feldman, supra, note 2, 116 F.Supp. at 111. (An adverse party shall interpose a specific objection that deposition was improperly taken or unduly prolonged.)

Federal Savings & Loan Ins. Corp. v. Szarabajka, 330 F.Supp. 1201, 1210 (N.D. Ill. 1971).

5. Hill v. BASF Wyandotte Corp., 547 F.Supp. 348 (E.D. Mich. 1982).

Anthony Martino v. Sundance Services, Inc., et al., No 82-5591, Slip Op. at 6 (E.D. Pa. February 27, 1985).

Esler v. Safeway Stores, Inc., 77 F.R.D. 479, 483 (W.D. Mo. 1978). (Copies must be obtained for a purpose other than counsel's convenience to be taxable.)

Action Alliance of Senior Citizens of Greater Phila., etc. v. Shapp, supra, note 2, 74 F.R.D. at 621. (Copies of depositions obtained by Harrisburg-based attorney were r merely for convenience since depositions were filed ir

clerk's office in Philadelphia. Under such circumstances, copies were taxable.)

Wade v.Mississippi Cooperative, 64 F.R.D. 102, 107 (E.D. Miss. 1974). (Taxability of copy depends on factual circumstances of each case.)

Electronic Specialty Co., supra, note 2, 47 F.R.D. at 162. (Party seeking cost of copies must make a showing that depositions were not filed timely with court.)

Pearlman v. Feldman, supra, note 2, 116 F.Supp. at 111. (Where filing of depositions waived by parties and as a result no copy is available in the clerk's office, cost of one copy taxable.)

See, U.S. v. Kolesar, 313 F.2d 835 (5th Cir. 1963), rejecting "rigid" rule that copies of depositions are never taxable.

6. Sack v. Carnegie Mellon University, 106 F.R.D. 561 (W.D. Pa. 1985).

Dorothy K. Winston & Co. v Town Heights Development, Inc., 68 F.R.D. 431 (D.C. 1975).

Wahl v. Carrier Manufacturing Co., Inc., supra, note 2, 511 F.2d at 217.

DeRoburt v. Gannett Co., Inc., 558 F.Supp. 1223 (D. Hawaii 1983).

George R. Hall, Inc. V. Superior Trucking Co., supra, note 2, 532 F.Supp. at 985.

Neely v. General Electric Co., supra, note 2.

Frigiquip Corp. v. Parker-Hannifin Corp., 75 F.R.D. 605, 615 (W.D. Okla. 1977).

Norman v. U.S., 74 F.R.D. 637 (D. Del. 1977).

Chemical Bank v. Kimmel, supra, note 2, 68 F.R.D. at 684.

Harrisburg Coalition Against Ruining the Environment v. Volpe, supra, note 2, 65 F.R.D. at 612.

Bailey v. Meister Brau, Inc., 378 F.Supp. 883, 888 (N.D. Ill. 1974).

Sperry Rand Corp. v. A-T-O, Inc., 58 F.R.D. 132, 139 (E.D. Va. 1973).

Kaiser Industries v. McLouth Steel Corp., 50 F.R.D. 5, 12 (E.D. Mich. 1970).

Anderson v. General Motors Corp., 161 F.Supp. 668, 678 (W.D. Wash. 1958).

Hope Basket Co. v. Product Advancement Corp., 104 F.Supp. 444, 451-52 (W.D. Mich. 1952).

7. Neely v. General Electric Co., 90 F.R.D. 627, (N.D. Ga. 1981).

Dasher v. Mutual Life Ins. Co. of New York, supra, note 2, 78 F.R.D. at 144.

Bailey v. Meister Brau, Inc., supra, note 6, 378 F.Supp. at 888.

Trial Transcript

8. Since the statute controlling this area of cost taxation is couched in general terms, and since a degree of discretion can be exercised, courts have found it useful to identify certain factors which will permit the taxation of trancript costs. These factors include: the length of the trial; the complexity of the issues and the multiplicity of the parties; whether the case was tried to the court or the jury; whether proposed findings of fact were required; whether post-trial motions raised factual issues for which a transcript was necessary; whether a transcript was requested by the court; and whether it was feasible for counsel to take notes. Roberts v. Charter National Life Insurance Company, 112 F.R.D. 411 (S.D. Fla. 1986); Chore-Time Equipment, Inc. v. Cumberland Corporation, 713 F.2d 774, 782 (Fed. Cir. 1983); Wahl v. Carrier Manufacturing Co., supra, note 2; Independence Tube Corp. v. Cooperwald Corp., supra, note 2; Kraeger v. University of Pittsburgh, supra, note 2; Environmental Defense Fund, Inc. v. Andrus, 88 F.R.D. 617 (E.D. Cal. 1980); Marcoin, Inc. v. Edwin K. Williams & Co., supra, note 2, 588 F.R.D. at 590. (A transcript will be found to be "necessarily obtained" if "it was necessary to counsel's effective performance and handling of the case."); Dorothy K. Winston & Co. v Town Heights Development, Inc., supra, note 6; Chemical Bank v. Kimmel, supra, note 2; Federal Savings & Loan Ins. Corp. v. Szarabajka, supra, note 4; Kaiser Industries v. McLouth Steel Corp., supra, note 6; Advanced Business Systems and Supply Co. v. SCM Corp., supra, note 5; Mercon v. Goodyear Tire Co., supra, note 6,; Syracuse Broadcasting Corp. v.Newhouse, 319 F.2d 684 (2d Cir, 1963); Electronic Specialty Co. V. International Controls Corp., supra, note 2; Tracy v. Goldberg, 203 F.Supp. 188 (E.D. Pa. 1962); Gillam v. A. Shyman, Inc., 31 F.R.D. 271 (D.C. Alaska 1961); Bank of America v. Loew's

International Corp., supra, note 2; Pearlman v. Feldman, supra, note 2; 6 J Moore's Federal Practice, ¶54.77 (7) at 1748 (2d Ed. 1975).

EXEMPLICATIONS AND COPIES PAPERS

9. Caselaw concerning this cost, considered as a whole, gives little guidance as to when exemplifications and copies of papers are "necessarily obtained for use in the case," the prerequisite for the taxation of their cost under 28 U.S.C. §1920(4). This area of costs has been subjected to a case-by-case analysis and thus the formulation of workable guidelines is difficult.

In order to demonstrate why formulation of specific guidelines is difficult here, as well as for general reference, some of the cases consulted are listed below:

Radol v. Thomas, 113 F.R.D. 172 (S.D. Ohio 1986).

Gorelangton v. City of Reno, 638 F.Supp. 1426 (D. Nevada 1986).

Northcross v. Board of Education, 611 F.2d 624, 640 (6th Cir. 1979) cert. denied, 447 U.S. 911 (1980). ("It would be advisable for the litigants to obtain authorization from the district court before incurring large items of expense."

G. H. & M. Construction and Development Company, Inc. v. The Municipal Sewer and Water Authority of Cranberry Township, et al., No. 80-567-6, Slip Op. at 10, 11 (W.D. PA. April 21, 1983) (Exemplification of papers used in a lawsuit under 28 U.S.C. §1920(4) includes more than making a copy of a document.")

Morrissey v. County Tower Corp., 568 F.Supp. 980, 982 (E.D. Mo. 1983).

Roche v. Normandy, 566 F.Supp. 37, 42 (E.D. Mo. 1983).

Banks v. Seaboard Coast Line Railroad Co., 62 F.R.D. 21, 22 (N.D. Ga. 1974) (Counsel's certification that copies of papers were introduced in evidence was a sufficient showing that they were "necessarily obtained" and hence taxable under §1920(4).)

Mikel v. Kerr, 64 F.R.D. 93, 95-96 (E.D. Okla. 1973) (Where court made use of copied material, cost therefore taxable under §1920(4).)

Hill v. Gonzalez, 53 F.R.D. 1, 3 (D. Minn. 1971) (Cost for charts taxable when such charts were more than illustrative of a witness' testimony.)

H. C. Baxter & Bro. v. Great Atlantic & Pacific Tea Co., 44 F.R.D 49, 52 (D. Me. 1968) (The court articulated a "test": "The reasonable expense of preparing charts, photographs, motion pictures and similar visual aids is properly taxable as costs when the exhibits have been received in evidence or have been of material aid to the court in resolving substantial and difficult questions of fact. The expense of such exhibits is not allowable when they are merely illustrative or repetitive of otherwise adequate evidence.")

General Casualty Company of America v. Stanchfield, 23 F.R.D. 58, 60 (D. Mont. 1959) (Cost for photostatic copies taxable where such copies had considerable influence on ultimate decision of case.)

Hope Basket Co. v. Product Advancement Corp., supra, note 6, 104 F.Supp. at 450. (Where charts aided court in its consideration of the case and expense therefore was reasonable, such cost was taxable.)

10. Gorelangton v. City of Reno, 638 F.Supp. 1426 (D. Nevada 1986).

Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201 (3d Cir. 1981).

Quy v. Air America, Inc., 667 F.2d 1059, 1065 (D.C. Cir. 1981).

Linneman Construction, Inc. v. Montana-Dakota Utilities Co., Inc., 504 F.2d 1365, 1372 (8th Cir. 1974).

United States v. Lynd, 334 F.2d 13, 16-17 (5th Cir. 1964).

G. H. & M. Construction and Development Company, Inc. v. The Municipal Sewer and Water Authority of Cranberry Township, et al., supra, note 9, Slip Op. at 12.

Morrissey v. County Tower Corp., supra, note 9. (Allowing witness fees for depositions reasonably necessary at time taken, but not used because case was dismissed.)

Rosebrough Monument Co. v. Memorial Park Cemetery Assoc., 572 F.Supp. 92, 94 (E.D. Mo. 1983).

Evans v. Fuller, 94 F.R.D. 311, 315 (W.D. Ark. 1982) (Fees for witnesses who did not testify are not recoverable.)

Principe v. McDonald's Corp., 95 F.R.D. 34, 37 (E.D. Va. 1982) (Witness fees allowed for witness present but not called.)

Christian v. Tackett, 86 F.R.D. 220 (N.D. Miss. 1979).

Worley Massey-Ferguson, Inc., 79 F.R.D. 534 (N.D. Miss 1978).

Esler v. Safeway Stores, Inc., supra, note 5, 77 F.R.D. at 482.

Harrisburg Coalition Against Ruining the Environment v. Volpe, supra, note 2, 65 F.R.D. at 611.

Bailey v. Meister Brau, Inc., supra, note 6, 378 F.Supp. at 887.

Lockett v. Hellenic Sea Transports, Ltd., supra, note 3.

Mikel v. Kerr, supra, note 9, 64 F.R.D. at 94.

Brennan v. Frisch Dixie, Inc., 61 F.R.D. 419, 420 (W.D. Ky. 1973).

Federal Savings & Loan Ins. Corp. v. Szarabajka, supra, note 4, 330 F.Supp. at 1208.

Bennett Chemical Co. v. Atlantic Commodities, Ltd., 24 F.R.D. 200, 204 (S.D.N.Y. 1959).

11. Spiritwood Grain Co. v. Northern Pacific Ry., 179 F.2d 338, 344 (8th Cir. 1950).

Dasher v. Mutual Life Ins. Co. of New York, supra, note 2, 78 F.R.D. at 145.

Federal Savings & Loan Ins. Corp. v. Szarabajka, supra, note 4, 330 F.Supp. at 1208.

Oscar Gruss & Son v. Lumberman's Mutual Casualty Co., supra, note 4, 46 F.R.D. at 639.

Gallagher v. Union Pac. Ry. Co., 7 F.R.D. 208, 209 (S.D.N.Y. 1947).

12. Hodge v. Seiler, 558 F.2d 284, 287 (5th Cir. 1977).

Heverly v. Lewis, 99 F.R.D. 135, 136 (D. Nev. 1983).

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

Goodwin Brothers Leasing, Inc. v. Citizens Bank, 587 F.2d 730, 735 (5th Cir. 1979).

Northcross v. Board of Education, supra, note 9.

Burgess v. Williamson, 506 F.2d 870 (5th Cir, 1975).

Adams v. Carlson, 521 F.2d 168 (7th Cir. 1975).

Fey v. Walston & Co., 493 F.2d 1036, 1056 (7th Cir. 1974).

Strong v. Ponder, 572 F.Supp. 129, 130 (N.D. Ga. 1983).

DeRoburt v. Gannett Co., Inc., supra, note 6, 558 F.Supp. at 1229.

Westman Commission Co. v. Hobart Corp., 562 F.Supp. 729, 737 (D.Colo. 1983).

Brager & Co. v. Leumi Securities Corp., 530 F.Supp. 1361 (S.D.N.Y. 1982).

George R. Hall, Inc. v. Superior Trucking Co., supra, note 2.

Mastrapras v. New York Life Ins. Co., 93 F.R.D. 401 (E.D. Mich. 1982).

Independence Tube Corp. v. Cooperwald Corp., supra, note 2.

NAACP v. Wilmington Medical Center, Inc., 530 F.Supp. 1018, 1027, (D. Del. 1981), rev'd on other grounds, 689 F.2d 1161 (3d Cir. 1982), cert. denied, 103 S.Ct. 1499 (1983).

Dittler Brothers, Inc. v. Allendale Mutual Ins. Co., 33 Fed.R. Serv.2d 280 (N.D. Ga. 1981).

Neely v. General Electric Co., supra, note 2.

Pate v. General Motors Corp., 89 F.R.D. 342, 344 (N.D. Miss. 1981).

United States v. Bexar County, 89 F.R.D. 391, 393 n. 3 (W.D. Tex. 1981).

Ingersoll Milling Machine Co. v. Otis Elevator Co., 89 F.R.D. 433, 434 (N.D. Ill. 1981).

Miller v. Mission, 516 F.Supp. 1333 (D. Kan. 1981).

Morrison v. Alleluia Cushion Co., 73 F.R.D. 70, 71 (N.D. Miss. 1976).

Barth v. Bayou Candy Co., Inc., 379 F.Supp. 1201, 1205 (E.D. La. 1974).

Picking v. Pennsylvania R. Co., 11 F.R.D. 71, 72 (M.D. Pa. 1951).

The Philadelphia, 163 F. 438, 439 (E.D. PA. 1908).

13. Kemart Corp. v. Printing Arts Research Lab, 232 F.2d 897 (9th Cir. 1956).

Marcoin, Inc. v. Edwin K. Williams & Co., supra, note 2.

Dorothy K. Winston & Co. v Town Heights Development, Inc., supra, note 6.

Sperry Rand Corp. v. A-T-O, Inc., supra, note 6, 58 F.R.D. at 137.

Electronic Specialty Co. v. International Controls Corp., supra, note 2. (The status of a witness as an employee of the defendant will not by itself serve to prevent taxation of the witness fees when it is neither shown nor alleged that the witness in question is an actual party in interest to the litigation.)

Modick v. Carvel Stores of New York, Inc., 209 F.Supp. 361, 365 (S.D.N.Y. 1962).

Pearl v. Feldman, supra, note 2, 116 F.Supp. at 115.

Nead v. Millersburg Home Water Co., 79 F. 129,130 (E.D. Pa. 1987).

14. Fees for expert witnesses in excess of the statutory amount are not taxable.

Crawford Fitting Co., et al. v. J. T. Gibbons Ins., 107 S.Ct. 2494 (1987).

Henkel V. Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 284 U.S. 444, 446 (1932).

Kivi v. Nationwide Mutual Ins. Co., 695 F.2d 1285 (11th Cir. 1983).

Quy v. Air America, Inc., supra, note 10.

Illinois v. Sangamo Construction Co., supra, note 2.

Frigiquip Corp. v. Parker-Hannifrin Corp., supra, note 6, 75 F.R.D. at 614. (Expenses claimed for preparation of analytic report by party's expert witness are research expenses and not taxable.)

Harrisburg Coalition Against Ruining the Environment v. Volpe, supra, note 2, 65 F.R.D. at 610.

Morris v. Carnathan, 63 F.R.D. 374 (N.D. Miss. 1974).

Wade v. Mississippi Cooperative, etc., supra, note 5, 64 F.R.D. at 105.

Bailey v. Meister Brau, Inc., supra, note 6, 378 F.Supp. at 888.

Sperry Rand Corp. v. A-T-O, Inc., supra, note 6, 58 F.R.D. at 137.

Mikel v. Kerr, supra, note 10, 64 F.R.D. at 94.

Hill v. Gonzalez, supra, note 9, 53 F.R.D. at 3.

Thorn v. Bryant, 52 F.R.D. 26, 26-28 (W.D.N.C. 1970).

Kaiser Industries Corp., etc., supra, note 6, 50 F.R.D. at 13.

Morgan v. Kight, 294 F.Supp. 40, 41-2 (E.D.N.C. 1968).

Scaramucci v. Universal Manufacturing Co., 234 F.Supp. 290, 291 (W.D. La. 1964).

MILEAGE FOR WITNESSES

15. Crawford Fitting Co., et al. v. J. T. Gibbons, Inc., 107 S.Ct. 2494 (1987).

Bergman, et al. v. United States, 648 F.Supp. 351 (W.D. Mich. 1986).

See, Farmer V. Arabian American Oil Co., 379 U.S. 227 (1964) (The application of the "100-mile rule" is discretionary.)

Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 147 (3d Cir, 1973).

16. Bergman v. United States, 648 F.Supp. 351 (W.D. Mich. 1986).

Jamison v. Cooper, 111 F.R.D. 350 (N.D. Ga. 1986).

Goodwin Brothers Leasing, Inc. v. Citizens Bank, supra, note 12.

Linneman Construction, Inc. v. Montana-Dakota Utilities Co., Inc., supra, note 10, (Follow "100-mile rule" absent special circumstances, e.g. where witness is necessary and gives material, not nerely repetitive or cumulative testimony. Id. at 1372, n. 13.)

Mastrapras v. New York Life Ins. Co., supra, note 12.

Dorothy K. Winston & Co. v Town Heights Development, Inc., supra, note 6, 68 F.R.D. at 433.

Dasher v. Mutual Life Ins. Co. of New York, supra, note 2.

Frigiquip Corp. v. Parker-Hannifrin Corp., supra, note 6.

Wade v. Mississippi Cooperative Extension Service, supra, note 5, 64 F.R.D. at 106. (Where witness' testimony is essential to case or other "special Circumstances" are present, disregard "100-mile rule".)

Sperry Rand Corp. v. A-T-O, Inc., supra, note 6, 58 F.R.D. at 137.

Kaiser Industries Corp. v. McLouth Steel Corp., supra, note 6, 50 F.R.D. at 10. (Follow "100-mile rule" absent special circumstances, namely, where witness' testimony is important and relevant.)

Vorburger v. Central of Georgia Railway Co., 47 F.R.D. 571, 573 (M.D. Ala. 1969) ("100-mile rule" applied absent exceptional circumstances.

Electronic Specialty Co., supra, note 2, 47 F.R.D. at 161.

Erving Paper Mills v. Hudson-Sharp Mach. Co. 271 F.Supp. 1017, 1023 (E.D. Wisc. 1967). ("100-mile rule applied unless "special circumstances" shown such a prior authorization by court that costs for travel in excess of 200 miles will be incurred.)

Rosenthal v. Brangier, 37 F.R.D. 248, 251-53 (D. Hawaii 1965).

Bennet Chemical Co. v. Atlantic Commodities, Ltd., supra, note 10, 24 F.R.D. at 203-4.

Bank of America v. Loew's International Corp., supra, note 2, 163 F.Supp. at 929. (Critical of the rigid application of the "100-mile rule". For an instructive discussion, see id. at 928-930.)

SUBSISTENCE

17. Hayes v. Surface Combustion Corp., 25 F.Supp. 515, 516 (S.D.N.Y. 1937).

APPENDIX J

GENERAL COURT REGULATION NO. 73-2
COURT OF COMMON PLEAS

D. Conflicts in the Engagement of Counsel

(1) Common Pleas Court

Common Pleas Court will recognize as engaged all counsel appearing of record in any case actually on trial before a Judge in the United States District Court in Philadelphia and one back-up case as published in the Legal Intelligencer. The engagement in the case actually on trial shall be effective until the trial terminates by verdict or otherwise and in the back-up case for a period of three (3) days including the day said case is first published in the Legal Intelligencer.

(2) United States District Court in Philadelphia

The District Court will recognize as engaged all counsel of record in any case actually on trial before a Common Pleas Court Judge and in cases appearing in the first 20 cases on the Major Case List and in the first 15 cases published on the General Jury Trial List. The engagement in the case actually on trial shall be effective until the trial terminates by verdict or otherwise and in the case appearing in the first 20 or 15 for a period of three (3) days after said case reaches that position on the respective list.

(3) Both the Common Pleas Court and the United States District Court will observe the procedure of alternating assignments, i.e., counsel assigned to trial in the Common Pleas Court must upon completion be available for assignment in the United States District Court before accepting anotner assignment in the Common Pleas Court and vice versa.

No counsel shall try successive cases in either court except by agreement between the respective judges involved as set forth in Paragraph 3 of Section "D" (4) hereof.

(4) General

Counsel Must Report Case Terminations to Appropriate Clerks

Counsel must immediately report the termination of all trials (by verdict or settlement conference) to the appropriate Clerk of the United States District Court or the Common Pleas Court. Failure to do so will result in the imposition of appropriate sanctions.

Engagement of Counsel in Non-Jury and Arbitration Cases

The United States District Court will not recognize engagements of counsel on the Non-Jury list of the Common Pleas Court or in Arbitration Cases, and conflicts encountered by counsel in this type of case shall be handled on an ad hoc basis as heretofore.

Problems of a Particular Case to be Taken Up With Appropriate Judge

Problems not otherwise covered in this regulation regarding the listing or assignment of a case for trial shall be taken up in the United States District Court with the Judge on whose individual calendar the case appears and in the Common Pleas Court with the Calendar Judge.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BUSY SLIP

I, _____

of _____.
(Address)

_____, do hereby certify that I am engaged in trial or appellate
(Telephone Number)

argument before _____, in
(Name of Judge or Judges)

_____, _____.
(Title or Name of Court of Record) (Room Number)

in the case of _____

vs. _____, _____
(Court Term & No.)

The case is expected to take approximately _____ trial days.

My case is number _____ on Judge _____ list in the U.S. District Court. Caption and number is as follows:

_____

I will notify that Judge's respective court clerk immediately upon the conclusion of this engagement.

Busy slips must be filed in Room 2609 on the designated form no later than 1.00 p.m. on the day after the day counsel becomes attached. If counsel is listed in the Legal Intelligencer on any Judge's trial list, counsel shall call that Judge's respective court clerk promptly so the attachment may be noted before the filing of a busy slip. It will be the duty of counsel to notify that Judge's respective court clerk immediately upon the conclusion of his engagement.

Failure to comply, including failure to use the designated form, will result in non-recognition of counsel's engagement.

_____
Attorney for (name of party)

Date Filed:

Date Withdrawn:

cc: All Counsel

Civ. 17 (8/80)

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSLYVANIA

STANDING ORDER RE: :

SENTENCING REFORM ACT OF 1984 :

ORDER

AND NOW, this day of February, 1990, in accordance with the resolution approved by the Judges of this court on , it is hereby

ORDERED that the following standing order is adopted for use in criminal cases in which sentences are imposed under the Sentencing Reform Act of 1984 (Chapter II of the Comprehensive Crime Control Act, Public Law No. 98-473, 98 Stat. 1837,1976 (enacted Ictober 12, 1984):

STANDING ORDER
RE: SENTENCING REFORM ACT OF 1984

Stage 1. Within 40 calendar days of the guilty plea or date of conviction, the Probation Officer shall send to defendant(s), counsel for Defendant(s) and to the government a copy of the Presentence Guideline Report.

Stage 2. Within 55 calendar days of the guilty plea or date of conviction, counsel shall submit to the Probation Officer, in writing with a copy to opposing counsel, any objections counsel may have to any material information, sentencing classifications, sentencing guideline ranges and policy statements contained in or omitted from the report.

Stage 3. Within 70 calendar days of the guilty plea or date of conviction, the Probation Officer shall conduct any further revisions to the presentence report that may be necessary as the result of counsel's objections. The officer may require counsel to meet with the officer to discuss unresolved factual and legal issues.

Stage 4. Within 80 calendar days of the guilty plea or date of conviction, the Probation Officer shall submit the presentence report to the sitting judge. Said report shall be acompanied by an addendum setting forth any objections counsel may have made that have not been resolved, together with the Officer's comments thereon. Copies of the addendum shall be sent to the Defendant and all counsel.

Stage 5. No copies or any dissemination of the presentence investigation, a confidential court document, or information contained therein shal be made. Unauthorized copying or disclosure will be an act in contempt of court and will be punished accordingly.

Defendant: _____ Criminal No._____
Date of Plea/Conviction: _____
Date of Sentencing: _____
Time of Sentencing: _____

FOR THE COURT:

_____

APPENDIX M

CREDIT CARD COLLECTION NETWORK
AUTHORIZATION FORM

_____

hereby authorizes the United States District Court for the Eastern District of Pennsylvania to charge the following bank credit card number for payment of filing fees and other court-related expenses.

PLEASE PRINT:

Visa No. _____ Exp. Date _____

MasterCard No. _____ Exp. Date _____

Name: _____

Address: _____

City _____ State _____ Zip Code _____

Phone No. _____

This form, which will kept on file in the Clerk's Office, shall remain in effect until specifically revoked in writing. It is the responsibility of the firm/company named herein to notify the Clerk's Office of the new expiration date when a credit card has been renewed, or if a credit card has been cancelled or revoked.

Signature: _____

Date: _____

APPEARANCE BOND

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : CRIMINAL NO.

WE, THE UNDERSIGNED, jointly and severally, acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of
($

The conditions of this bond are that the defendant above named is to appear before a judge or magistrate of the United States District Court for the Eastern District of Pennsylvania at Philadelphia, and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in the above entitled matter as may be given or issued by a judge or magistrate of the United States District Court for the Eastern District of Pennsylvania, or of any other United States District Court to which the defendant may be removed or the cause transferred, and that the defendant is to abide by any judgment entered in such matter by surrendering himself to serve any sentence imposed and obeying any order or direction in connection with such judgment as the court imposing it may prescribe.

If the defendant appears as ordered and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any judge or magistrate of any United States District Court having cognizance of the above matter at the time of such breach and, if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

It is agreed and understood that this is a continuing bond including any proceeding on appeal or review which shall continue in full force and effect until such time as the undersigned are duly exonerated.

This bond is signed on this day of , 19 , at Philadelphia, Pennsylvania.

Defendant_____ Address _____

_____

Surety_____ Address _____

_____

Surety_____ Address _____

_____

SIGNED AND ACKNOWLEDGED before me this day of
19

BAIL SET at $_____

BY _____, MAGISTRATE
☐ O.R. ☐ 10% Cash ☐ Cash ☐ Surety
☐ OTHER: _____

Date:

_____
Deputy Clerk/Deputy U.S. Marshal

_____
United States Magistrate
or Deputy Clerk
United States District Court
Eastern District of Pennsylvania

ORIGINAL - FOR CLERK U.S.D.C.
PINK - FOR CLERK, U.S.D.C.
YELLOW - FOR DEFENDANT
BLUE - FOR PRETRIAL SERVICES
GREEN - FOR COURTROOM DEPUTY

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BAIL BOND SECURED BY PROPERTY OR REAL ESTATE BAIL

1 The deed to the property must be presented and all titled owners must sign the bail bond and affidavit of surety

2 Proof of equity is required and if the real estate or property is located in Philadelphia a bail certificate issued by the City Controller's Office must be presented. If real estate or property located outside the City of Philadelphia is posted as security the following are required unless otherwise ordered by the Court:

(a) An appraisal by a qualified real estate appraiser located in the area.

(b) A copy of the settlement sheet evidencing the assessed valuation of the premises, if the property has been purchased within three years.

(c) A lien search statement by a title company.

(d) The latest receipt for taxes paid.

3 The justification of surety affidavit attached to the bail bond must be completed.

4 The deed is returned to surety unless special circumstances require that it be held by the Clerk during the pendency of the case.

5 A bail bond secured by real estate or property is entered as an outstanding encumbrance against the real estate or property posted as security in the judgment index of the Clerk of the United States District Court for the Eastern District of Pennsylvania.

6 Counsel for defendant or surety is required to file a certified copy of the bail bond with the Prothonotary of the Court of Common Pleas or Court of general jurisdiction of the county wherein the real estate or property which is posted as security is located. The filing of a certified copy of the bail bond with the Prothonotary enters judgment by confession and records the bail bond as an outstanding encumbrance against the real estate or property during the pendency of the case or until exoneration of surety by the United States District Court.

7 The certified copy of the bail bond filed with the Prothonotary must be accompanied by a form of notice to defendant of entry of judgment and properly stamped envelopes addressed to the defendant and Clerk of the United States District Court for the Eastern District of Pennsylvania.

8 Upon termination of proceedings or upon entry of an Order exonerating surety in the United States District Court counsel for defendant or surety is required to file a certified copy of the judgment of the United States District Court or a certified copy of an Order exonerating surety with the Prothonotary of the Court of the county where the bail bond is recorded as an outstanding encumbrance against the property posted as security.

JUSTIFICATION OF SURETY REAL ESTATE OR PROPERTY BAIL

AFFIDAVIT

The undersigned, about to become Surety in the case cited herein, being duly sworn (or affirmed) deposes and says:

1 (I/We) reside at _____

2 (I/We) have no undisposed of criminal cases against me (us) pending in any Court, except as follows: _____

_____

_____

3 (I am/We are) free from any trust,

_____ the sole owner(s) of)

_____ joint tenant(s) in)

_____ tenant(s) by the entirety in) _____ .
(address of property)

real estate situated in the said County of _____ ,

as follows, viz.: a parcel of ground in size _____

_____ , situated at _____

_____ , in the _____ Ward,

in the _____ Boro., _____ Twp., _____ City of _____ ,

which is improved with the following buildings: _____

_____

_____

(All other joint tenants or tenants by the entirety must co-sign this bond and state their addresses on the last page of this form or on an attachment hereto.)

4 The said property was obtained by _____ Deed _____ Will

5 The _____ Deed _____ Will is dated _____ , and is recorded in the office of the _____ Recorder of Deeds _____ Register of Wills, of _____ County, _____ Deed _____ Will Book, Vol _____ , Page _____ , and the title is in _____ my name _____ and my spouse's name.

Also, a parcel of ground, in size _____,

situated at _____,

in the _____ Ward, in the _____ Boro _____ Twp. _____ City of

_____,

which is improved with the following buildings: _____

_____

_____

The said property was obtained by me by _____ Deed _____ Will. The

_____ Deed _____ Will is dated _____ and is recorded in

_____ Deed _____ Will Book, Vol. _____, Page _____ of

_____ County, and is in _____ my name _____

and my spouse's name.

6. I am not Surety on any kind except as follows:

Date	Amount	Defendant

7. (I am/We are) not surety, guarantor, nor indorser for anyone, except as follows: _____

_____

_____

8. There are no mortgages, or other liens or encumbrances of any kind or description, upon the said premises, and there are no judgments against me except as follows: _____

_____

_____

Mortgages as set forth in the Recorder of Deeds on first property

_____

Mortgages as set forth in the Recorder of Deeds on second property

_____

Judgments and Liens _____

Real estate taxes have been paid except: _____

9 The assessed valuation of said premises is _____

10 No judgment has been entered or action instituted against me upon a forfeited recognizance except _____

11 There are no negotiations pending for the sale of any part of the said real estate or property, that there are no foreclosure proceedings now pending against me or the real estate or property herein described, that I have not acquired, taken, or received, the title to the said real estate or property, or any part thereof, with any design or intention to make any false, fraudulent, or deceptive showing of my sufficiency as surety in this behalf or otherwise than in good faith, but with the intention of holding and using the said real estate and property as my own.

12 I (we) promise not to transfer or encumber said property until final disposition of this case and exoneration of the subject bond.

13 I (we) further state that I (we) have read the bond of the defendant named above to which this affidavit is attached and made a part of, and I (we) acknowledge that I (we) and my (our) personal representatives are bound, jointly and severally with the defendant and any other sureties, to pay to the United States of America the bond amount specified in the event the bond is forfeited

14 And further in accordance with law, we do hereby empower any attorney of any court of record within the United States District Court for the Eastern District of Pennsylvania or elsewhere to appear for us at any time, and with or without declarations filed, and whether or not the said obligation be in default, to confess judgment against us, and in favor of the United States of America for use of the aforesaid government, for the above sum and costs, with release of all errors, without stay of execution, and inquisition on and extension upon any levy or real estate is hereby waived, and condemnation agreed to, and the exemption of personal property from levy and sale on any execution hereon is also hereby expressly waived, and no benefit of exemption is claimed under and by virtue of any exemption law now in force or which may be passed hereafter

And for so doing this shall be sufficient warrant. A copy of this bond and warrant being filed in said action, it shall not be necessary to file the original as a warrant of attorney, any law or rule of the Court to the contrary, notwithstanding.

15 I (we) agree to pay the fees and costs of the Prothonotary of the Common Pleas Court or the Court of general jurisdiction wherein the real estate or property posted as security is located for recording the lien, notifying the Clerk of the United States District Court for the Eastern District of Pennsylvania of the entry of the lien, and for recording of the satisfaction after proceedings have been terminated or surety is otherwise exonerated by the United States District Court

16 I (we) have read carefully the foregoing affidavit and know that it is true and correct

_____ (SEAL) _____
(Surety) Address

_____ (SEAL) _____
(Surety) Address

_____ (SEAL) _____
(Co-Surety*) Address

Sworn (affirmed) and subscribed before me this

_____ day of _____, 19____

_____

* Co-Surety if any (joint tenant or co-tenant by the entirety)

IN THE COURT OF COMMON PLEAS OF _____ COUNTY, PENNSYLVANIA

CIVIL ACTION — LAW

vs NO. _____

Notice is given that a judgment in the above captioned matter has been entered against you on _____, 19____.

_____, PROTHONOTARY

BY _____, Deputy

If you have any questions concerning the above, please contact:

_____
Attorney for Party Filing

_____
Address (number, street)

_____
(City, State, Zip)

_____
Phone No

IN THE COURT OF COMMON PLEAS OF COUNTY

vs. NO.

ORDER TO SATISFY JUDGMENT OR VERDICT

TO PROTHONOTARY, COURT OF COMMON PLEAS OF COUNTY

( ) Mark the judgment in the above case satisfied upon payment of Prothonotary's costs only

Attorney for

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPLICATION FOR ADMISSION

I, THE UNDERSIGNED, hereby make application to practice in the United States District Court for the Eastern District of Pennsylvania and in support of my application, state that I have been admitted to practice in the Supreme Court of Pennsylvania on:

_____ _____
(Admission Date) (Attorney State Bar I.D. #)

that I am at present a member of the bar of said court in good standing, and that I will demean myself as an attorney of this court, uprightly and according to law, and that I will support and defend the Constitution of the United States.

_____
(Applicant's Signature)

Sworn to and subscribed before me this

_____ day of _____ 19 .

_____
(Street or Building and Number)

_____ _____
Deputy Clerk (City and State)

MOTION AND CERTIFICATE

THE UNDERSIGNED member of the bar of the United States District Court for the Eastern District of Pennsylvania hereby moves the admission of _____
(print name)

to practice in said court and certify that I know (or after reasonable inquiry believe) that the applicant is a member of the bar in good standing of the Supreme Court of Pennsylvania and that the applicant's private and professional character is good.

Admitted: _____ , 19 ____ _____
(Sponsor's Name—please print)

before _____ , J. _____
(Signature)

_____ _____
Deputy Clerk (Office Address)

_____
(City and State)

MICHAEL E. KUNZ
CLERK OF COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURT HOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106-1797

CLERK'S OFFICE
ROOM 2609
TELEPHONE
215 597-7704

NOTICE TO MEMBERS OF THE BAR

In order to improve security at the Courthouse, the court has initiated a program which will provide for the issuance of photographic identification cards to members of the bar.

You are requested to complete the attached application and return it with two color I.D. pictures (approximately 1 1/4" high by 1" wide) to my office.

We will prepare your Attorney Identification Card and have it ready for your signature in Room 2625 (second floor) between 9 a.m. and 5:00 p.m. within 5 days of receipt of your completed application and photos. Please bring your present blue Attorney I.D. Card with you since it will not be accepted by Court Security Officers. If you have any questions, please call Ms. Carol Sampson, deputy clerk, at 597-5147.

We appreciate your cooperation in assisting the court in this matter.

MICHAEL E. KUNZ
CLERK OF COURT

Standard Photo Service
2031 Chestnut Street
Philadelphia, PA 19103
(215) 561-0770

American International
Passport Photos
700 Arch Street
Philadelphia, PA
(215) 925-3127

Passport Fotos Express
740 Arch Street
Philadelphia, PA
(215) 922-0211

Verma
1533 S. Broad Street
Philadelphia, PA
(215) 336-2828

Eastern Camera Shop
1523 Sansom Street
Philadelphia, PA 19102
(215) 561-0501

Jerome Croxton Photo
1427 Spruce Street
Second Floor
(215) 732-2666

Sokoloff Studio
10767 Bustleton Avenue
Philadelphia, PA
(215) 677-7667

Marsella Studio
81 E. Main Street
Norristown, PA
(215) 275-0562

The Paper Pad
12 W. State St.
Media, PA
(215) 566-2173

Dales Miniphot Studio
143 N. 7th Street
Allentown, PA
(215) 434-5161

DeChristopher Studio
621 Hamilton Mall
Allentown, PA
(215) 433-0526

Moser Studio
632 E. Broad Street
Doylestown, PA
(215) 723-4326

Maddox Photo Studio
51 E. State Street
Doylestown, PA
(215) 348-5891

Bowers Photo Studio
135 N. 5th Street
Reading, PA
(215) 376-3909

Photographic Creations
100 S. Dwight Street
West Lawn, PA
(215) 670-1500

Flynn Hester Photos
1217 West Chester Pike
West Chester, PA
(215) 692-2740

Briar Studio
18 N. West Chester Pike
West Chester, PA
(215) 692-2880

The Camera Craft Shop
29 S. State Street
Newtown, PA 18940
(215) 968-2833

MICHAEL E. KUNZ
CLERK OF COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURT HOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106-1797

CLERK'S OFFICE
ROOM 2609
TELEPHONE
215-597 5147

REQUEST FOR PHOTOGRAPHIC IDENTIFICATION CARD

I hereby apply for a photographic identification card for U.S. District Court for the Eastern District of Pennsylvania. Enclosed are two color I.D. pictures (Approximately 1 1/4" high by 1" wide).

I understand that I will be able to sign and pick up my identification card within 5 days in Room 2625 (second floor) between 9:00 a.m. and 5:00 p.m. (If you have any questions, please call Ms. Carol Sampson, Deputy Clerk, at 597-5147).

NAME: _____

OFFICE
ADDRESS: _____

_____

TELEPHONE NUMBER: _____

DATE OF ADMISSION: _____
(TO EASTERN DISTRICT)

PENNSYLVANIA I.D. #: _____

I understand that this card is not transferable or useable by any other person and I agree to notify the Clerk of Court in the event that the card is lost.

_____ _____
DATE SIGNATURE

AO435
(Rev. 5/88)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

TRANSCRIPT ORDER

Read Instructions on Back.

FOR COURT USE ONLY
DUE DATE:

1. NAME	2. PHONE NUMBER	3. DATE	
4. MAILING ADDRESS	5. CITY	6. STATE	7. ZIP CODE

8. CASE NUMBER	9. JUDICIAL OFFICIAL	DATES OF PROCEEDINGS	
		10. FROM	11. TO
12. CASE NAME		LOCATION OF PROCEEDINGS	
		13. CITY	14. STATE

15. ORDER FOR

☐ APPEAL ☐ CRIMINAL ☐ CRIMINAL JUSTICE ACT ☐ BANKRUPTCY
☐ NON-APPEAL ☐ CIVIL ☐ IN FORMA PAUPERIS ☐ OTHER (Specify)

16. TRANSCRIPT REQUESTED (Specify portion(s) and date(s) of proceeding(s) for which transcript is requested)

PORTIONS	DATE(S)	PORTION(S)	DATE(S)
☐ VOIR DIRE		☐ TESTIMONY (Specify Witness)	
☐ OPENING STATEMENT (Plaintiff)			
☐ OPENING STATEMENT (Defendant)			
☐ CLOSING ARGUMENT (Plaintiff)		☐ PRE-TRIAL PROCEEDINGS (Spcy)	
☐ CLOSING ARGUMENT (Defendant)			
☐ OPINION OF COURT			
☐ JURY INSTRUCTIONS		☐ OTHER (Specify)	
☐ SENTENCING			
☐ BAIL HEARING			

17. ORDER

CATEGORY	ORIGINAL (Includes Free Copy for the Court)	FIRST COPY	ADDITIONAL COPIES	NO. OF PAGES ESTIMATE	COSTS
ORDINARY	☐	☐	NO. OF COPIES		
EXPEDITED	☐	☐	NO. OF COPIES		
DAILY	☐	☐	NO. OF COPIES		
HOURLY	☐	☐	NO. OF COPIES		

CERTIFICATION (18. & 19.)
By signing below, I certify that I will pay all charges (deposit plus additional).

ESTIMATE TOTAL

18. SIGNATURE

PROCESSED BY

19. DATE

PHONE NUMBER

TRANSCRIPT TO BE PREPARED BY

COURT ADDRESS

	DATE	BY		
ORDER RECEIVED				
DEPOSIT PAID			DEPOSIT PAID	
TRANSCRIPT ORDERED			TOTAL CHARGES	
TRANSCRIPT RECEIVED			LESS DEPOSIT	
ORDERING PARTY NOTIFIED TO PICK UP TRANSCRIPT			TOTAL REFUNDED	
PARTY RECEIVED TRANSCRIPT			TOTAL DUE	

(All previous editions of this form are cancelled and should be destroyed.)

ORIGINAL- COURT COPY YELLOW- TRANSCRIPTION COPY GREEN- ORDER RECEIPT PINK- ORDER COPY

AO 436
(Rev. 1/87)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

TAPE ORDER

Read Instructions on Back.

1. NAME	2. PHONE NUMBER	3. DATE	
4. MAILING ADDRESS	5. CITY	6. STATE	7. ZIP CODE

8. CASE NUMBER	9. CASE NAME	DATES OF PROCEEDINGS	
		10. FROM	11. TO
12. PRESIDING JUDICIAL OFFICIAL		LOCATION OF PROCEEDINGS	
		13. CITY	14. STATE

15. ORDER FOR

☐ APPEAL ☐ CRIMINAL ☐ CRIMINAL JUSTICE ACT ☐ BANKRUPTCY
☐ NON-APPEAL ☐ CIVIL ☐ IN FORMA PAUPERIS ☐ OTHER (Specify)

16. TAPE REQUESTED (Specify portion(s) and date(s) of proceedings for which duplicate tape(s) are requested.)

PORTIONS	DATE(S)	PORTION(S)	DATE(S)
☐ VOIR DIRE		☐ TESTIMONY (Specify Witness)	
☐ OPENING STATEMENT (Plaintiff)			
☐ OPENING STATEMENT (Defendant)			
☐ CLOSING ARGUMENT (Plaintiff)		☐ PRE-TRIAL PROCEEDINGS (Spcy)	
☐ CLOSING ARGUMENT (Defendant)			
☐ OPINION OF COURT			
☐ JURY INSTRUCTIONS		☐ OTHER (Specify)	
☐ SENTENCING			
☐ BAIL HEARING			

17. ORDER

	NO. TAPES	NO. COPIES	COSTS
☐ REFORMATTED DUPLICATE TAPE(S) FOR PLAYBACK ON A STANDARD CASSETTE RECORDER AT 1-7/8 INCHES PER SECOND			
☐ UNREFORMATTED DUPLICATE TAPE(S) FOR PLAYBACK ON A 4-TRACK CASSETTE RECORDER AT 1-7/8 INCHES PER SECOND			
☐ UNREFORMATTED DUPLICATE TAPE(S) FOR PLAYBACK ON A 4-TRACK CASSETTE RECORDER AT 15/16 INCHES PER SECOND			

CERTIFICATION (18. & 19.) By signing below, I certify that I will pay all charges (deposit plus additional) upon completion of the order.	ESTIMATE TOTAL	
18. SIGNATURE	19. DATE	
PROCESSED BY	PHONE NO.	

	DATE	BY		
ORDER RECEIVED			DEPOSIT PAID	
DEPOSIT PAID			TOTAL CHARGES	
TAPE DUPLICATED			LESS DEPOSIT	
ORDERING PARTY NOTIFIED TO PICK UP TAPE			TOTAL REFUNDED	
PARTY RECEIVED TAPE			TOTAL DUE	

(All previous editions of this form are cancelled and should be destroyed.)

WHITE - COURT COPY GREEN - ORDER RECEIPT PINK - ORDER COPY

APPENDIX S

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
ROOM 2609
TELEPHONE
215 597-7704

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURT HOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106-1797

NOTICE

I am pleased to announce that PACER, the Public Access to Court Civil Electronic Docket Records system, will be available August 1, 1991 in the United States District Court for the Eastern District of Pennsylvania. This electronic access system will allow any member of the bar or the public who is equipped with a computer and a modem to access court records. By dialing a designated number, the public will be able to access the complete electronic history of all cases that are contained on the CIVIL docketing system. The PACER system will contain all civil cases that were filed after July 1, 1990, and all pending civil cases, except asbestos and prisoner cases filed prior to July 1, 1990. Currently, there are over 10,200 cases contained within the CIVIL system.

The PACER system will allow the remote end user to search a case by name or number and print the docket report from their printer. In addition, the PACER system will allow an end user to check recent activity. If there has been no recent activity, the PACER system will confirm that fact in seconds. The system will be accessible 24 hours a day except for two and one-half hours a day for system maintenance. An application form for a login and password is enclosed and must be completed prior to accessing the system. Upon receipt of your completed application, we will furnish you with detailed instructions on the operation of the system. Initially, this service will be free of charge.

The Clerk's Office of the Eastern District of Pennsylvania has been highly successful in implementing several court automated programs to provide the bar, litigants, and the public with an efficient and effective court system. The programs available include: the automated CIVIL docketing system; BANCAP, the Bankruptcy access to court records; the Voice Case Information System (597-2244), telephone access to Bankruptcy records; electronic filing system, a system to file certain documents electronically; electronic sound recording and videotaping, to record the official transcript; and broadcasting in the courtroom. As with these other programs, this court believes the PACER system will be successful in providing better access to court records. Technical specifications and information on the automated court systems can be received from the Clerk's Office by contacting Marlene McHugh Anderson at 597-5712, Susan Matlack at 597-5861, or Karen Vample at 597-5711.

Michael E. Kunz
Clerk of Court

PACER
Public Access To Court Electronic Records
Application Form

Please fill in the information in Part I and return the form to:

Michael E. Kunz
Clerk of Court
U.S. Courthouse
Room 2609
601 Market Street
Philadelphia, PA 19106-1797

Attn: PACER Application Form

Your assigned login name and password will be noted on this form in Part II and a copy will be returned to you. **Only one application per firm or company is needed.**

PART I

Name: _____

Firm/Company: _____

Address: _____

_____

_____

Telephone No.: _____

☐ Check here if change of address

_____
Signature

_____
Date

PART II

Login name: _____ (lower case)

Password: _____ (lower case)

Date: _____

Public Access

to Court Electronic Records

(PACER)

A Public Access Project
brought to you by

The Clerk's Office of
The United States District Court
for the Eastern District of Pennsylvania

in cooperation with

The Administrative Office of the United States Courts

June, 1991

Public Access to Court Electronic Records

June, 1991

CONTENTS

1. PACER

1.1 Introduction

The Federal Court system is introducing new services and technologies designed to provide people outside the court (the "public") with easier and better access to court information. In cooperation with the United States District Court for the Eastern District of Pennsylvania, the Administrative Office of the United States Courts (AOUSC) presents an electronic public access system called PACER (Public Access to Court Electronic Records).

This system allows you to use a terminal or computer and modem to dial in to the court, connect to a special public information computer, and request information about a case. The system can provide lists of cases, searched by name, as well as the full electronic docket on your own computer, or print it out in your office.

We think you will find this to be very useful when you want quick, accurate information about current federal cases in the court.

You can:

- Track updates to a case of interest - In less than a minute, you can check if anything has happened to one or perhaps several cases you are tracking.

- Get a printed history of a case - You can retrieve the entire electronic docket of a typical case in less than 30 seconds.

- Research case involvements by name - For example, you can search for all the cases where "ABC Manufacturing" is a litigant.

1.2 What You Need

You will need the following things to access this new system. Unfortunately, the court cannot provide assistance if you have trouble with your equipment. Please contact your equipment vendor if you have difficulties with your office equipment and software.

1. Terminal or Computer - A computer has the advantage that you could save down loaded data (case information) onto a disk for later review, printing, or even editing (such as with a word processor). However, even a "dumb" terminal will suffice.

2. Printer - You will find this indispensable for getting a "hard copy" of the docket information you receive. It is much easier to read a printed docket, and it can serve as a file document for later reference.

3. Modem - We currently can accept both 2400 baud and 1200 baud modems. The former is twice as fast; use this speed, if possible. It makes the system more pleasant to use, particularly if you download large docket reports. It is not possible to use the system at 300 baud or speeds above 2400 baud at this time. (If you are only able to use 1200 baud, try sending a [BREAK] to the system if you do not get an "ID:" displayed when you first connect.)

1.3 Technical Specifications

Our system is set for 8 bits, 1 stop bit and no parity. Other than that, it is pure ASCII. If you do not know what these facts mean, try connecting with what you have. You may find if works just fine. If not, talk to your vendor for assistance.

The phone number to access the PACER system computer is 597-0258. This is in Philadelphia, but like any phone, could be reached long distance form virtually anywhere if you need it while travelling.

1.4 Downloading

If you are using a computer, rather than just a terminal, the easiest way to use the system is to set your communications software to perform a continuous save to disk during the entire session.

(For example, in CROSSTALK this is called "capture to disk" and can be invoked by pressing "ESC" followed by "ca filename" and a return. See your terminal emulator software manual for instructions specific to your system.)

When you finish your session, you can edit the saved file, and if necessary, print it out for later review and reference. If you prefer, you may begin the save-to-disk after you select a case for which you want a docket report, but before the question "Do you want a docket report? (y/n)" is answered. In this way, you can save just the report in a file, so you will not have to edit the extraneous lines later.

If you are using a printing terminal, you will of course have a printed version of the entire session. Often, a dumb terminal can also be set up to do a continuous print. Either way, this gives you a paper copy of your session which you can read and perhaps file for later review.

1.5 Printing

We have taken out all hardware specific codes from the output sent to you. This has the advantage that no matter what sort of printer or terminal/computer you use, you probably will not have much trouble printing the report. Note that the form feed code (CTRL)(L) is used to separate the pages. Often this will automatically, advance your printer to the next page, which is just what you want. If not, you can edit and paginate as necessary, using any editor or word processor you want.

The output is formatted for 80 characters per line, so you will need a printer that can handle output at least that wide. Paging is set to be suitable for standard 11 inch paper.

1.6 Information Currency

The PACER system runs on a computer which is separate from the main court computer. While this allows us to offer public service without slowing down the court operations (and offers the potential to expand public service in the future), it does have a slight penalty in information currency. Case filings and updates to the docket will typically not appear on the PACER system until the day after they are entered on the main court computer. These updates will include all changes made the previous day, and will be done early in the morning. During the update, the system will be unavailable for about 30 minutes. Of course, technical difficulties may cause delays which are somewhat longer. If there is any major problem with the reporting system, we will display a warning message to you when you first sign on.

1.7 Cost

During the earliest period of offering PACER, we will provide this system initially free of charge. However, in fairness to others, please try to keep your sessions brief. We only have a single telephone line at this time and your session will block all others until you are done.

1.8 Time Limits

There is an "idle time" limit (how long you can just let it sit there before it complains). Again, reflecting that we have only one line and others are waiting to get access to the system. The system will not allow you to "do nothing" for more than 90 seconds. You will be warned when the limit is approaching.

1.9 Other Limits

You may run across other limits to what you can get from this system. For example, older cases (before 1990) may not be available because they have not been entered on the court computer. All cases filed after July 1, 1990 are available on the system, as well as, pending non-asbestos and non-prisoner cases filed before July 1, 1990. Also, there are time limits built in as to the maximum number of people and cases you are allowed to match at one time. You should have little problem with these, if you try to type in a name that is fairly complete and avoid searching on extremely common litigant names.

1.10 Access Sign Up

In order to use the system, you need an application form for a password and account id. These forms are available to be picked up in the Clerk's office or you may contact any of the following to receive a form in the mail:

Marlene Anderson	597-5712
Susan Matlack	597-5861
Karen Vample	597-5711.

1.11 When?

The system will be available at all times except during nightly system backup and file updates. These times will be approximately: 5:00 pm. to 7:00 pm. for system backups and 3:00 am. to 3:30 am. for PACER file updates. Day to day circumstances may cause some variance in this schedule.

2. About PACER Information

2.1 Understanding CIVIL Case Numbers

Each typical case number has 4 parts, for example:

"2:90cv12345"

This indicates that the case is for the court divisional office 2, the case year is 1990, it is a civil case and it is numbered 12345.

If a court has more than one divisional office, there will usually be office codes of 1, 2, 3, etc. The office code for Philadelphia is 2. All cases opened in a given year have the last two digits of the year as the second part of the case number. Next comes the type, here "cv" for a civil case. Finally, there is an ascending sequence number. All four parts of the case number are needed to uniquely identify a case. At present, type "cv" is the only type available for PACER. However, criminal cases (type "cr") will be added in the future.

2.2 Understanding CIVIL Docket Reports

The CIVIL docket reports were designed to be the official record of a case, primarily used by people intimately familiar with the format. The docket report illustration shows many of the features of the report which may be slightly confusing. Refer to this sample report as the parts of a typical docket report are discussed.

The information at the top of the report was obtained from the JS-44 Civil Cover Sheet submitted by the plaintiff for each civil complaint filed. The counsel for each party is listed immediately to the right, including an address and telephone number.

Following a case, a page break using (CTRL)(L) form feed, starts a fresh page for the listing of events in the case.

Additional features of the docket report include:

- Docket as of... - This is the date and time the report was processed on the court's main computer. If no recent

updates have been made to the case, this date may be quite some time ago since it has not been necessary to reprocess the report when no updates occur.

- Nature of Suit: - Refer to the JS-44 list for a complete explanation of the various codes used here. Major categories include:

110-195	Contracts
210-290	Real Property
310-385	Torts
422-423	Bankruptcy
440-444	Civil Rights
510-550	Prisoner Petitions
610-690	Forfeiture/Penalty
710-790	Labor
820-840	Property Rights
861-865	Social Security
870-875	Federal Tax Suits

- Jurisdiction: - The basis of jurisdiction that this complaint can be filed at the U.S. District Court.

- Cause: - The U.S. Civil Statute (in Title: Section format) under which the plaintiff files the complaint, as well as a brief description of the statute.

- Lead Docket: - The case docket number of the lead case for associated or joined cases such as multi-district litigation cases (MDL) and associated cases.

- Dkt# in other court: - The case docket number from another court: cases such as Bankruptcy, Appeals, Removals from State Courts and Transfers from other State Courts.

- Case Type: - The category (Civil, Criminal or Miscellaneous) and sub-category, if any.

- ASB A/R - There may be additional codes or notations at the top right side of each docket page. These local codes or words represent special case identifiers for the court or case management processing.

- [COR LD NTC] - Stands for "Council of Record" as well as "Lead" attorney. The "NTC" indicates that this person will receive notices for the case. Could also contain PRO SE, indicating a self-represented party.

- 4/19/90 - The left hand dates in the event list for the case indicate when each event was filed in the court.

- 1 - The sequence numbers (here, 1, 2, and 3) are unique document numbers for each filing in the case record. If a "--" appears, there is no document for the particular docketed entry.

- (arl) - The initials of the court staff member who docketed the event.

- [Entry date 4/20/90] - The date the event was entered on the electronic docket; it appears only if the entry date differs from the filing date.

- [Edit date 4/25/90] - The date this event was edited by the court staff.

- (N) - This indicates that notices were sent to litigants.

2.3 Sample CIVIL Docket Report

Docket as of August 2, 1990 10:00 pm Page 1

Proceedings include all events.
2:90cv12345 BECKLEY v. RAMBOG, et al ASB A/R

U.S. District Court
USDC Eastern District of Pennsylvania (Philadelphia)

CIVIL DOCKET FOR CASE #: 90-CV-12345

BECKLEY v. RAMBOG
Assigned to: Judge LOUIS C. BECHTLE
Jury Demand: plaintiff
Nature of Suit: 350
Jurisdiction: Diversity

Filed: 4/19/90
Demand: $500,000
Lead Docket: None
Dkt# in other court: None

Cause: 28:1332 Diversity-Auto Negligence

GRACE M. BECKLEY
plaintiff

Penny T. Sullivan
[COR]
Michael T. Watchwell
[COR LD NTC]
SUEM & HOWE
123 Main Street
Philadelphia, PA 19106
555-1212

v.

BYRON THOMAS RAMBOG
defendant

Raymond A. Yost
[COR LD NTC]
QUICKLY, PILLSBURY
& SPIERO
102 Vermont Avenue, NW
Suite 150
Washington, DC 20005
(202) 555-1212

BILLY LAWSON
aka
WILLIAM DIXON
defendant

BILLY LAWSON
[PRO SE]
PETERBORO PRISON
1920 Redwood Road
Tulsa, OK 10921
(205) 555-1212

PACER

Docket as of August 2, 1991 10:00 pm Page 2

Proceedings include all events.
2:90cv12345 BECKLEY v. RAMBOG, et al ASB A/R

4/19/91	1	COMPLAINT filed summons issued (arl) [Entry date 4/20/90]
4/19/90	2	NOTICE OF DEPOSITION by plaintiff GRACE M. BECKLEY of defendant BYRON THOMAS RAMBOG (arl) [Entry date 4/20/90] [Edit date 4/25/90]
5/03/90	3	RETURN OF SERVICE executed as to defendant BYRON THOMAS RAMBOG on 4/25/90 by certified mail; Attachment (1) (N) (ks) [Entry date 5/4/90]

[END OF DOCKET: 2:90cv12345]

2.4 Getting Answers to Questions

If you have questions about the information the court is providing, you can contact the Clerk's Office directly at 597-5861 or 597-5712.

Unfortunately, neither the court nor the AOUSC have the resources to provide extensive technical assistance if you have trouble getting your PC to communicate, or similar troubles. Please contact your vendor or local systems technician if you are having basic difficulties using your terminal or computer equipment.

3. Using PACER

To use the new system, just follow the steps in this checklist.

1. SET UP YOUR EQUIPMENT - If you are using a terminal or terminal with printer, turn everything on. If you are using a PC or other computer system, use your standard startup procedure. You will need to set the modem to communicate at 1200 or 2400 baud, 8 data bits, one stop bit, and no parity; this standard setup may already be the default in your system.

2. DIAL 597-0258 - Use your modem to dial in to the court public access system. You should receive a prompt for "ID:" shortly after the connection is made.

3. ID: - Enter the user name and password given to you by the court.

4. SELECT A CASE - You need to select a case for the docket you are interested in viewing. To do this, you can either specify the case number or a particular participant name.

   IF YOU HAVE A CASE NUMBER - Type it in at the prompt. If you know all the parts (the office number, the year, the case type, and the sequential number) you can get the docket report immediately.

   If you do not know the office and/or the case type, just type in the parts your know (for example, type '90-123' or '90 123' if you do not know the office or the type). If only one case matches the parts that you supplied, again you will immediately be able to get the docket report. If more than one case matches, you will see a list of these cases, and you can select the one you want.

   IF YOU HAVE A PARTICIPANT NAME - Again, type it in at the prompt, in the format:

   'Last, First, Middle.'

   You do not need to worry about capitalization. When you press (RETURN), the system will look for matching names.

If there is more than one matching name, you will be shown a list of names.

Once you have a targeted name, the system will see if there is more than one case for that person on the computer. If not, you will be able to get the docket report immediately. If there is more than one case, you will be shown a list of each case and may then select the one of interest.

You can type the entire name or you may just supply part of the name if you wish. For example, you may want to look up cases for "Milleville Canning and Bottling Corporation." This could be typed as:

- Milleville Canning and Bottling Corp
- Milleville Canning
- Millevil

Likewise, individuals can also be 'wildcarded' by entering less than the entire 'Last, First, Middle' name. 'Peter Phillip Gordon' could be entered as:

- Gordon, Peter Phillip
- Gordon, Pete
- Gordon

4. Tips on Using PACER

There are a number of ways you can use this new public information program to rapidly get specific information. Here are some special features and techniques which can save you time and effort.

4.1 Case Number Wildcarding

With PACER, you do not have to know each of the four parts of the case 'number' (office, year, type, and number); only year and number are required. The system will look up the case or cases which match what you supply, listing the choices for your further selection.

4.2 Update Review

You may be tracking several cases with a common participant. If you have already retrieved the electronic docket during an earlier session, when you get to the case list you can review the "last update" date to see if there is any need to get a new docket report.

4.3 Litigant Analysis

You can use this system to learn more about other cases involving the same party. For example, if you are working on a suit against XYZ Corp., you can search the corporate name to find out if anyone else is also currently involved in a case with the same company.

4.4 Searching By Name

In the District Court, there are thousands of people and organizations currently on the main court computer. The PACER system will search for a party any way you request. It is helpful, though, if you ask for the name the same way that it was entered on the computer. Here are some ways to make this easier.

In any court, there are quite a number of people who actually enter cases into the computer. Because of this, there can be some variations in how a name is actually entered. Therefore, you may have to try several searches to find a party of interest.

Because PACER is not case sensitive, you do not have to pay attention to the use of capitals or lower case letters.

If your first attempt to search a name is not successful, try different variations. Often common words are abbreviated, such as "ASSN.," "DEPT.," and "CORP."

Note that attorneys and judges may not be searched using the PACER system.

4.5 Common Names

It is possible to look up a case with PACER using any of the parties in the case. However, names which represent very active litigants (such as "USA") may not be specific enough for a successful search. If you use a party who is in too many cases, the system will spend a minute or two searching, and eventually complain that too many cases were selected.

The solution is to use a more unique litigant to find the case of interest. If, for example, you want to look up a case of John Q. Watchburg vs. USA, do your search on the name "Watchburg" rather than on the too-common "USA."

APPENDIX T

APPLICATION FOR A GROUP USER ACCOUNT FOR ELECTRONIC SUBMISSION OF CIVIL DOCUMENTS

Purpose:

This application may be completed by any legal agency or law firm wishing to establish a group account whereby attorneys belonging to that agency or firm may make electronic submissions of certain civil documents (excluding complaints, notices of removal and notices of appeal) to the United States District Court of the Eastern District of Pennsylvania. A submission is defined as a document that would normally be submitted to the court on paper. Electronic submissions consist of machine-readable information that, instead of being typed out on paper using the attorney's word processor, is transmitted to the court computer where it is then printed out for submission to the judge. Those documents that an attorney elects to electronically submit are in lieu of paper submissions and must not be followed up by paper submissions of the same documents to the court. The attorney making the submission will still be required to serve other counsel in the case with paper copies of any electronically submitted document and take care to ensure that the informational content of the copies served on other counsel is exactly the same as that of the electronic submission. Once this application is approved, attorneys that are members of the agency or firm may use their computer to gain access to a court computer via a dial-in modem.

This document must be executed by an appropriate manager within the applying agency or firm.

Return the completed application to the following address:

Michael E. Kunz
Clerk of Court
United States District Court
for the Eastern District of Pennsylvania
Room 2609
601 Market Street
Philadelphia, PA 19106

1. Date of Application: _____

2. Name and Address of Applicant Agency or Firm:

_____

_____

_____

3. Name and Phone Number of Designated System Liaison Within Agency or Firm:

_____

4. Approximate Number of Attorneys Within Agency or Firm: _____

5. Make and Model of Computer System(s) Used by Applicant:

_____

_____

6. Make and Model of Computer Terminal(s) Used by Applicant:

_____

_____

7. Word Processing Software Packages Used by Applicant:

_____

_____

8. Communications Protocols Used by Applicant:
(NOTE: Only ASCII and XMODEM may be used at this time)

_____

The applicant agrees to the following requirements and conditions:

Appointment of a Group System Liaison. The agency or firm will appoint a System Liaison whose name and phone number appear in item 3 of this application. This person shall be responsible for activating and deactivating individual user accounts for each attorney employed by the agency or firm desiring to make electronic submissions to the Court.

Individual User Accounts. User accounts will only be established for attorneys assigned to the firm that are admitted to practice before the Court and who agree to abide by the provisions of the following resolution of the Court dated 13 March 1989 (the Resolution):

> AND NOW, this 13th day of March, 1989, it is RESOLVED that the Judges of the United States District Court for the Eastern District of Pennsylvania hereby authorize the Clerk of Court to conduct an electronic filing system pilot program in this district, which will allow attorneys to submit selected types of pleadings electronically.
>
> It is further RESOLVED that, for the purpose of this pilot program, papers submitted electronically will be limited to civil pleadings, motions, and other papers and that complaints and notices of appeal are specifically excluded.

To satisfy the requirements of Rule 11 of the Federal Rules of Civil Procedure, which states in part:

> Every pleading, motion and other paper represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. [Emphasis added]

an attorney participating in this pilot project must submit ten (10) original signature forms to the Clerk of Court to be appended to any document electronically filed. In addition, each electronic submission must contain the following statement authorizing the Clerk of Court to append a signature page to that document:

> I hereby authorize the Clerk of Court to append my signature document, on file in the Clerk's office, to this electronic submission.

Signature Documents. It shall be the responsibility of each attorney with an electronic filing account to keep the Clerk of Court supplied with an adequate number of signature documents so that one may be attached to any electronic submission. Any electronic submission received from an attorney not having a signature document on file will be rejected. Attachment A to this application is a copy of the signature document that must be used.

Signature Document Authorization Statement. Each electronic submission must contain the statement indicated in the Resolution that authorizes the Clerk to append a signature document to the submission in order for it to be accepted for filing. Any submission not containing the authorization statement will be rejected.

Acceptable Communication Protocols. The electronic filing system will presently only accept files that are transmitted via either ascii or xmodem. Only one of these communications protocols will be used.

Acceptable Terminal Types. The following terminal types are presently recognizable by the system: tv970 (Televideo 970), vt100, ansi, and dumb. Users should

specify the dumb terminal type if they are unsure as to which terminal they have. Only one of the above terminal types will be specified.

Modem Settings. The court dial-in modem is presently set as follows: 2400 baud, 8-bit, 1 stop, no parity. Data can be transmitted at 2400 baud. User dial-out modems should be set appropriately.

Filing Status Messages. Individual attorneys will be expected to access the electronic filing system periodically to check either private or public messages regarding the status of any electronic submissions. Both acceptance and rejection messages relative to an attorney's electronic submissions will appear under private messages. Information relative to submissions by any attorneys that are accepted for filing within the previous few days will appear under public messages.

Technical Support by Court Personnel. The users will be responsible for making the appropriate settings on their hardware and communications package in order to gain access to the electronic filing system. If a user is unable to gain access and there is reason to believe that the court system is not operational, please call 597-5711 and request to speak to the Electronic Filing System Administrator. Normally, if users get a "no answer" message when attempting to dial in, then either there are no ports available presently (and the user should try again later) or the system is down for some type of maintenance. Routine system backups will be accomplished between the hours of 7:30 am and 8:30 am Monday thru Friday. The system will not be available for use during these hours.

User Fees. A fee structure may be implemented in order to recover any increased personnel, equipment and telephone line costs that are incurred by the Court. Users will be advised at least 60 days in advance of the implementation of any fee system. At that point users will have the options of either agreeing to pay the established fees or of having their electronic filing access services discontinued.

Document Formatting. Presently this system will only accept documents containing standard ascii characters (See Attachment B to this application for a list of the standard ascii characters). Therefore, only ascii files should be transmitted to the court system. Most word processing packages have an option whereby the user can convert the word processing formatted file to an ascii file. When this option is used, the word processing system will strip out all special formatting characters and retain only the ascii characters. As a matter of practice, the attorney should review any file that is converted to ascii prior to the electronic submission of the ascii file to the court. The symbol "&" must be used in lieu of the section symbol when referring to a title and section of a code. Title 18, Section 495 of the U.S. Code would be typed as 18 USC & 495. Documents may not be transmitted at this time that contain any special word processing control characters that provide such document formatting features as boldfacing, underlining, italicizing and footnoting. Footnotes must either be treated as end notes or manually inserted on each page. Page breaks (CONTROL-L) must be inserted for each page of the document being submitted. Otherwise, the system will automatically insert a page

break every 66 lines. Some formatting standards may be available at a later date when a subset of the WordPerfect 5.0 features are implemented.

Attachments, Appendices, Exhibits to Electronic Submissions. Documents with attachments, appendices or exhibits may only be submitted electronically if they may also be included in full as part of the submission document. This means that only documents with attachments, appendices or exhibits that consist entirely of ascii text files may be submitted. No document may be electronically submitted that has attachments, appendices or exhibits that consist of graphs, drawings or pictures of any other non-ascii characters.

Affidavits, Depositions and Other Signed Statements. Affidavits, depositions or any other sworn statement signed by any person other than the attorney making a submission may not be electronically transmitted to the court. Certificates of service that are normally signed by the attorney must be included as part of any electronic submission.

Effective Filing Date and Time for Electronically Submitted Documents. The date and time that the document is transmitted will be considered as the "Date Filed" for the document. In most cases, documents will be reviewed within a few hours after they are received on the Court machine. The only exceptions will be documents that are electronically submitted after normal office hours (8:30 am to 5:00 pm EST) Monday thru Friday, documents submitted on weekends and documents submitted on holidays. Documents submitted during the exception periods will be promptly reviewed on the next court business day.

Files Lost Due to Hardware Malfunction. It is remotely possible that an electronically submitted document may be lost on rare occasions due to a malfunction of the court computer. This problem is only likely to occur if the hard disk on the computer should sustain some damage during the few seconds between the time that a user confirms acceptance of the document for submission and a security copy of the document is printed out in the court. In these instances, users will not receive a document review message and should contact the Electronic Filing System Administrator by calling 597-5711. Any lost documents will then have to be resubmitted. It must be emphasized that this type of problem is extremely rare and may never occur.

The undersigned, as the duly authorized representative of the applicant agency or firm hereby states that he or she has read all of the terms and conditions on this application and promises that steps will be implemented to ensure that all employees will abide by these terms and conditions. The undersigned further affirms that the statements made in this application are true and factual.

_____

(Signature of Applicant's Authorized Representative)

_____

(Title)

_____

(Phone Number)

Attachment A

Signature Document

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CERTIFICATION OF SIGNATURE
PURSUANT TO F.R.C.P. 11

I hereby authorize the Clerk of Court to append this signature document to any pleading, motion or other paper electronically filed in order to satisfy the requirements of Rule 11 of the Federal Rules of Civil Procedure and agree to be bound by the provisions thereof.

_____
(Attorney Signature)

PLEASE PRINT:

_____
(Attorney Name)

_____
(Firm Name)

_____
(Address)

_____

_____

_____
(Electronic Submission No.)

Attachment B

ASCII Character Set

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

a b c d e f g h i j k l m n o p q r s t u v w x y z

0 1 2 3 4 5 6 7 8 9

~ ` ! @ # $ % & * ( ) - + = { } [ ] : ; " ' < > ? , . /

Space Delete

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPENDIX U

OFFICE OF THE CLERK OF COURT

DIRECTORY OF COURT AUTOMATED SERVICES

The Office of the Clerk of Court of the United States District and Bankruptcy Courts for the Eastern District of Pennsylvania offers the following services to provide the bar, litigants, and the general public with convenient and inexpensive access to court records.

UNITED STATES DISTRICT COURT

Public Access to Court Electronic Records (PACER)

The PACER system allows any member of the bar or the public that has access to a computer and a modem to obtain civil docket records. The user can obtain the complete electronic history of all cases that are contained on the CIVIL docketing system (i.e., all civil cases filed after July 1, 1990 and all pending civil cases, except asbestos and prisoner cases, filed prior to July 1, 1990).

The following functions are available to the user:

(1) Search for a docket report by name or case number.

(2) Print the docket report at the end user's printer.

(3) Check for recent docket activity.

The system is accessible twenty-four (24) hours a day except for a three (3) hour daily maintenance period.

Electronic Filing System

The Electronic Filing System allows any member of the bar that is equipped with a computer and modem to obtain certain civil documents that have been electronically filed on the system. The following functions are available to the user:

(1) Select a document by filer name, date, or other document index fields.

(2) View a document on the user's terminal screen.

(3) Print the document from the user's terminal screen.

(4) Download a document to the user's computer.

FAX Ordering of Docket/Document Copies and/or Searches

Any member of a law firm, legal agency, or the public can FAX a request to obtain the following:

(1) Copies of bankruptcy dockets.

(2) Copies of bankruptcy documents.

(3) Name searches performed on bankruptcy records.

Credit Card Collection Network

Any law firm, legal agency or company can arrange to use a Visa or Mastercard from the Security Pacific National Bank of Glendale, CA when making payment for filing fees and other bankruptcy-court-related expenses. Credit card payment provides for an alternative to cash/checks that easily accommodates any internal accounting procedure. The network supports in-person, telephone, and mail requests. The network supports the following transactions:

(1) Filing fees.

(2) Copies of docket sheets, documents, opinions, and ESR-taped proceedings.

(3) Fines & restitution.

(4) Repayment of travel and salary advances.

(5) Attorney admission fees.

(6) Searches and Certifications.

(7) Retrieval fees for records maintained at the FRC.

Microfiche Reports

1. INDEX BY PARTY OR CASE NUMBER

   Bankruptcy filings from June 15, 1986 to the present.

2. INDEX BY JUDGMENT

   (A) Outstanding judgments from December 31, 1984 to the present.

   (B) Outstanding/satisfied judgments from January 1, 1985 to the present.

For further information, please check the appropriate service(s) listed below, provide the indicated address information, and return to: Michael E. Kunz, Clerk of Court, United States District and Bankruptcy Courts, 2609 Market St., Philadelphia, PA 19106-1797.

Services:

___ PACER (Civil)

___ Electronic Filing System

___ Electronic Submission of Civil Documents

___ FAX Ordering (Civil)

___ PACER (Bankruptcy)

___ Voice Case Information System

___ FAX Ordering (Bankruptcy)

___ Credit Card Collection Network

___ Automated Voice Attendant Telephone Answering System

___ Microfiche Reports

___ All of the above.

Address Information:

Name: _____

Firm: _____

Address: _____

Telephone No.: _____

Electronic Submission of Civil Documents

Any law firm or legal agency may submit certain civil documents (excluding complaints, notices of removal, and notices of appeal) in an electronic form instead of in the usual paper-document form. An electronic submission consists of computer-readable information that is transmitted to the court computer where it is then printed out for submission to the judge.

FAX Ordering of Docket/Document Copies and/or Searches

Any member of a law firm, legal agency, or the public can FAX a request to obtain the following:

(1) Copies of civil dockets.

(2) Copies of civil documents.

(3) Name searches performed on civil records.

Credit Card Collection Network

Any law firm, legal agency or company can arrange to use a Visa or Mastercard from the Security Pacific National Bank of Glendale, CA when making payment for filing fees and other district-court-related expenses. Credit card payment provides for an alternative to cash/checks that easily accommodates any internal accounting procedure. The network supports in-person, telephone, and mail requests. The network supports the following transactions:

(1) Filing fees.

(2) Copies of docket sheets, documents, opinions, and ESR-taped proceedings.

(3) Fines & restitution.

(4) Bail.

(5) Repayment of travel and salary advances.

(6) Attorney admission fees.

(7) Searches and Certifications.

(8) Retrieval fees for records maintained at the FRC.

(9) Arbitration fees.

(10) CVB payments.

Automated Voice Attendant Telephone Answering System

Provides automated information on district court office hours, address, court costs, and filing procedures.

Microfiche Reports

1. INDEX BY PARTY OR CASE NUMBER

   (A) Civil filings from 1961 to the present.

   (B) Criminal filings from 1964 to the present.

   (C) Miscellaneous filings from 1969 to the present.

   (D) Magistrate filings from March 1, 1980 to the present.

2. INDEX BY JUDGMENT

   (A) Outstanding judgments from December 31, 1984 to the present.

   (B) Outstanding/satisfied judgments from January 1, 1985 to the present.

3. INDEX BY NATURE OF SUIT

   Civil cases from 1961 to the present.

UNITED STATES BANKRUPTCY COURT

Public Access to Court Electronic Records (PACER)

The PACER system allows any member of the bar or the public that has access to a computer and a modem to obtain bankruptcy docket records. The user can obtain the complete electronic history of all cases that are contained on the BANCAP docketing system (i.e., any bankruptcy case filed after May 5, 1988 with activity in the last 12 months).

The following functions are available to the user:

(1) Search for a docket report by name or case number.

(2) Print the docket report at the end user's printer.

(3) View or print the claims register.

(4) Check for recent docket activity.

The system is accessible twenty-four (24) hours a day except for a three (3) hour daily maintenance period.

Voice Case Information System (VCIS) (215) 597-2244

The VCIS system allows the general public to obtain voice BANCAP information from any standard touch-tone telephone. The procedure for accessing VCIS is as follows:

(1) Dial the above number.

(2) Enter the name of a case participant as follows:

- If the name is that of an individual, enter the last name followed by the first name.

- If the name is that of a company, type the company name without any suffixes.

Use telephone keys that correspond to name letters. Use the "1" key for the letters "Q" and "Z". Skip any non-alphabetic characters (e.g., spaces, apostrophes, etc.).

(3) Press the "#" key to signify end of name.

(4) All relevant cases are mentioned. The following case information can be referenced by the system:

Case Number, Bankruptcy Chapter Title, Case Filing Date, Debtors Name(s), Debtor Attorney Name & Phone/City, Trustee Name, Presiding Judge's Name, Case Status, 341 Creditor Meeting Date & Location, and Closing Date.

REQUIREMENTS FOR FILING A BANKRUPTCY PETITION IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPENDIX V

		CHAPTERS			
		7	11	12	13
VOLUNTARY PETITION					
Petition [to be signed by all debtors and counsel for debtor(s)]	___	x	x	x	x
Schedules	___	x	x	x	x
Statement of Financial Affairs	___	x	x		x
Statement of Financial Affairs for Debtor Engaged in Business	___			x	
Matrix	___	x	x	x	x
Debtor's Statement of Intention	___	x		x	
Debtor's Income and Expense Statement	___	x		x	x
Statement of No Prior Filing	___	x	x	x	x
List of Twenty (20) Largest Unsecured Creditors	___		x		
Statement of Executory Contracts (when applicable)	___	x	x	x	
Corporate Resolution (when applicable)	___	x	x	x	
Plan	___			x	x
Supplemental Statement	___			x	x
Summary Sheet	___	x	x	x	x
Attorney's Declaration Re: Certification of Chapters	___	x	x	x	x
Cost		$120.	$500.	$200.	$120.
Requisite Number of Copies - Original		& 4	& 8	& 4	& 4

Involuntary Chapter 7

Petition (signed by petitioning attorney) (signed by petitioning creditors if Pro Se)	___	x
List of Creditors	___	x
Cost		$120.
Requisite Number of Copies -		(same as Voluntary Chapter 7)

Involuntary Chapter 11

Petition (signed by petitioning attorney) (signed by petitioning creditors if Pro Se)	___	x
List of Creditors	___	x
Cost		$500.
Requisite Number of Copies -		(same as Voluntary Chapter 11)

Notes:

(1) A 9x11½" backer (approximate measurements), properly executed, may be used on all filings.

(2) Filing fees are to be paid as follows: cash, money order, check of debtor's attorney, or certified check of the debtor.

(3) Installment filing fees must be accompanied by an Application and Order, and filed with Petition.

OVER

Form I-3 (1-90)

Effective Thursday, December 21, 1989

(1)	Motion to vacate or modify the automatic stay	$ 60.00
	Motion to withdraw the reference of a case	60.00
	Motion to compel abandonment of property of the estate	60.00

This new fee will be charged whenever a party files a motion under 11 U.S.C. §362(d) to vacate or modify the automatic stay provided by 11 U.S.C. §362(a); files a motion under 28 U.S.C §157(d) to withdraw any case or proceeding referred to a bankruptcy judge by the district court; or files a motion requiring a trustee or debtor in possession to abandon property of the estate as provided by Bankruptcy Rule 6007 (b).

Effective Thursday, January 11, 1990

(1) Deconsolidation of a joint petition, one-half the cost of original filing fee

Chapter 7	$ 60.00
Chapter 13	60.00
Chapter 11	250.00
Chapter 12	100.00

This new fee will be charged when any estate filed as a joint petition is later deconsolidated at the request of the debtor. The fee will be equal to one-half of the filing fee which would otherwise be paid for filing of a new petition at the time of deconsolidation. A Chapter 7 or 13 deconsolidation would be assessed a fee of $60.00. A Chapter 11 deconsolidation would be assessed a fee of $250.00. A Chapter 12 deconsolidation would be assessed a fee of $100.00.

(2)	Deconsolidation/Subsequent Conversion Chapter 7 or 13 to Chapter 11	$400.00

If an estate is deconsolidated and subsequently converted to a chapter other than that under which it was originally filed, the fee due on conversion would be the full fee under the chapter to which the case is being converted less any amount paid upon deconsolidation. This is in accordance with the policy statement clarifying reopened or converted Code cases at the end of the fee schedule. If the deconsolidating debtor is requesting the conversion of a Chapter 7 or 13 to a Chapter 11, $400.00 is required to be paid in accordance with 28 U.S.C. §1930(a).

(3)	Docketing a cross appeal from a bankruptcy court determination	$100.00

This new fee will be charged whenever an appellee files a cross appeal within the 7 days provided by Bankruptcy Rule 8006.

JOSEPH SIMMONS, DEPUTY IN CHARGE

APPENDIX W

Local Bankruptcy Form 9014.1A

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: : Chapter

:

Debtor(s) : Bankruptcy NO.

ORDER REQUIRING ANSWER AND
NOTICE OF HEARING TO CONSIDER MOTION

AND NOW, this day of , 198 , it is ORDERED that all interested persons are required to serve upon movant's attorney, whose address is set forth below and file with the clerk, an answer to the Motion * _____ _____, which has been served upon them within _____ days after service of this Order, exclusive of the date of service. If no answer is filed, an Order may be entered granting the relief demanded in the motion.

A hearing will be held before the Honorable , United States Bankruptcy Judge, in Courtroom at the United States Bankruptcy Court, United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106 on , 198 , at _____ A.M., or as soon thereafter as counsel can be heard, to consider the motion.

The hearing scheduled herein may be adjourned from time to time without further notice to interested parties by announcement of such adjournment in Court on the date scheduled for the hearing.

_____

Attorney for Movant:

*Title of Motion

APPENDIX X

Local Bankruptcy Form 9014.1B

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COVER SHEET

In re	Case No.
Moving Party	Respondent (if any)
Counsel	Counsel (if known)
Address: Phone No.:	Address: Phone No.:
Form of Action (Title of Document)	(Designation)

TO THE CLERK OF THE BANKRUPTCY COURT:

Please take the following action with respect to the above-mentioned document:

_____ 1. File and docket.
_____ 2. File and return attached copy (when filed and stamped) in enclosed self-addresed, stamped envelope
_____ 3. Present to Bankruptcy Judge.
_____ 4. Please provide the following NOTICE:
_____ Notice and opportunity to be heard.
_____ Notice of actual hearing date.
(Suggested Date: _____.)
(Estimated time required: _____ hrs.)
_____ 5. Approve form of notice (attached and mail to:
_____ Undersigned.
_____ All creditors.
_____ All parties in interest (and their counsel) as provided on attached list.
_____ Creditors' Committee (and their counsel as provided on attached list.
_____ Other.
_____ 6. Expedited hearing requested (pursuant to L.B.R. 9014.2).
_____ 7. Other (Please specify) _____

Date Signature of Moving Party's Attorney

*This Cover Sheet must accompany all applications, petitions, motions, requests and other similar pleadings seeking affirmative relief except adversary proceedings instituted by complaint.

APPENDIX Y

BOF 19
(Rev 5 85)

United States Bankruptcy Court

For the _____ **District of** _____

In re

Case No. _____

*Debtor**

PROOF OF CLAIM

1. [*If claimant is an individual claiming for himself*] The undersigned, who is the claimant herein, resides at**

[*If claimant is a partnership claiming through a member*] The undersigned, who resides at**

is a member of , a partnership,
composed of the undersigned and ,
of** , and
doing business at** ,
and is authorized to make this proof of claim on behalf of the partnership.

[*If claimant is a corporation claiming through an authorized officer*] The undersigned, who resides at**

is the of ,
a corporation organized under the laws of ,
and doing business at** ,
and is authorized to make this proof of claim on behalf of the corporation.

[*If claim is made by agent*] The undersigned, who resides at**

, is the agent of ,
of** , and is
authorized to make this proof of claim on behalf of the claimant.

2. The debtor was, at the time of the filing of the petition initiating this case, and still is indebted [*or* liable] to this claimant, in the sum of $

3. The consideration for this debt [*or* ground of liability] is as follows:

[*If filed in a chapter 7 or 13 case*] This claim consists of $_____ in principal amount and $_____ in addition charges [*or* no additional charges]. [*Itemize all charges in addition to principal amount of debt, state basis for inclusion and computation, and set forth any other consideration relevant to the legality of the charge.*]

4. [*If the claim is founded on a writing*] The writing on which this claim is founded (or a duplicate thereof) is attached hereto [*or* cannot be attached for the reason set forth in the statement attached hereto].

5. [*If appropriate*] This claim is founded on an open account, which became [*or* will become] due on , as shown by the itemized statement attached hereto. Unless it is attached hereto or its absence is explained in an attached statement, no note or other negotiable instrument has been received for the account or any part of it.

6. No judgment has been rendered on the claim except

7. The amount of all payments of this claim has been credited and deducted for the purpose of making this proof of claim.

8. This claim is not subject to any setoff or counter-claim except

9. No security interest is held for this claim except

[*If security interest in the property of the debtor is claimed*] The undersigned claims the security interest under the writing referred to in paragraph 4 hereof [*or* under a separate writing (or a duplicate of which) is attached hereto, *or* under a separate writing which cannot be attached hereto for the reason set forth in the statement attached hereto]. Evidence of perfection of such security interest is also attached hereto.

10. This claim is a general unsecured claim, except to the extent that the security interest, if any, described in paragraph 9 is sufficient to satisfy the claim. [*If priority is claimed, state the amount and basis thereof.*]

Claim No. (office use only) _____ Total Amount Claimed $ _____

Full Name of Creditor: _____

Signature _____

Date _____

Penalty for Presenting Fraudulent Claim: Fine of not more than $5,000 or imprisonment for not more than 5 years or both — Title 18, U.S.C., §152

*Include all names used by debtor within last 6 years **State mailing address

INDEX

MEDIATION AND ARBITRATION

Prepared By

H. Francis deLone, Jr., Esquire

ARBITRATION AND MEDIATION
IN THE EASTERN DISTRICT

I. ARBITRATION

A. Local Rule 8

1. Eligible Cases - Damages Less Than $100,000.00

a. Exceptions - Social Security, Prisoner Cases, Constitutional Claims, Injunction/Section 1343 Cases

b. Presumption re Damages Absent Certificate

c. Arbitration by Stipulation

2. Scheduling

a. Trial - 120 Days after Answer

i) earlier trials by agreement

ii) continuances - up to 30 days by arbitrators, longer by court

iii) exact date and time set by court order issued at least 30 days before hearing

iv) pending motions to dismiss or for summary judgment must be resolved before court order setting date and time is issued

b. Discovery - Completion within 90 Days after Answer

i) changes in discovery deadline authorized by court

3. Arbitration Trial

a. Usually Before Three Randomly Selected Lawyer/Arbitrators

b. May Be Before One by Agreement

c. Sanctions for Failure to Participate

i) striking of demand for trial de novo

d. F.R.C.P. 45 Applicable

e. F.R. Evid. Generally Applicable

f. Mandatory Exchange of Exhibits 10 Days Before Trial

i) Authenticity of exhibits established absent notification of objections 5 days before trial

g. Recording or Transcript of Proceedings May Be Made

4. Trial De Novo

a. Must Be Demanded within 30 Days of Entry of Award

b. Fee - $100.00 per Arbitrator

c. Treatment of Action As If Not Referred to Arbitration

d. Trial de novo within 90 Days

e. Prior Demand for Jury Pursuant to F.R.C.P. 38(b) Necessary to Preserve Right to Jury Trial. Bank Bldg. & Equip. v. Local 677, 87 F.R.D. 553(E.D. Pa. 1980)

f. Finality of Award Absent Demand for Trial de Novo

B. Statistics

1. Arbitration Is Not a Dress Rehearsal

C. Preparation for Arbitration Trial

1. Do Prepare

2. Complaint and Answer - Specificity May Be In Order

3. Discovery

a. Quick, Inexpensive, To the Point - If at All

4. Arbitration Memorandum

a. Brevity and Clarity Are Virtues

b. Authority on Unusual Points of Law

II. MEDIATION

A. Local Rule 15

1. Eligible Cases

a. "Odd" Cases

i) Exceptions - social security, prisoner cases, arbitration cases, asbestos cases, inappropriate cases

2. Scheduling

a. Within 30 Days of First Appearance for a Defendant

i) changes up to 15 days by mediator, for longer periods with court approval

3. Mediation Conference

a. Before Randomly Selected Lawyer

b. Primary Counsel and Unrepresented Parties Must Attend

i) possible sanctions for failure to attend

ii) attendees must be prepared to discuss all liability and damages issues, any equitable or declaratory remedies requested, and settlement positions

iii) client must be available by telephone

c. All Proceedings Confidential

d. No Recordings or Transcript Allowed

4. No Modification of F.R.C.P. 16 or Local Rule 21

B. Statistics

1. An Opportunity to Serve the Client

C. Preparation

1. Do Prepare

2. Determine the Client's Goals/Desires

3. Be Flexible

4. You Gotta Believe

5. Mediation Memorandum

   a. Short and To the Point

   b. Remember Who Must Be Persuaded

   c. Don't Burn Bridges

ATTACHMENTS

1. Local Civil Rule 8
2. Statistics on Arbitration in the Eastern District
3. Sample Arbitration Memorandum
4. Opinion in Bank Bldg. & Equip. v. Local 677, 87 F.R.D. 553 (E.D. Pa. 1980)
5. Local Civil Rule 15
6. Statistics on Mediation in the Eastern District
7. Sample Mediation Memorandum by Plaintiff
8. Sample Mediation Memorandum by Defendant

peditious and inexpensive, as mandated by 28 U.S.C. § 363(c)(4).*

* Pub. Note: So in original. Probably should read "§ 636(c)(4)."

D. Memoranda. The appellant shall, within 30 days of the filing of the notice of appeal, file a typewritten memorandum with the clerk, together with two additional copies, stating the specific facts, points of law, and authorities on which the appeal is based. The appellant shall also file a copy of the memorandum on the appellee or appellees. The appellees shall file an answering memorandum within 30 days of the filing of the appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his memorandum within the time provided by this rule, or any extension thereof, the court may dismiss the appeal.

E. Disposition of the Appeal by a Judge. The judge shall consider the appeal on the record, in the same manner as if the case had been appealed from a judgment of the district court to the court of appeals and may affirm, reverse, or modify the magistrate's judgment, or remand with instructions for further proceedings. The judge shall accept the magistrate's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the magistrate to judge the credibility of the witnesses.

F. Appeals from other Orders of a Magistrate. Appeals from any other decisions and orders of a magistrate not provided for in this rule should be taken as provided by governing statute, rule, or decisional law.

Effective May 31, 1990.

RULE 8. ARBITRATION—THE SPEEDY CIVIL TRIAL

1. **Certification of Arbitrators.**

A. The Chief Judge shall certify as many arbitrators as he determines to be necessary under this rule.

B. Any individual may be certified to serve as an arbitrator if: (1) he/she has been for at least five years a member of the bar of the highest court of a state or the District of Columbia, (2) he/she is admitted to practice before this court, and (3) he/she is determined by the Chief Judge to be competent to perform the duties of an arbitrator.

C. Any member of the bar possessing the qualifications set forth in subsection B, desiring to become an arbitrator, shall complete the application form obtainable in the office of the Clerk and when completed shall file it with Clerk of Court who shall forward it to the Chief Judge of the Court for his determination as to whether the applicant should be certified.

D. Each individual certified as an arbitrator shall take the oath or affirmation prescribed by Title 28 U.S.C. § 453 before serving as an arbitrator.

E. A list of all persons certified as arbitrators shall be maintained in the office of the Clerk.

F. Any member of the Bar certified as an arbitrator may be removed from the list of certified arbitrators for cause by a majority of the judges of this Court.

2. **Compensation and Expenses of Arbitrators.** The arbitrators shall be compensated $100 each for services in each case assigned for arbitration. Whenever the parties agree to have the arbitration conducted before a single arbitrator, the single arbitrator shall be compensated $100 for services. In the event that the arbitration hearing is protracted, the court will entertain a petition for additional compensation. The fees shall be paid by or pursuant to the order of the Director of the Administrative Office of the United States Courts. Arbitrators shall not be reimbursed for actual expenses incurred by them in the performance of their duties under this rule.

3. **Cases Eligible for Compulsory Arbitration.**

A. The Clerk of Court shall, as to all cases filed on or after May 18, 1989, designate and process for compulsory arbitration all civil cases (including adversary proceedings in bankruptcy, excluding, however, (1) social security cases, (2) cases in which a prisoner is a party, (3) cases alleging a violation of a right secured by the U.S. Constitution, and (4) actions in which jurisdiction is based in whole or in part on 28 U.S.C. § 1343) wherein money damages only are being sought in an amount not in excess of $100,000.00 exclusive of interest and costs. All cases filed prior to May 18, 1989 which were designated by Clerk of Court for compulsory arbitration shall continue to be processed pursuant to this Rule.

B. The parties may by written stipulation agree that the Clerk of Court shall designate and process for arbitration pursuant to this rule any civil case (including adversary proceedings in bankruptcy) wherein money damages only are being sought in an amount in excess of $100,000.00, exclusive of interest and costs.

C. For purposes of this rule only, damages shall be presumed to be not in excess of $100,000.00, exclusive of interest and costs, unless:

(1) Counsel for plaintiff, at the time of filing the complaint, or in the event of the removal of a

case from state court or transfer of a case from another district to this court, within ten (10) days of the docketing of the case in this district filed a certification that the damages sought exceed $100,000.00, exclusive of interest and costs; or

(2) Counsel for a defendant, at the time of filing a counterclaim or cross-claim filed a certification with the court that the damages sought by the counterclaim or cross-claim exceed $100,000.00, exclusive of interest and costs.

(3) The judge to whom the case has been assigned may "sua sponte" or upon motion filed by a party prior to the appointment of the arbitrators to hear the case pursuant to section 4(C), order the case exempted from arbitration upon a finding that the objectives of an arbitration trial (i.e., providing litigants with a speedier and less expensive alternative to the traditional courtroom trial) would not be realized because (a) the cases involve complex legal issues, (b) because legal issues predominate over factual issues, or (c) for other good cause.

4. Scheduling Arbitration Trial.

A. After an answer is filed in a case determined eligible for arbitration, the arbitration clerk shall send a notice to counsel setting forth the date and time for the arbitration trial. The date of the arbitration trial set forth in the notice shall be a date about one hundred twenty (120) days (5 months for cases filed prior to May 18, 1989) from the date the answer was filed. The notice shall also advise counsel that they may agree to an earlier date for the arbitration trial provided the arbitration clerk is notified within thirty (30) days of the date of the notice. The notice shall also advise counsel that they have ninety (90) days (120 days for cases filed prior to May 18, 1989) from the date the answer was filed to complete discovery unless the judge to whom the case has been assigned orders a shorter or longer period for discovery. In the event a third party has been brought into the action, this notice shall not be sent until an answer has been filed by the third party.

B. The arbitration trial shall be held before a panel of three arbitrators, one of whom shall be designated as chairperson of the panel unless the parties agree to have the hearing before a single arbitrator. The arbitration panel shall be chosen through a random selection process by the clerk of the court from among the lawyers who have been certified as arbitrators. The clerk shall endeavor to assure insofar as reasonably practicable that each panel of three arbitrators shall consist of one arbitrator whose practice is primarily representing plaintiffs, one whose practice is primarily representing defendants, and a third panel member whose practice does not fit either category. The arbitration panel shall be scheduled to hear not more than four (4) cases on a date or dates several months in advance.

C. The judge to whom the case has been assigned shall at least thirty (30) days prior to the date scheduled for the arbitration trial sign an order setting forth the date and time of the arbitration trial and the names of the arbitrators designated to hear the case. In the event that a party has filed a motion to dismiss the complaint, a motion for summary judgment, a motion for judgment on the pleadings, or a motion to join necessary parties, the judge shall not sign the order until the court has ruled on the motion, but the filing of such a motion on or after the date of said order shall not stay the arbitration unless the judge so orders.

D. Upon entry of the order designating the arbitrators, the arbitration clerk shall send to each arbitrator a copy of all the pleadings, including the order designating the arbitrators, and the guidelines for arbitrators.

E. Persons selected to be arbitrators shall be disqualified for bias or prejudice as provided in Title 28, U.S.C. § 144, and shall disqualify themselves in any action in which they would be required under Title 28, U.S.C. § 455 to disqualify themselves if they were a justice, judge, or magistrate.

F. The arbitrators designated to hear the case shall not discuss settlement with the parties or their counsel, or participate in any settlement discussions concerning the case which has been assigned to them.

5. The Arbitration Trial.

A. The trial before the arbitrators shall take place on the date and at the time set forth in the order of the Court. The trial shall take place in the United States courthouse in a room assigned by the arbitration clerk. The arbitrators are authorized to change the date and time of the trial provided the trial is commenced within thirty (30) days of the trial date set forth in the Court's order. Any continuance beyond this thirty (30) day period must be approved by the judge to whom the case has been assigned. The arbitration clerk must be notified immediately of any continuance.

B. Counsel for the parties shall report settlement of the case to the arbitration clerk and all members of the arbitration panel assigned to the case.

C. The trial before the arbitrators may proceed in the absence of any party who, after notice, fails to be present. In the event, however, that a party fails to participate in the trial in a meaningful manner, the Court may impose appropriate sanctions, including, but not limited to the striking of any demand for a trial de novo filed by that party.

D. Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at the trial before the arbitrators. Testimony at the trial shall be under oath or affirmation.

E. The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be marked for identification and delivered to adverse parties at least ten (10) days prior to the trial and the arbitrators shall receive such exhibits into evidence without formal proof unless counsel has been notified at least five (5) days prior to the trial that the adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrators may refuse to receive into evidence any exhibit, a copy or photograph of which has not been delivered prior to trial to the adverse party, as provided herein.

F. A party may have a recording and transcript made of the arbitration hearing at the party's expense.

6. **Arbitration Award and Judgment.** The arbitration award shall be filed with the court promptly after the trial is concluded and shall be entered as the judgment of the court after the thirty (30) day time period for requesting a trial de novo has expired, unless a party has demanded a trial de novo, as hereinafter provided. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal. In a case involving multiple claims and parties, any segregable part of an arbitration award concerning which a trial de novo has not been demanded by the aggrieved party before the expiration of the thirty (30) day time period provided for filing a demand for trial de novo shall become part of the final judgment with the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal.

7. **Trial De Novo.**

A. Within thirty (30) days after the arbitration award is entered on the docket, any party may demand a trial de novo in the district court. Written notification of such a demand shall be served by the moving party upon all counsel of record or other parties. Withdrawal of a demand for a trial de novo shall not reinstate the arbitrators' award and the case shall proceed as if it had not been arbitrated.

B. Upon demand for a trial de novo and the payment to the Clerk required by paragraph E, infra, the action shall be placed on the trial calendar of the court and treated for all purposes as if it had not been referred to arbitration. In the event it appears to the judge to whom the case was assigned that the case will not be reached for de novo trial within ninety (90) days of the filing of the demand for trial de novo, the judge shall request the Chief Judge to reassign the case to a judge whose trial calendar will make it possible for the case to be tried de novo within ninety (90) days of the filing of the demand for trial de novo. Any right of trial by jury which a party would otherwise have shall be preserved inviolate.

C. At the trial de novo, the court shall not admit evidence that there had been an arbitration trial, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding unless the evidence would otherwise be admissible in the Court under the Federal Rules of Evidence.

D. To make certain that the arbitrators' award is not considered by the Court or jury either before, during or after the trial de novo, the arbitration clerk shall, upon the filing of the arbitration award, enter onto the docket only the date and "arbitration award filed" and nothing more, and shall retain the arbitrators' award in a separate file in the Clerk's office. In the event no demand for trial de novo is filed within the designated time period, the arbitration clerk shall enter the award on the docket and place it in the case file.

E. Upon making a demand for trial de novo, the moving party shall, unless permitted to proceed in forma pauperis, deposit with the Clerk of Court a sum equal to the arbitration fees of $100.00 for each arbitrator as provided in Section 2. The sum so deposited shall be returned to the party demanding a trial de novo in the event that party obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. In the event the party demanding a trial de novo does not obtain a judgment more favorable than the arbitration award, the sum so deposited shall be paid to the Treasury of the United States.

Effective May 31, 1990; amended Dec. 17, 1990, effective Jan. 1, 1991; effective Dec. 31, 1991.

RULE 9. APPEARANCE OF JUDICIAL OFFICER OF THIS COURT AS CHARACTER WITNESS

(a) No subpoena to compel a judge of this court, U.S. Magistrate or Bankruptcy Judge to testify as a character witness shall be issued or enforced unless the issuance of the subpoena shall have been specially allowed pursuant to this Order.

(b) Petitions for allowance of a subpoena shall be filed in the Office of the Clerk of this court, shall be verified and shall set forth:

(1) The caption and criminal docket number of the proceeding in which the witness is to appear togeth-

they placed the Suggestion of Death on the record. In addition, after the action was dismissed under the terms of this court's order of December 14, 1979, the firm was confronted with the present untimely motion by plaintiff. It was required to investigate the facts asserted in plaintiff's papers, which proved to be inaccurate, and to respond appropriately to the legal and factual issues presented.

In sum, plaintiff's counsel has been blatantly irresponsible in his conduct with regard to the substitution of an estate representative for the deceased plaintiff. As a result, the action has been substantially delayed, and defendant Svenska has incurred unnecessary expense.

[2] Notwithstanding the foregoing, where a negligence action survives the plaintiff's death for the benefit of his widow and children, I am reluctant to visit a dismissal upon innocent clients for the unpardonable conduct of the lawyer. At best, such a course would leave the widow with a malpractice action against her attorney as her only remedy. At the same time, it would be distressing to impose on defense counsel or defendant the unnecessary litigation expenses occasioned by plaintiff counsel's utter lack of care and disregard of the governing legal rules and court orders. I therefore deem it appropriate to require that these expenses be paid as a condition of reopening this case. Furthermore, since it is conceded that plaintiff's counsel and not his client is at fault here, the costs should not be charged to the plaintiff. Fed. R.Civ.P. 60 permits the court to relieve the plaintiff from a dismissal of the action "upon such terms as are just." In this case, equity demands that Haight, Gardner be paid attorneys' fees by plaintiff's counsel from his own funds and not by the widow or estate representative or as a charge against any recovery.

Costs are to be assessed in terms of actual billable time, as opposed to reasonable fees. Thus, I direct that the parties appear before a Magistrate of this court for a determination as to the following: (a) the time spent by Haight, Gardner in preparing defendant's motion to dismiss of November 1, 1979, and in responding to plaintiff's motion to substitute of January 30, 1980; and (b) the normal hourly rate charged by Haight, Gardner for this type of work. On the basis of these calculations, Haight, Gardner is to be reimbursed in full for its fees incurred in connection with these two motions. In addition, Haight, Gardner is to be reimbursed for the time spent before the Magistrate in determining those costs. Following the Magistrate's report on attorneys' fees and review thereof by this court, if sought, and payment of such fees to Haight, Gardner by the firm of Kenneth Heller, the dismissal of this case shall be vacated and the action restored to the calendar of this court.

So ordered.

BANK BUILDING & EQUIPMENT CORPORATION OF AMERICA

v.

MACK LOCAL 677 FEDERAL CREDIT UNION.

Civ. A. No. 79-24.

United States District Court,
E. D. Pennsylvania.

April 28, 1980.

Diversity suit was brought to recover for services performed under a consultant and a construction management agreement. After completion of discovery, the case was referred to an arbitration panel which made an award in favor of plaintiff. Eighteen days later, defendant demanded a trial de novo and for the first time requested a jury trial. Plaintiff moved to strike defendant's demand for a jury trial, and the District Court, Troutman, J., held that because de-

fendant did not demand a jury trial within ten days after the pleadings ended, defendant waived its right to a jury trial.

Ordered accordingly.

1. **Federal Civil Procedure** ⇐2044

Defendant waived its right to a jury trial where defendant did not demand a jury trial within ten days after the pleadings ended. Fed.Rules Civ.Proc. Rules 7(a), 38(b), 28 U.S.C.A.

2. **Federal Civil Procedure** ⇐2037

Where defendant had not made timely demand for jury trial and thus did not "otherwise have" a right of trial by jury, the Local Rule which provides that, upon demand for trial de novo, an action shall be placed on the calendar and treated for all purposes as if it had not been referred to arbitration and any right of trial by jury "that a party would otherwise have shall be preserved inviolate" did not excuse defendant from demanding a jury trial unless and until appeal was taken from decision of arbitration panel to which the dispute had been referred. U.S.Dist.Ct.Rules E.D.Pa., Civil Rules 49, 49, § 7(b).

3. **Federal Civil Procedure** ⇐2037

Despite a party's failure to make timely demand for jury trial, the right to a jury trial may be revived in the court's discretion if the moving party offers an adequate or proper reason for failing to make timely demand. Fed.Rules Civ.Proc. Rule 39(b), 28 U.S.C.A.

4. **Federal Civil Procedure** ⇐2037

Belief of defense counsel that no demand for a jury trial is necessary until completion of arbitration proceedings will not resurrect defendant's right to a jury trial since mere inadvertence, oversight or lack of diligence will not justify an omission to make a timely demand for a jury trial or abrogate the consequent waiver. Fed.Rules Civ.Proc. Rule 39(b), 28 U.S.C.A.

5. **Federal Civil Procedure** ⇐2037

Unfamiliarity with or misinterpretation of rules does not excuse compliance with procedural requirements relating to timely demand for a jury trial. Fed.Rules Civ.Proc. Rules 38(d), 39(b), 28 U.S.C.A.; U.S.Dist.Ct.Rules E.D.Pa., Civil Rules 49, 49, § 7(b).

Pepper, Hamilton & Scheetz, Philadelphia, Pa., for plaintiff.

Robert E. Donatelli, Allentown, Pa., for defendant.

MEMORANDUM

TROUTMAN, District Judge.

To recover for services performed pursuant to a Consultant and later a Construction Management Agreement, plaintiff instituted this diversity action on January 3, 1979, but did not request a jury trial. Several weeks later defendant filed a motion to dismiss, which the Court denied as moot after plaintiff filed an amended complaint. Defendant then filed an answer and counterclaim and also did not demand a trial by jury. Following completion of discovery, the court clerk, acting in accordance with Local R.Civ.P. 49, referred the case to an arbitration panel, which heard the matter and filed an arbitration award in favor of plaintiff on both its claim and defendant's counterclaim. Eighteen days later defendant filed a demand for a trial *de novo* and for the first time requested a jury trial. Plaintiff now moves to strike defendant's demand therefor.

[1] Fed.R.Civ.P. 38(b) indicates when and how parties should demand a trial by jury. A party may do so

> on any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and *not later than 10 days after the service of the last pleading directed to such issue*. . . . (emphasis added)

The pleadings ended with the plaintiff's reply to defendant's counterclaim. Fed.R.Civ.P. 7(a). Not having made a demand within ten days after this reply, defendant waived its right to a jury trial. Fed.R.

Civ.P. 38(d). *See also Walton v. Eaton Corp.*, 563 F.2d 66 (3d Cir. 1977).

[2] Defendant argues that Local Rule 49 moots the issue of a demand for a jury trial unless and until a party appeals from the arbitrators' award. However, Local Rule 49 provides that

> [u]pon a demand for a trial *de novo* the action shall be placed on the calendar of the court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party *would otherwise have* shall be preserved inviolate.

Local R.Civ.P. 49, § 7(b) (emphasis added). Defendant, having failed to make a timely demand, did not assert or "otherwise have" a right of trial by jury.

[3–5] The right may be revived, however, in the Court's discretion if the moving party offers an adequate or proper reason for failing to make a timely demand. *New Hampshire Fire & Insurance Co. v. Perkins*, 28 F.R.D. 588 (D.Del.1961). *See* Fed.R.Civ.P. 39(b). Defense counsel's belief that a demand for jury trial was unnecessary until completion of arbitration will not effect resurrection of the right, for mere inadvertence, *Bullock v. Sterling Drug, Inc.*, 8 F.R.D. 575 (E.D.Pa.1948), oversight, *Ridge Theatre Corp. v. United Artist Corp.*, 27 F.R.D. 8 (E.D.Pa.1961), or lack of diligence, *McConney v. Great Atlantic & Pacific Tea Co.*, 455 F.Supp. 1143 (E.D.Pa.1978), will not justify the omission or abrogate the waiver. Nor will unfamiliarity with or misinterpretation of rules excuse compliance with procedural requirements. *Kutz v. Janney, Montgomery & Scott, Inc.*, 18 F.R.Serv.2d 158 (E.D.Pa.1973), *Godfrey v. Pabst Brewing Co.*, 15 F.R.Serv.2d 1309 (E.D.Pa.1972). *See generally Biesenkamp v. Atlantic Richfield Co.*, 70 F.R.D. 365 (E.D.Pa.1976) and *Todd v. Lutz*, 64 F.R.D. 150 (W.D.Pa.1974).

To sanction defendant's omission would invite disregard of procedural requirements in all of the Rules, cause delay in disposition of disputes by creating confusion on trial dockets and prejudice the opposing party by injecting an unnecessary element of uncertainty into trial strategy and preparation. Worse, the Rules' articulated purpose of securing the "just, speedy and inexpensive determination of every action" would be reduced to an empyrean principle with no practical meaning. *See* Fed.R.Civ.P. 1. Avoiding this undesirable result and encouraging familiarity with federal procedure so that all litigants receive prompt and full consideration impels the conclusion that plaintiff's motion to strike defendant's demand for a jury trial must be granted and defendant's motion for a jury trial must be denied.

In re ANTHRACITE COAL ANTITRUST LITIGATION.

This Document Relates to: Wilkes-Barre Steam Heat Company

Steven J. Hartz, Trustee in Bankruptcy for Neast & Co., Inc.

Colonial Fuel Company.

MDL No. 293.
Civ. Nos. 76–1500, 77–699 and 77–1049.

United States District Court,
M. D. Pennsylvania.

May 22, 1980.

Proceedings were instituted in anthracite coal antitrust litigation. The District Court, Muir, J., held that corporation which was in a sense both a plaintiff and a defendant in anthracite coal antitrust litigation because it had submitted a proof of claim as a member of the industrial purchaser settlement class and had two corporate defendants as subsidiaries was not barred from recovery because of activities of its subsidiaries where proof of claim form which altered for first time definition of industrial purchaser class to provide that

Rule 15 Court-Annexed Mediation (Early Settlement Conference)

Purpose--The court adopts this Rule for the purpose of determining whether a program of court-annexed mediation will provide litigants with a speedier and less expensive alternative to the burdens of discovery and the traditional courtroom trial. As hereinafter provided, commencing January 1, 1991, (and continuing until further action by the court) those cases which have been assigned an "odd" number by the Clerk of Court will be placed in the program with the understanding that thereafter a study will be made to determine whether this program should be continued in the interest of providing a more expeditious resolution of litigation.

1. Certification of Mediators

(a) The Chief Judge shall certify as many mediators as he determines to be necessary under this rule.

(b) An individual may be certified to serve as a mediator if: (1) he/she has been for at least fifteen (15) years a member of the bar of the highest court of a state or the District of Columbia; (2) he/she is admitted to practice before this court; and (3) he/she is determined by the Chief Judge to be competent to perform the duties of a mediator.

(c) Any member of the bar possessing the qualifications set forth in subsection (b), and desiring to become a mediator, shall complete the application form obtainable in the office of the Clerk and when completed shall file it with the Clerk of Court who shall forward it to the Chief Judge of the Court for his determination as to whether the applicant should be certified.

(d) Each individual certified as a mediator shall take the oath or affirmation prescribed by Title 28, U.S.C. §453 before serving as a mediator.

(e) A list of all persons certified as mediators shall be maintained in the office of the Clerk.

(f) A member of the bar certified as a mediator may be removed from the list of certified mediators for cause by a majority of the judges of this Court.

2. Compensation and Expenses of Mediators

Mediators shall receive no compensation for services and shall not be reimbursed for expenses. The services and expenses of a mediator shall be considered a pro bono service in the interest of providing litigants with a speedier and less expensive alternative to the burdens of discovery and a courtroom trial.

3. Cases Eligible for Mediation

The Clerk of Court shall, as to all cases filed on or after January 1, 1991, designate and process for mediation all civil cases to which the Clerk of this Court has assigned an "odd" (not "even") number, except (1) social security cases, (2) cases in which a prisoner is a party, (3) cases eligible for arbitration pursuant to Local Civil Rule 8, (4) asbestos cases, and (5) any case which a judge determines, sua sponte, or on application by an interested party (including the mediator), is not suitable for mediation.

4. Scheduling Mediation Conference

(a) After the first appearance for a defendant is made in a case determined eligible for mediation, the mediation clerk shall promptly send a notice to counsel and any unrepresented party setting forth a date, time and place for the mediation conference, and the name, address, and telephone number of the mediator. The date of the mediation conference set forth in the notice shall be a date within thirty (30) days from the date the first appearance for a defendant is made.

(b) The mediation conference shall be held before a mediator selected by a random selection process by the Clerk of Court from the list of lawyers certified as mediators.

(c) Upon mailing the notice pursuant to 4(a), the mediation clerk shall send to the mediator copies of the complaint and any motion(s) or pleading(s) that as of the date of the mailing of the notice have been filed in response to the complaint.

(d) A mediator is authorized to change the date and time for the mediation conference, provided the conference takes place within fifteen (15) days of the date set forth in the notice pursuant to 4(a), and the mediation clerk is notified. Any continuance of the conference beyond this fifteen (15) day period must be approved by the judge to whom the case is assigned.

(e) Persons selected as mediators shall be disqualified for bias or prejudice as provided by Title 28, U.S.C. §144, and shall disqualify themselves in any action in which they would be required under Title 28, U.S.C. §455 to disqualify themselves if they were a justice, judge, or magistrate.

5. The Mediation Conference

(a) The mediation conference shall take place on the date and at the time set forth in the notice pursuant to 4(a), or as changed pursuant to 4(d). The mediation conference shall take place in a courthouse, a courtroom in the United States Customs House, or at such other place designated by the mediation clerk.

(b) Counsel primarily responsible for the case and any unrepresented party shall attend the mediation conference, and shall be prepared to discuss: (1) all liability issues; (2) all damages issues; (3) all equitable and declaratory remedies if such are requested; and (4) the position of the parties relative to settlement. Counsel shall make arrangements with the client to be available by telephone or in person for the purpose of discussing settlement possibilities. Willful failure to attend the mediation conference shall be reported to the Court and may result in the imposition of sanctions.

(c) All proceedings at any mediation conference authorized by this Rule (including any statement made by a party, attorney, or other participants) shall not be reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission. No party shall be bound by anything done or said at the conference unless a written settlement is reached and signed by the parties or their counsel.

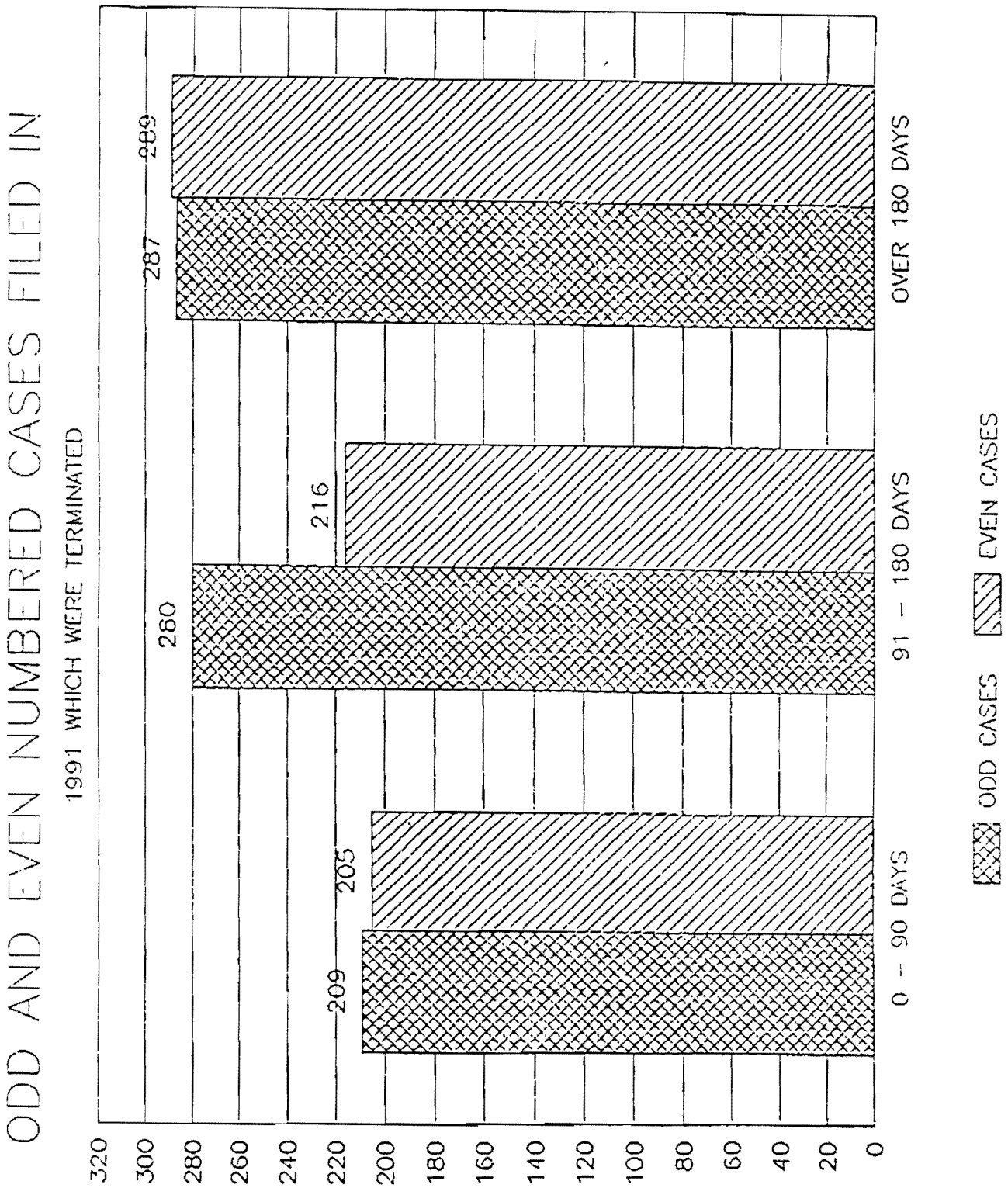
(d) In the event the mediator determines that no settlement is likely to result from the mediation conference, he shall terminate the conference and promptly thereafter send a report to the mediation clerk and the judge to whom the case is assigned stating that there has been compliance with the requirements of this Rule, but that no settlement has been reached. In the event, however, that a settlement is achieved at the mediation conference, the mediator shall send a report to the mediation clerk and the judge to whom the case has been assigned stating that a settlement was achieved.

(e) No one shall have a recording or transcript made of the mediation conference.

(f) This rule shall not be construed as modifying the provisions of Federal Rule of Civil Procedure 16 or Local Civil Rule 21.

6. Revisions to this Rule

The court may, in order to further the purposes of court-annexed mediation, revise the text of this rule after consultation with the Federal Courts Committee of the Philadelphia Bar Association and the Lawyers' Advisory Committee for this court.



ATTACHMENT 6

A STATISTICAL BREAKDOWN OF
ODD AND EVEN NUMBERED CASES
FILED IN 1991

	TOTAL CASES*	TOTAL CASES TERMINATED		CASES*** TERMINATED 0-90 DAYS		CASES*** TERMINATED 90-180 DAYS		CASES*** TERMINATED OVER 180 DAYS		MEDIAN TIME FROM THE DATE COMPLAINT FILED TO THE DATE FOR WHICH THE MEDIATION CONFERENCE WAS FIRST SCHEDULED
		SETTLED **	OTHER ****	S	O	S	O	S	O	
ODD NUMBERED CASES	1607	776	487	209	227	280	156	287	104	110
EVEN NUMBERED CASES	1635	710	514	205	222	216	180	289	112	

* All civil cases except (1) social security cases, (2) cases in which a prisoner is a party, (3) cases eligible for arbitration pursuant to Local Civil Rule 8, (4) asbestos cases.

** Cases resolved by consent judgment, dismissed voluntarily and dismissed by settlement are included in the "settled" category.

*** Time shown is from date of filing to date of termination.

**** Cases resolved by jury verdict, dismissed without prejudice, dismissed want of prosecution, dismissed lack of jurisdiction, other judgments, other dismissals, statistical closings, motion before trial judgments, default judgments and transfer/remand to another district are included in the "other" category.

CONCLUSION: During that period when virtually all mediation conferences were first scheduled (90 through 180 days after the complaint was filed), the number of settlements reported in cases eligible for mediation under Rule 15 of Eastern District of Pennyslvania Local Rules of Civil Procedure (odd numbered cases) was 41% higher* than comparable even numbered cases not eligible under Rule 15. In those periods before the mediation conference was first scheduled (0 to 90 days after the complaint was filed) or after the mediation conference was first scheduled (over 180 days after the complaint was filed), the number and percentage of settlements reported were virtually identical.

Accordingly, it is suggested that the scheduling and holding of early settlement conferences in accordance with Local Rule 15 has resulted in a substantial increase in the rate of early settlements without a concomitant increase in the expenditure of available judicial resources.

* Represents percentage of settlement of cases pending 90 days following the filing of the Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS A. TRIEDENTRUE	:	CIVIL ACTION
vs.	:	
NEWLOOK, INC.	:	No. 90-5555

PLAINTIFF'S MEDIATION CONFERENCE STATEMENT

I. PROCEDURAL HISTORY

This action for declaratory, injunctive and monetary relief was brought by Plaintiff to recover damages for his improper and unlawful termination from longstanding employment as a salesman and sales manager with Defendant, Newlook, Inc., a computer software developer and manufacturer. Plaintiff bases his claims on allegations of unlawful age discrimination, breach of implied covenants of good faith and fair dealing in his oral employment contract and emotional and physical injuries he suffered as a result of the Defendant's wrongful actions.

Defendant has answered Plaintiff's complaint generally denying all allegations and setting forth numerous (albeit inapplicable) affirmative defenses.

II. STATEMENT OF THE FACTS

Plaintiff, Thomas A. Triedentrue [Date of Birth: 7/29/31], first became employed by Newlook, Inc. on August 1, 1974 as a salesperson in Defendant's Pittsburgh office. As the result of his consistently excellent sales results, in 1980 Plaintiff was promoted to the position of Eastern Regional Manager in Defendant's Boston office. Throughout his employment

with Defendant, Plaintiff always received excellent evaluations and was consistently the leading sales producer in dollar volume in the company.

In early 1988, Plaintiff was requested to transfer to Philadelphia and assume the responsibility of Sales Manager for the Mid-Atlantic Region. To that end, Plaintiff and his wife canceled the lease on their home, leased a home in Philadelphia and Plaintiff's wife quit her job as a travel agent. Then, without warning, just days before the Christmas holiday, 1988, Plaintiff was advised that he would be terminated effective December 31, 1988. His sales duties in Boston were assumed by his 28 year old assistant.

Prior to his discharge, Plaintiff had noticed that other employees of Defendant over the age of 55 were being systematically removed form employment. It is averred that his discharge was part of a pattern and practice of discrimination against older employees. At the time of his discharge, he was the oldest employee in Defendant's sales force.

III. STATEMENT OF DAMAGES

Since his termination, Plaintiff has not been able to find work and has been employed only as a consultant to a Philadelphia distributor of software products for a fee of $2,000/month. Prior to his discharge, Plaintiff earned the following in salary and commission: 1986 - $105,000; 1987 - $125,000; 1988 - $86,000. Since January of 1989, Plaintiff has been required to purchase his own accident and health insurance

(the only benefit he received as an employee of Newlook, Inc.).

Plaintiff additionally suffered humiliation and mental anguish requiring several visits to his physician who treated him with Valium and had upper and lower g.i. test series and several cardiological tests performed because of continued and abdominal and chest pain.

SUMMARY OF DAMAGES

Loss of Earnings		
Past - 1/1/89 to date (2.75 years x $125,000/yr)		$ 343,750
Future - 9/30/91 to age 65 ($125,000/yr x 5 years)		625,000
TOTAL LOSS OF EARNINGS		$ 968,750
Liquidated Damages		343,750
Loss of Benefits		
$6,000/yr x 7.5 years		45,000
Relocation Expense		50,000
Medical Expenses		
Dr. Feilgud	$ 1,000	
Abdominal testing	1,000	
Cardiological testing	1,500	3,500
Humiliation, Mental Anguish, Pain and Suffering		1,000,000
TOTAL DAMAGES		$2,411,000

IV. MISCELLANEOUS

Plaintiff has demanded $2,000,000 in full settlement of his claims. Defendant has made no offer to date.

Respectfully submitted,

_____

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS A. TRIEDENTRUE	:	CIVIL ACTION
vs.	:	
NEWLOOK, INC.	:	No. 90-5555

DEFENDANT'S MEDIATION CONFERENCE STATEMENT

I. STATEMENT OF THE CASE

A. Introduction

Plaintiff brings the present action under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., and Pennsylvania common law to recover damages for alleged wrongful termination.

Plaintiff is entitled to no damages since he was properly terminated as part of a general reduction-in-force from a company which is experiencing severe financial difficulties

B. Statement of Facts

Newlook, Inc., is a sales and service company whose computer software products provide data base support for large institutions using IBM main frame installations. The company, until 1988, maintained 15 Regional Sales offices throughout the United States. Since January 1, 1989, the company's sales force has been consolidated in 10 regional centers which include staffing for all technical support services rendered.

Plaintiff was employed with Newlook Inc., as a salesperson since 1974 and has for much of that time been located in Defendant's Boston office.

Plaintiff was for many years a leading salesperson with

the company. In 1987, the company abandoned the marketing of a significant portion of its older and outdated product line and concentrated on newer, state-of-the-art application programs. Plaintiff, unlike many newer employees, is not technically trained as a computer engineer. He found it very difficult to fully understand the value of the new replacement products or explain them to clients without significant technical advice from service specialists. This would often result in two people instead of one being sent out on sales calls.

In 1987, his sales results showed a slight increase but the Company's second two quarterly sales reports demonstrate that he was not having much success with the newer, more technically advanced products. Plaintiff's results for 1988 clearly show his inability to sell the new product line. In 1988, in order to provide him with more technical support, the company offered him the opportunity to move to Philadelphia to run the Mid-Atlantic Regional Sales Office. He accepted and plans were made regarding the transfer.

In the fall of 1988, the company was forced to abandon the continued marketing of much of its older product line and a decision was made to consolidate many of the Regional Sales Offices. The Philadelphia office which Plaintiff was to run was one of the five offices the company closed at the end of 1988. As a result, Plaintiff was terminated since his position as Regional Sales Manager was eliminated.

C. **Statement of Applicable Principles of Law**

Under the Age Discrimination in Employment Act, an employer is only responsible for the termination of an employee if age was a determining factor in that decision. Where, as here, the company has a legitimate nondiscriminatory reason for the discharge, i.e., the elimination of Plaintiff's position it may discharge an employee without fear that a court would have arrived at a different conclusion.

D. **Conclusion**

It is clear that Plaintiff has no claim upon which a recovery can be made. Defendant acted in a proper and businesslike fashion in eliminating Plaintiff's position and demands attorneys' fees and costs necessary to the defense of this unnecessary action.

Respectfully submitted,

_____

Attorney for Defendant

UNITED STATES MAGISTRATE JUDGES
POWERS, DUTIES & PROCEDURES

Prepared By

Honorable Tullio Gene Leomporra

and

Honorable Charles B. Smith

United States Magistrate Judges

Eastern District of Pennsylvania

CONTINUING LEGAL EDUCATION
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

OUTLINE: THE MAGISTRATE JUDGE - (CIVIL)

HONORABLE CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

1. OFFICE OF THE MAGISTRATE JUDGE

A. Who is a Magistrate Judge?

A United States Magistrate Judge is a judicial officer of the United States District Court. The jurisdiction which the Magistrate Judge exercises is the jurisdiction of the District Court itself, delegated to the Magistrate Judge by the Judges of the District Court and by statute and rule.

See 28 U.S.C. §631-639, Federal Rules of Civil Procedure 72-76, Rule 7 of the U. S. District Court for Eastern District of Pennsylvania.

B. Appointment Tenure and Compensation-

1. A U.S.M.J. is appointed by the "concurrence of a majority of all the judges of such district court."

2. The selection is made pursuant to standards and procedures promulgated by the Judicial Conference of the United States and follows a public notice of all vacancies in magistrate judge positions and a screening by a merit selection panel appointed by the District Court.

3. A U.S.M.J. serves a term of 8 years and may, of course, be reappointed; the compensation paid is "92% of the salary a judge of the district court" receives.

2. CIVIL DUTIES OF MAGISTRATE JUDGE

A. TRIAL OF CIVIL CASES

1. Authority

A Magistrate Judge may conduct any proceedings, including a jury or non-jury

trial, and dispose of any civil case upon the consent of the parties. The Magistrate Judge sits in lieu of the District Judge on stipulation of the parties and on reference by the court. In such capacity the Magistrate Judge may exercise case-dispositive jurisdiction and order entry of final judgment. The Magistrate Judge must be certified and specially designated to exercise this authority.

2. Consent and References

The parties must consent voluntarily to the case dispositive jurisdiction of the Magistrate Judge. 28 U.S.C. § 636(c)(2). An order of reference normally is issued by the Court assigning the case for trial and disposition. See also 28 U.S.C. § 636(c)(6).

3. Why would one elect trial before a U. S. Magistrate Judge?

A District Judge's civil calendar is in many ways driven by his or her criminal calendar since the Speedy Trial Act requires a criminal defendant be tried within seventy (70) days. As a result, civil cases will be delayed, often at the last minute, because of a criminal trial. A U. S. Magistrate Judge can provide a date certain for trial and often provide a faster track.

4. JUDGMENT AND APPEAL - ALTERNATIVES

Appeals from the Magistrate Judge's case dispositive judgment may be made in two alternate routes:

a. To the Court of Appeals in the same manner as a case tried before a District Judge. 28 U.S.C. § 636(c)(3).

b. To the District Judge as an appeal judge. 28 U.S.C. § 636(c)(4).

The standard for review in either alternative is the "clearly erroneous" standard. The appeal to the District Judge is intended to be more expeditious and less expensive. A further appeal from the District Judge to the Court of Appeals is upon Petition for Leave to

Appeal. Appeal to the Supreme Court is retained. Selection of either alternative is made at the time of consent and on the same form.

B. "ADDITIONAL DUTIES" - 28 U.S.C. § 636(b)

A Magistrate Judge is assigned "additional duties" under four separate authorities, 28 U.S.C. § 636(b):

a. A Magistrate Judge may hear and determine any NON-DISPOSITIVE pretrial motion or matter. § 636(b)(1)(A).

These non-dispositive matters may include:
(1) General supervision of the civil calendar;

(2) Hearing and determining pretrial procedural and discovery motions and other matters not excepted in 28 U.S.C. § 636(B)(1)(A);
(3) Issuance of subpoenas, writs of habeas corpus ad testificandum or ad prosequendum, or other orders to produce parties, witnesses or evidence; and
(4) Conduct preliminary and final pretrial conferences, status calls and settlement conferences.

In all matters delegated above, the Magistrate Judge has the authority to "hear and determine." The Magistrate Judge's decision is final and binding and is subject only to a right of appeal to the district judge to whom the case was assigned. Under our Local Rule 7, the parties have 10 days to make this appeal. The standard of review is "clearly erroneous" or "contrary to law".

b. A Magistrate Judge may hear and recommend to a judge the determination of either categories of "DISPOSITIVE MOTIONS" and the determination of various prisoner cases. § 636(b)(1)(B) and (C).

"Notwithstanding any provision to the

contrary ... a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the dispositions, by a judge of the court, of any dispositive motion or prisoner petition."

Some of these motions include injunctive relief, to dismiss for failure to state a claim, involuntary dismissal, to permit or deny class actions, judgment on the pleadings or for summary judgment.

Some of these referrals include review of actions by administrative agencies. Examples, review of claims for benefits under the Social Security Act, "Black Lung" benefits, and related statutes. Also administrative awards on denial of licenses or privileges, federal retirement eligibility and various rights of federal employees.

c. Prisoner Cases

A Magistrate Judge may conduct hearings and submit a Report and Recommendation on "applications for post-trial relief made by individuals convicted of criminal offenses of prisoner petitions challenging conditions of confinement." 28 U.S.C. §636(b)(1)(B).

Prisoner petitions include:

a. Habeas corpus petitions filed by state prisoners under 28 U.S.C. §2254. The issuance of orders and writs is authorized. §636(b)(1)(A).

b. Habeas corpus petitions filed by federal prisoners under 28 U.S.C. § 2241, 28 U S.C. § 2255 or Rule 35 of F.R. Crim. P.

c. Suits by federal or state prisoners for the deprivation of civil rights arising out of conditions of confinement under 42 U.S.C. §1983. These cases are often

tried before a Magistrate by consent and referral. 28 U.S.C. §636(c).

In furtherance of his referral, the Magistrate Judge prepares a Report and Recommendation which is filed with the Court. The Report and Recommendation is his independent review of the matter referred. The report is mailed to the parties and they may file specific objections in writing to the report. The Judge must make a "de novo determination" of any matters which have been specifically objected to. The Judge must give "fresh consideration" to those issues to which specific objection has been made by a party, and he is not bound to adopt the findings and conclusions of the Magistrate Judge. He may modify, reject, recall witnesses, recommit or take whatever action is appropriate to review the matter.

d. A Magistrate Judge may be appointed by a Special Master under Rule 53 of the F.R. Civ. P. § 636(b)(2).

"A judge may designate a magistrate judge to serve as special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of Rule 33b of the Federal Rules of Civil Procedure for the United States District Courts."

These duties may include hearings on complicated damages or issues in jury cases, employment discrimination cases or under Title VII of the Civil Rights Act or 1964, whenever a judge cannot schedule trial, patent, antitrusts and other complex cases where a great many claims, documents, issues, may need closer supervision, assess damages on land condemnation cases or in admiralty cases, and other such matters.

e. A Magistrate Judge may be assigned "additional duties" not inconsistent with the Constitution and laws of the United States.

Under this section the District Courts are encouraged to "continue innovative experiments" in the assignment of duties. Some duties which have been delegated include: review of commitments under the Narcotic Addict Rehabilitation Act, conduct of voir dire, supervise letters rogatory, preside at naturalization ceremonies, forfeiture of collateral, and other duties.

JUDGE BARRY M. KURREN

U.S.D.C.
DISTRICT OF HAWAII

NOTICE OF RIGHT TO CONSENT TO TRIAL
BY A UNITED STATES MAGISTRATE JUDGE

As you may realize, the civil calendar is at the mercy of the criminal calendar, because of the constraints under the Speedy Trial Act, which in effect contains a 70-day "statute of limitations" which cannot be waived.

Many of you have found that your civil cases, although set for trial well in advance, get "bounced" - sometimes at the 11th hour - because of a criminal trial. This court is well aware of the hardship which so often is created upon parties and witnesses, not to mention the emotional strain on counsel. The hardship is of course quite pronounced in this district, because so many cases involve out-of-state witnesses, including experts.

Pursuant to 28 U.S.C. 636(C)(2), as amended in 1990, this is to advise you that the parties can consent to trial (Jury or Jury-waived) before a U. S. Magistrate Judge, and that by so doing, your scheduled trial date is almost certain not to change.

JUDGE BARRY M. KURREN

1. Can I still have a jury if I go to trial before a Magistrate Judge?

Yes, so long as a proper and timely jury demand has been made.

2. Can I force my opponent to consent to such a trial?

No. (Both) (All) must agree.

3. What is the procedure for appeal?

Any appeal will be via either of two ways:

A. Straight and ordinary appeal to the U. S. Court of Appeal; or

B. If (both) (all) parties agree when consent is given to trial before a U. S. Magistrate Judge, the appeal may be to a district judge (i.e., a one-judge appellate court). Cases in which an appeal is taken to a district judge may be reviewed by the U. S. Court of Appeals by way of a petition for leave to appeal.

4. As a practical matter, what's the difference between a trial before a Magistrate Judge versus a district judge?

A. Virtual certainty of trial date versus virtual uncertainty.

B. Title of the judge.

5. How do we exercise our consent?

Copies of the forms "Consent to Proceed Before a United States Magistrate Judge" and "Election of Appeal to a District Judge" are available in the Clerk's Office.

DISCOVERY --
MANAGEMENT & CONTROL

Prepared By

David H. Marion,

Nicholas E. Chimicles

and

William T. Hangley

DISCOVERY PROCEDURE UNDER THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

David H. Marion
Montgomery, McCracken, Walker & Rhoads
Philadelphia, Pennsylvania

I. Review of General Principles of Scope and Limits of Discovery - How Affected by New Plan:

A. Legitimate Objectives of Discovery: to narrow and clarify the basic issues between parties; to ascertain the facts, or information as to the existence or whereabouts of witnesses or facts pertinent to those issues. Hickman v. Taylor, 329 U.S. 495, 500-501 (1947). Fed. R. Civ. P. 26(b) intended to provide for mutual knowledge of all relevant facts while avoiding abuse through the devices provided in Fed. R. Civ. P. 26(a).

(1) General Rule: Parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter of the pending action.

(2) Limitations: Protective orders, pursuant to Fed. R. Civ. P. 26(c).

II. Discovery Sequence and Timing:

A. General Rule [Fed. R. Civ. P. 26(d)]: Absent a court order entered for particular reasons, methods of discovery may be used in any sequence. No fixed priority in the sequence or method of discovery; the parties are permitted to obtain discovery when and how they deem best. 48 F.R.D. at 506.

B. Timing Under the Civil Justice Expense and Delay Reduction Plan:

(1) Section 1.03: **Assignment to a Management Track:** The clerk of court will assign cases to the Habeas Corpus, Social Security, Arbitration and Asbestos tracks based on the initial pleading.

(2) Section 1.04: Cases assigned to the **Standard Track** shall be disposed of in accordance with the routine practices and procedures of the court.

*(3) Section 1.05: **Procedures for the Special Management Track:**

(a) Section 3.01: **Initial Pretrial Conference:** Scheduled by the assigned judge or magistrate within 30-60 days after the filing of the complaint. Prior to this conference, the parties shall confer and provide the court with a proposed case management plan.

(b) Section 3.02: **Second Pretrial Conference:** The primary purpose of this conference is to determine whether the case will settle. Prior to the conference, the parties shall submit to the court brief preconference statements that identify their claims and defenses with the evidentiary support obtained from discovery. The purpose of these statements is to enable the judicial officer conducting the conference to make an informed contribution to the settlement process.

If the case does not settle during the conference, the court shall, at or shortly after the conference, set firm trial and discovery cutoff dates and order the parties to submit a plan to prepare for the trial of the case.

(c) Section 3.03: **Subsequent Conferences:** The court may continue to hold conferences on a frequent basis to monitor discovery, allow continued opportunities to explore settlement, etc.

III. Case Management Plans for Cases on the Civil Justice Expense and Delay Reduction Plan's Special Management Track:

A. Section 7.01: **Development of a Joint Plan:**

In all cases designated to be administered on the Special Management Track, the parties shall convene prior to the first pretrial conference for the purpose of developing a Joint Discovery-Management Plan. Included among the topics that the parties shall include in the Joint Plan are:

(1) the identification of lead and liaison counsel and the description of the responsibilities of each;

(2) suggestions for maintaining confidentiality;

(3) a Plan setting forth a description of, and the sequence of, discovery to be had under relevant provisions of the Federal Rules of Civil Procedure;

(4) in class action cases, a proposed timetable for class issue discovery, briefing and hearing;

(5) a timetable for the filing and service of dispositive motions under Federal Rule of Civil Procedure 12 and/or Federal Rule of Civil Procedure 56;

(6) proposals relating to the addition of parties, bifurcation, and special needs concerning service of process; and

(7) subjects bearing upon the administration of the case, including consideration of the appointment of Special Masters to administer multi-track discovery, resolving initial discovery disputes, identifying a custodian of exhibits, and serving notices and court orders to multiple parties when necessary in consolidated cases.

B. Section 7.02: **Discovery to Proceed Simultaneously:**

It is contemplated that discovery in such a Plan will proceed simultaneously with the completion of other obligations of the parties under the Plan and the parties can only expect a stay of all or part of any discovery for the most extraordinary and compelling reasons.

IV. Expeditious and Simplified Discovery:

A. General Goal: Parties should attempt to agree on discovery deadlines and sequences of discovery with respect to issues, parties to be discovered and types of discovery (e.g., interrogatories, depositions) to be conducted.

B. Duty of Self-Executing Disclosure under the Civil Justice Expense and Delay Reduction Plan:

(1) Section 4.01:

(a) The Plan imposes new obligations on parties, without awaiting a discovery request, within thirty (30) days of the filing of an answer

to the Complaint, to provide information to all other parties in the action concerning (i) persons reasonably believed to have information that bears significantly on the claims and defenses, (ii) a general description, including location of all documents, etc., meeting the same criterion, and (iii) insurance coverages.

(b) A party who has made a disclosure is under a duty to supplement or correct its disclosures if the party obtains information on the basis of which it knows that the information disclosed was either incomplete or incorrect when made, or is no longer complete or true.

(c) Each disclosure or supplement by a represented party must be signed by at least one attorney of record. The signature will constitute a certification of various understandings required by the Federal Rules, and that the disclosure was complete as of the time it was made.

(2) Section 4.02: **Cooperative Discovery Devices**

Under this section, cooperative discovery arrangements in the interest of reducing delay and expense are encouraged, and the parties may, by stipulation, extend the scope of the obligation for self-executing discovery.

C. Debate about the Overall Impact of Self-Executing Disclosure:

1. How is it different from that previously required in RICO and class action cases?

2. Is it reducing the burdensome formalities of interrogatory practice endured by litigants and the courts?

3. How have the following concerns expressed by the Plan's Advisory Group played out in practice:

a. disclosure of harmful as well as helpful information

b. preclusion of objections as a result of the automatic nature of disclosure

c. problems which arise because parties, at the preliminary stage of litigation, have not identified documents or witnesses that "bear significantly" on their claims

4. Does it really reduce cost and delay?

5. Is "gamesmanship" reduced or increased?

a. Does summary, initial disclosure hasten the resolution of disputes and reduce costs?

b. Is there room for gamesmanship in disclosing or withholding crucial information in this phase of initial disclosure?

c. Are decisions about which witnesses and documents "bear significantly" on the claims and defenses of the case different from those decisions on routine discovery disclosures which were already a part of a lawyer's professional responsibility?

V. Trial Attorneys' Experience Under the Civil Justice Expense and Delay Reduction Plan

DISCOVERY ISSUES IN COMPLEX LITIGATION

IMPORTANCE OF DISCOVERY PLAN DEVELOPED ACCORDING TO CHARACTERISTICS OF INDIVIDUAL CASE CANNOT BE MINIMIZED

I. REQUESTS FOR PRODUCTION OF DOCUMENTS

A. Preparing Document Requests

1. Notice Fed. R. Civ. P. 30(b)(6) deposition of the record custodian to establish a "lay of the land" before proceeding with discovery. This deposition will provide information concerning how and where certain documents are kept and can be useful in identifying relevant documents and crafting tailored requests

2. Consult with an expert prior to formulating the document requests for help in identifying appropriate documents (e.g., using an accounting or financial expert early in discovery can help you focus your requests. The cost of the expert will be outweighed by the benefits derived in time savings). Use of such an expert is also helpful to formulate deposition questions

3. Consider carefully the significance of the definitional section of the request for documents. Boilerplate definitions tend to be overbroad and redundant and lead to boilerplate objections

B. Informal Resolution of Discovery Disputes Without Court Intervention

1. Refine discovery requests through consultation with opposing counsel

Advantages: Expedites discovery and avoids costly motion practice allowing for production of a core set of relevant documents in a more timely manner. Discovery occurs in stages in which allows requesting party to tailor and refine subsequent discovery requests

Disadvantages: Can alert opposing party to particular litigation strategy; requesting party may not obtain relevant documents which would have been produced if a broader document production was sought

2. Means To Informally Resolve Disputes Over Documents

a. Agree to request documents in stages requesting major categories of documents first, i.e., loan files, Board of Director minutes and use information retrieved from those documents as a guide in subsequent productions

b. Limit the scope of the request. Example: In a loan loss case set a value limit as a floor, e.g., all loans exceeding $1,000,000.00 that were placed on a watch list, were restructured, written off, classified, etc.

C. Use Of Computer Assisted Organization Of Documents

1. elpful in massive document cases to organize and cess relevant documents efficiently

2. iis sort of index, while a helpful tool, is only s effective as the persons inputting the data. It is never a substitute for familiarizing yourself with the documents

3. Different types of computerized indices can be used

a. Outside depository

b. In-house - software such as InMagic utilized

4. Possible need for document depository. Establish procedure for access, cost sharing and retrieval

II. INTERROGATORIES

A. Often more useful after initial document production as they can be more narrowly constructed to follow-up on information obtained as a result of the initial review of documents produced (e.g., identifications of the persons whose handwriting is on a document) and may thereafter provide the basis for a second round of document requests or depositions

B. Contention Interrogatories.

1. Appropriate at the conclusion of or after a substantial amount of discovery has been conducted

2. Generally propounded to ascertain the legal basis or theory behind adversaries pleadings

3. Fisher and Porter Co. v. Tolson, [Current] Sec. L. Rep. (CCH) ¶ 96,976 at 94,198 (E.D. Pa. August 13, 1992) (citing Convergent Tech. Sec. Litig., 108 F.R.D. 328, 338 (N.D. Cal. 1985)), discusses the

appropriate timing of contention interrogatories

III. DEPOSITIONS

A. Court has discretion to limit the number of depositions each side can take and the length of time of each deposition. This procedure recently has seen increasing judicial use

Advantages: Curtails unnecessary depositions and forces the parties to focus on who is really important to depose

Disadvantages: Number is often arbitrarily set and the parties must go back to the judge if they believe it is necessary to exceed the limit. Also, a party reveals litigation strategy by early designation of a limited number of deponents

B. Requiring predesignation of deposition exhibits is another means courts have of attempting to streamline the discovery process

Advantages: Expedites deposition process and avoids disputes over documents during the deposition

Disadvantages: Adversary knows strategy to be pursued at deposition. Often parties will designate many more documents than necessary in order to "hide the ball"

IV. COMMUNICATIONS WITH THE COURT

A. Discovery Plan

1. Development of a discovery plan is increasingly required by courts in complex litigation. Be realistic; do not hand-cuff yourself in your eagerness to be compliant, but do not expect to be given carte blanche. Be prepared to justify the discovery you want

2. Even if the Court does not require a discovery plan, you should prepare one yourself. Use experts early in the process to assist in preparing a well-focused plan

B. Establish procedures at inception of case to handle disputes

1. Use of pretrial orders - consider appointment of magistrate to handle day-to-day issues

2. Schedule of periodic status conferences, preferably by telephone, to discuss discovery

3. Handle deposition question disputes without resorting to motion practice. Either handle by telephone or prompt visit with Court

DISCOVERY DISPUTES

by William T. Hangley

A. Overview

Basically, discovery disputes in the federal court are resolved under the procedures contained in Rule 37, Fed. R. Civ. P., and, with respect to protective orders, Rule 26. Procedures specific to discovery motions are contained in Local Rule 24. Like every aspect of civil litigation in the Eastern District of Pennsylvania, the procedures involved in resolving discovery disputes will also be affected by the Eastern District Civil Expense and Delay Reduction Plan (the "Plan"), which was adopted pursuant to the Civil Justice Reform Act of 1990 and became effective December 31, 1991. The Plan calls for "self-executing disclosure" early in the case, and postpones traditional discovery until the self-executing disclosure has occurred. Plan § 4:01(b)

The Plan's self-executing disclosure procedures do not specifically incorporate the general concepts or procedures contained in Rules 26 and 37; yet it seems axiomatic that the Court will apply those concepts and procedures in resolving disputes relating to self-executing discovery, either directly or by analogy under the aegis of its general powers.

B. Introductory Sermonette on Discovery Motion Practice

Discovery in general, and discovery disputation in particular, are under attack for their part in causing expense, delay, court gridlock and client alienation. Overburdened district judges do not take kindly to dealing with discovery

disputes unless they are shown (i) that the discovery is worth fighting about, (ii) that every effort has been brought to bear to resolve the dispute informally before commencing motion practice, and (iii) that the movant's hands are clean.[1] Experienced counsel have an ample supply of horror stories about cases in which both counsel were taken to task by the judge for their inability to resolve discovery disputes. (In these stories, the narrator's position was always eminently reasonable, the other side's position was untenable and the judge didn't listen.)

Rule 26 allows the discovery of all information that is calculated to lead to the discovery of admissible evidence -- no more, no less. Interrogatories are not an occasion for sending the other guy to the Augean Stable, and responding to interrogatories should not be an exercise in making up abstruse objections or the creative misinterpretation of straightforward questions. A kitchen sink interrogatory or a Three Card Monte

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[1] See, e.g., Autofacts, Inc. v. Price Books and Forms, Inc., 1992 U.S. Dist. LEXIS 8023 (E.D. Pa. June 2, 1992):

> It is painfully apparent that counsel for both plaintiff and defendant are properly chargeable with egregious discovery abuses -- plaintiff by overly broad, hopelessly complex and repetitious discovery requests, and motions which violate Local Rule 24 in various respects; defense counsel by unduly prolonging depositions with silly objections and instructions not to answer, and with constant attempts to coach her witnesses. Trial is scheduled to commence on June 8, 1992. In my view, both sides have forfeited their right to obtain the assistance of the court for any further discovery, except as follows: . . .

answer will have little appeal to a trial judge who has put other important work aside to deal with your case.

Therefore, counsel on both sides should think long and hard before bringing or forcing any discovery dispute to court: Does obtaining or withholding the information justify the delay? Will it justify the cost of prosecuting or defending the motion? Will you or your client get off on the wrong foot with the district judge when she sees your pettifoggery up close? What happens to the bond between attorney and client if one or both of you is ordered to pay the other side's counsel fees associated with the discovery dispute? This is not to say that discovery disputes do not sometimes have to be brought to court. But if you do so, make sure that your justification for seeking or withholding the information is clear.

C. **General Discovery Dispute Procedure**

The rules establish a series of steps to be taken when a discovery disagreement arises.

1. ***First step:*** The attorneys themselves must try to resolve the dispute by informal agreement. Local Rule 24. Judges will not hesitate to dismiss a discovery motion that does not carry the required certificate of compliance or otherwise fails to comply with Local Rule 24(f). See Crown Cork & Seal Co. v. Chemed Corp., 101 F.R.D. 105 (E.D. Pa. 1984) (dismissal of motion where Local Rule 24(f) certification showed inadequate efforts to resolve dispute); BML Group, Inc. v. U.S. Pizza, Inc., 1992 U.S. Dist. LEXIS 6476 (E.D. Pa. April 30, 1992) (dismissing motion for failure to

provide details of the disputed discovery as required by Local Rule 24(b)). Compliance with Rule 24(f) should not be perfunctory; counsel must make a serious effort to resolve the dispute. Both parties should be prepared to engaged in some discovery "horse trading" in order to avoid expensive further steps.

Pointer: *This is as good a place as any to point out a couple of discovery protocols that should always be agreed upon. The current, irritating vogue in answering interrogatories and requests is (i) to begin with several pages of canned general objections (just in case any of them happens to be on target) and (ii) to object to almost every question, but also provide answers "without waiving these objections." Remember that, technically, an objection excuses a party from answering until the objection is disposed of. Therefore, you have less certainty that your opponent's answer is complete, and she can always argue that she withheld information in reliance on the stated objection. The solution is to obtain -- before discovery, in the discovery plan or in the Local Rule 24 dialogue -- a written understanding that each answer given will be complete (as if no objection had been made) except to the extent specifically stated in that answer. Counsel should also ascertain that, even though there is a general "privilege" objection (and there invariably will be one in the general objections), the privilege will be specifically invoked when it is applicable to a particular question, and*

the required information with respect to what is being withheld on grounds of privilege will be supplied.

2. ***Stipulations:*** If a dispute is resolved by a written stipulation, the stipulation should be filed with the court. Local Rule 17(b)(1).

3. ***Second step:*** If negotiations fail to resolve the dispute, the next step is to seek the assistance of the court by filing either a motion to compel discovery pursuant to Rule 37(a), or a motion for a protective order pursuant to Rule 26(c). Under Local Rule 24(b) and (c), the specific discovery in dispute must be explicitly quoted in the motion papers. Expenses and attorney's fees may be awarded to the prevailing party if the losing party cannot show that it was "substantially justified in making or opposing the motion or that other circumstances make an award of expenses unjust." Rule 37(a)(4).

Pointer: Although the Rule, by its terms, requires an award of counsel fees unless the losing party carries its burden of "substantial justification,"[2] awards of counsel fees incurred in prosecuting or opposing "first stage" Rule 37(a) discovery motions are rare. This appears to be the result of (i) a reluctance to impose a sanction after the

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[2] Rule 37(a)(4):

> [T]the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay . . . .

"first bite," (ii) an unwillingness by overburdened judges to hold a separate hearing to determine whether the inappropriate discovery behavior was "substantially justified" and determine a fee award, if any, and (iii) the fact that rulings frequently involve victories and losses for both sides.

But as busy judges have become less tolerant of discovery abuses in recent years, there appears to have been an increase in the frequency of fee awards associated with Rule 37(a) motions. Cf., e.g., Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 1992 U.S. Dist. LEXIS 4737 (E.D. Pa. April 10, 1992) (awarding fees of $7,000 incurred in connection with Rule 37(a) motion). In preparing or opposing a motion under Rule 37(a) or (b), you should include a request for an award of counsel fees and expenses.[3] If you think your opponent is likely to be able to resist the award based on the "substantial justification" test, perhaps you should go back to the Local Rule 24(f) drawing board.

The Court may assign your motion, or all discovery disputes in the case, to a magistrate judge. She may also introduce still further procedures in an attempt to resolve the discovery disputes without taking the Court's time. In Yeager's Fuel, for example, the Court ordered the parties

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[3] The sample motion package attached as an appendix includes a form of order which contemplates a fee award. See Yeager's Fuel for the detail required in fee award submissions.

"to meet face-to-face at 9:00 a.m. on the morning of the hearing" to attempt to resolve their differences.

4. ***Third step:*** If a party fails to comply with a court discovery order, a broad range of sanctions -- from the award of expenses to the striking of claims or defenses to the entry of judgment -- may be imposed pursuant to Rule 37(b)(2). However, the punishment must fit the crime. Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3d Cir. 1984).[4] Because the Rule 37(b) motion is a separate motion and a new discovery dispute, Local Rule 24(f)'s requirement of an attempt to resolve the dispute informally is triggered a second time, and must be followed before the motion can be filed.

5. ***Exceptions:*** There are some exceptions to the two-step Rule 37(a)/37(b) process. See Rule 37(d) (sanctions for failure of a party to attend his own deposition, to respond to interrogatories, or to respond to a request for inspection; Rule 37(c) (sanctions for an unjustified failure to make admissions pursuant to Rule 36).

6. ***Self-Executing Discovery:*** With respect to self-executing discovery under the Plan, the need to go through the Rule 37(a) process before invoking the Rule 37(b) process would seem to depend on the particular dispute. If

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[4] Dicta in a recent Third Circuit decision, Mindek v. Rigatti, 964 F.2d 1369, 1374-75 (3d Cir. 1992), (not a discovery case) hint courts will be quicker to impose or approve strong sanctions for dilatory or uncooperative conduct after the enactment of the Civil Justice Reform Act of 1990.

a party has simply failed to produce some information or documents which counsel considers appropriate within the meaning of Plan § 4:01(a), or has failed to supplement disclosure, a Rule 37(a) motion would seem to be called for. But if a party has flouted the self-executing discovery process despite counsel's requests for compliance, direct access to a Rule 37(b) motion would seem appropriate. Thus far, we have found no decisions on the point.

D. Specifics of the Procedures

1. Rule 37(a): Motion For An Order Compelling Discovery

a. *Appropriate court: Rule 37(a)(1).* Generally, the court where the action is pending. But motions directed to a non-party deponent must be brought in the forum where she is being deposed, and motions involving a party's deposition can be brought in either the trial forum or the deposition forum.

b. *Applicability: Rule 37(a)(2).* Rule 37(a) is applicable to depositions, interrogatories, and requests for inspection, where the party served has failed to respond completely. Note that it does not apply to Requests for Admissions under Rule 36.

c. *"Evasive or incomplete answers": Rule 37(a)(3),* are treated as a failure to answer.

d. *Protective Orders: Rules 26(c), 37(a)(2).* If the court denies the motion to compel, in whole or in part, a protective order may be issued.

e. *Disputes during depositions: Rules 30(d) and 37(a)(2).* When taking a deposition, the proponent of a question may complete or adjourn the examination before applying for an order compelling an answer. The deponent may suspend the deposition while seeking a protective order.

Pointers: One approach is to suspend the deposition and telephone the assigned judge, the E.D. Pa. emergency judge or the emergency judge in the remote deposition forum for a ruling on an instruction not to answer a question, a ruling on harassing tactics by the examining attorney or a ruling on the interfering conduct of the deponent's counsel. Be sure to have the appropriate telephone numbers at hand. Many judges will resolve such disagreements by telephone, provided you pick your issue carefully and argue your point succinctly. Have the court reporter mark the offending conduct in the transcript so that it can be read to the judge when you speak with her.[5] *Doing this just once, early in the discovery, can have a salubrious effect on all the remaining discovery. Overdoing it, or doing it without justification, can be disastrous.*

Another approach (particularly when the dispute is a complicated one) is to adjourn the deposition for the day and file a formal motion. Obviously, this costs more in time and money. In the one situation in which this author decided that was appropriate, it resulted in an order to answer the questions

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[5] When you know you are approaching meltdown at a deposition, insist that the colloquy between counsel be placed on the record, even though your adversary will undoubtedly be saying "Off the record! Off the record!"

without interference by deponent's counsel, an award of counsel fees and a requirement that the deponent make a second trip to Philadelphia. Once again, the effect on the remaining depositions was salubrious.

Rule 30(c) provides that testimony will be taken in depositions despite objections, but witnesses are regularly instructed not to answer questions at depositions. Whether this is proper depends on the particular question. For example, a request for privileged information certainly need not be complied with, and some lines of questioning are so far afield, so needlessly invasive or so redundant that instructions are likely to be upheld by the Court. See Lapenna v. Upjohn Co., 110 F.R.D 15, 19-20 (E.D. Pa. 1986) (applying a flexible test to instructions not to answer irrelevant or overly broad questions during the taking of a deposition). Compare In Re Asbestos School Litigation, 1988 U.S. Dist. LEXIS 13131 (E.D. Pa. November 2, 1988) (Questions must be answered even though they were held irrelevant with respect to earlier depositions).

2. **Sanctions for Failure to Make Discovery: Rule 37(d).**

Where a party does not respond **at all** to the discovery requests, sanctions may be imposed without first obtaining an order compelling discovery. Rule 37(d). This means, inter alia, that a party who does not wish to appear for deposition, cannot put the burden on the other side to obtain an order. She must seek **and obtain** a protective order. Local Rule 24 does not require a brief for movant in this situation.

3. **Motion For A Protective Order Pursuant To Rule 26(c).**

a. Grounds: "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including [eight specific grounds for a protective order]."

b. Good cause must be shown by party/ person seeking protection.

c. Rule 37(a) (4) "Award of Expenses of Motion" applies to motions for protective orders.

Pointers: A motion for a protective order is not a protective order. Unless the protective order is granted, the party is obligated to go forward with the discovery. Crossley v. Iroquois Foundry Co., 1992 U.S. Dist LEXIS 7368 (E.D. Pa. May 19, 1992); Hydramar, Inc. v. General Dynamics Corp., 115 F.R.D. 147, 153 (E.D. Pa. 1986). Advisory Committee Notes to 1970 Amendments to Rule 37.

In practice, parties sometimes refuse, e.g., to appear for a deposition because a protective order motion is pending. This is improper, but the Court rarely if ever awards sanctions when the protective order motion is denied, so long as the resisting party had an arguable theory upon which to rely. See, e.g., Crossley v. Iroquois Foundry Co., 1992 U.S. Dist LEXIS 7368 (E.D. Pa. May 19, 1992); Hydramar, Inc. v. General Dynamics Corp., 115 F.R.D. 147, 153 (E.D. Pa. 1986). A dramatically different situation arises with respect to Rule 36 Requests for Admissions, where facts and the application of law to facts are

admitted if the Request is not timely answered or objected to. A lawyer who places reliance on a pending motion for protective order, and lets the 30-day Rule 36 period elapse, has a ***big*** *problem.*

4. **Failure To Comply With A Discovery Order: Rule 37(b) Sanctions.**

a. The only sanction available from the court in the district where the deposition is to be taken is contempt of court. Rule 37(b)(1).

b. Sanctions available from the court where the case is pending include but are not limited to:

- treating designated facts as having been established, Rule 37(b)(2)(A);

- refusing to allow the disobedient party to support or oppose designated claims or defenses, Rule 37(b)(2)(B);

- prohibiting the disobedient party from introducing designated matters in evidence, Rule 37(b)(2)(B);

- striking out pleadings, staying further proceedings, or dismissing the action. Rule 37(b)(2)(C); Poulis v. State Farm fire and Casualty Co., 747 F.2d 863 (3d Cir. 1984); Scarborough v. Eubanks, 747 F.2d 871 (3d Cir. 1984);

  contempt of court except for failure to obey an order to submit to a physical or mental examination. Rule 37(b)(2)(D).

c. Expenses and attorney's fees are to be imposed on the party and/or the party's attorney, unless the court finds that the failure to comply with the order vas substantially justified or other circumstances make such an award unjust. Rule 37(b). As a practical matter, the award of fees is far more

likely when a party has disregarded or misinterpreted a Court order.

5. **Failure to Admit. Rule 37(c).**

a. If a party unjustifiably fails to admit the truthfulness of any matter or the genuineness of any document under Rule 36, which is later proven to be truthful/genuine, sanctions can be imposed. See Advisory Committee Note to Rule 37(c): "Rule 37(c) is intended to provide post-trial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial."

6. **Other Sanctionable Conduct.**

a. Rule 37(d): Expenses and attorney's fees may be imposed if a party fails to attend its own deposition, serve answers to interrogatories or respond to a request for inspection.

b. Rule 37(a): For failure to participate in good faith in the framing of the discovery plan, expenses and attorney's fees may be imposed.

7. **Forms**

Attached as an appendix to this outline is a sample discovery motion package which contains:

a. a form of order (Local Rule 20(a)); Hansen v. Shearson/American Express. Inc., 97 F.R.D. 465 (E.D. Pa. 1983) (Pollak, J.);

(b) a motion;

(c) a memorandum of law (Local Rule 20(c));

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLAINTIFF,	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
	:	
v.	:	
	:	
DEFENDANT,	:	NO._____
	:	
Defendant	:	

BRIEF IN SUPPORT OF THE MOTION OF DEFENDANT
FOR AN ORDER COMPELLING PLAINTIFF TO MAKE DISCOVERY

I. INTRODUCTORY STATEMENT

[Local Rule 20(c) provides that every motion not certified as uncontested shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion.]

II. LEGAL DISCUSSION

III. CONCLUSION

For all the above reasons, the Motion of defendant _____ for an Order Compelling Plaintiff to Make Discovery should be granted.

_____
Attorney's name
Attorney's firm's name
Address
Phone number

DATED: Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on _____, I served a true copy of the Motion of Defendant for an Order Compelling Plaintiff to Make Discovery, the Certification of Counsel pursuant to Local Rule 24(f), and the accompanying Brief and proposed Order on the following persons by United States Mail, First Class postage paid:

Attorney for Plaintiff
Address

_____
Attorney's Name

Attorney for Defendant

MOTION PRACTICE

AND

INTERLOCUTORY APPEALS

Prepared By

CHARLES B. BURR, II*

*The author wishes to thank Ann Cairns, Esquire of the Pennsylvania Bar, for her invaluable assistance in the preparation of this article.

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I. MOTION PRACTICE

A. Professional Conduct in Motion Practice

Initially, every conscientious attorney must recognize that there are primarily three federal rules authorizing the imposition of sanctions in the federal courts:

(1) Rule 11

Every motion of a party represented by counsel must be signed by an attorney of record. The signature of an attorney constitutes a certificate by him that he has read the motion, that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The standard is not one of good faith but rather one of reasonableness under the circumstances. Business Guides, Inc. v. Chromatic Communications Enter., Inc. ___U.S.___, 111 S. Ct. 922, 933 (1991); Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277 (3d Cir. 1991).

Failure to sign a motion will result in it being stricken unless it is promptly signed after the omission is brought to counsel's attention. If a motion is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. Sanctions may include an order to pay to the other party(s) the amount of the reasonable expenses incurred

because of the filing of the motion, including a reasonable attorney's fee.

(2) 28 U.S.C. §1927

Any attorney admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

(3) Local Rules 19(b) and (c)

Local Rules 19(b) and (c) provide that an attorney may be disciplined, as the court deems just, for failing to appear, without just cause, when his case is before the court on a call, motion, pretrial or trial; for presenting vexatious motions or vexatious opposition to motions; for failing to prepare for presentation to the court; or for otherwise multiplying the proceedings in a case so as to unreasonably and vexatiously increase the costs.

B. Eastern District Local Rules Relating to Motions

It is imperative that you consult the local rules of the court before which you are practicing. A summary of the local rules, in this District, as they relate to motion practice, is set forth below.

(1) Local Rule 20

Motion practice in the Eastern District is governed by Local Rule 20 which specifies the papers that should accompany a motion: (a) a form of order granting, denying or amending the

relief sought by the motion [(Rule 20(a)]; (b) if the motion is uncontested, a certificate of counsel stating such must accompany the motion [(Rule 20(b)]; (c) if, however, the motion is not certified as uncontested, a brief in support of the motion containing a statement of the legal contentions and authorities relied upon must accompany it. A party opposing the motion must serve a brief in opposition, together with such answer or other response as may be appropriate, within 10 days after service of the motion and supporting brief. The parties may agree upon a different schedule and set forth their agreement in the motion or the court may direct otherwise. If the opposing party fails to respond in a timely manner, the motion may be treated as uncontested [(Rule 20(c)]; (d) if a motion is not certified as uncontested, it must be accompanied by a written statement as to the date and manner of service of the motion and supporting brief [Rule 20(d)]; (e) as to post-trial motions, the movant must either order a transcript of the trial or file a verified motion showing good cause to be excused from this requirement within 10 days after filing any post-trial motion. If this procedure is not followed, the post-trial motion must be dismissed for lack of prosecution [Rule 20(e)].

Any interested party may request oral argument on a motion. The court may require oral argument whether or not requested by a party. The court may also dispose of a motion without oral argument. [(Rule 20(f)]. Motions for reconsideration or re-argument must be served within 10 days after the entry of the judgment, order or decree concerned. [Rule 20(g)].

(2) Local Rule 22(a)

Local Rule 22(a) governs the timing of a motion to join a third party. That rule provides that "Applications pursuant to F.R. Civ. P. 14 for leave to join additional parties after the expiration of the time limits specified in that rule will ordinarily be denied as untimely unless filed not more than ninety (90) days after the service of the moving party's answer..." A brief extension of time may be granted by the court in the interests of justice if it appears that the party sought to be joined, or the basis for joinder, could not, with reasonable diligence, have been ascertained within the stated time period.

(3) Local Rule 24

Local Rule 24 governs discovery motions. Every motion governing discovery must identify and set forth, verbatim, the relevant parts of the discovery at issue. Likewise, the responding party must set forth, verbatim, in that party's memorandum any other part believed necessary to the court's consideration of the motion [Rule 24(b)]. If material in interrogatories, requests, answers, responses, or depositions is used as evidence in connection with any motion, a verbatim account of the relevant parts must be set forth in the moving papers or in responding memoranda. If it is used as evidence at trial, the offering party must read it into the record or, if the court directs, offer it as an exhibit [Rule 24(c)]. Every motion regarding discovery must contain a certification of counsel that "the parties, after reasonable effort, are unable to resolve the

dispute." [Rule 24(f)]. Finally, a routine motion to compel answers to interrogatories or to compel compliance with a request for production, wherein it is averred that no response or objection has been timely served, need have no accompanying brief and need have no copies of the interrogatories or request for production attached. The court may summarily grant or deny such motion without waiting for a response [Rule 24(g)].

(4) Local Rule 27(c)

Rule 27(c) concerns class action motions. That rule provides that within 90 days after the filing of a complaint in a class action, unless the period is extended on motion of good cause appearing, the plaintiff shall move for a determination as to whether the case is to be maintained as a class action. In ruling upon a motion, the court may allow the action to be so maintained, may disallow and strike the class action allegations or may order postponement of the determination. Where it is held that the determination should be postponed, the court will set a date for renewal of the motion.

C. Role and Purpose of Motions

A motion may be thought of as a request for the court to act. Every application to the court for entry of any kind of order should be made by motion. F.R. Civ. P. 7(b). Representative examples of such motions are:

1. Motions to certify a class, pursuant to F.R.Civ. P. 23.
2. Motions related to the discovery process pursuant to F.R. Civ. P. 26, 29, 30, 33, 34, 35 and 37.

3. Motions to dismiss a complaint pursuant to F.R.Civ. P. 12(b).
4. Motions for intervention in the proceedings pursuant to F.R.Civ. P. 24.
5. Motions for preliminary injunctions and temporary restraining orders pursuant to F.R. Civ. P. 65.
6. Motions to bifurcate the trial pursuant to F.R.Civ. P. 42(b)
7. Motions for summary judgment pursuant to F.R.Civ. P. 56.
8. Post-trial motions pursuant to F.R.Civ. P. 59, 60 and 62.

D. Contents and Form of Motions

Federal Rule of Civil Procedure 7(b)(1) specifies that a motion must be in writing, must state with particularity the grounds therefor and must state the relief or order requested. Counsel should make averments of fact, in numbered paragraphs, similar to pleadings in a complaint. This format is implied by Local Rule 20(c) which states that opposition to motion shall be by "answer or other response as may be appropriate", in addition to an opposing brief.

(1) Contents of Motions:

(a) Proposed form of order to be entered by the court if the motion is granted. [See Local Rule 20(a)].

(b) Motion, including affidavits and exhibits.

(c) Memorandum of law setting forth the legal contentions and authorities relied upon for the motion. [See Local Rule 20(c)].

(d) Request for oral argument, if desired. [See Local Rule 20(f)].

(e) Certificate of Service showing the date and manner of service of the motion, [See F.R. Civ. P. 5(b)], and the form of certificate of service. [See Local Rule 20(d)]. (See also F.R.Civ. P. 6(d) which requires that a written motion, any supporting affidavits, and notice of the motion and hearing be served on every party at least 5 days before the hearing date unless the federal rules or a court order alters the time requirement.)

(f) If no other party contests the motion, a certificate to this effect. [See Local Rule 20(b)].

(2) Contents of Answer or Response

The Answer or Response by the party opposing the motion must be made within 10 days after service of the motion. See Local Rule 20. Add 3 days if service is by mail. F.R. Civ. P. 6(e) and Local Rule 20(c). The Answer or Response should meet both the form as well as the substance of the motion and should include:

(a) Proposed form of order denying the relief sought in the motion.

(b) An answer or response, including exhibits or affidavits.

(c) Request for oral argument, if desired.

(d) Memorandum of law, setting forth legal contentions and authorities relied upon.

(e) Certificate of Service.

(3) Reply

While the federal and local rules do not specifically provide for a reply, it is common practice in this District for the movant to file a reply brief. Reply briefs should not rehash the arguments set forth in the motion. Instead, a reply brief should specifically address the opposition to the motion and expose the weaknesses in the opponent's argument.

E. Timing of Motions

The sequence and timing of motions is determined by the progress of the action. Certain motions, however, must be brought within a specified time. These latter motions include:

1. Generally, no written motion is to be made later than 5 days before the date set for hearing. F.R.Civ.P. 6(d).

2. Any motion for reconsideration or reargument respecting any order must be made within 10 days after entry of the order. Local Rule 20(g).

3. Motion to certify a class pursuant to F.R.Civ. P. 23 must be within 90 days after filing the complaint. Local Rule 27(c).

4. Motion under F.R.Civ.P. 12(b) to dismiss a claim for relief in any pleading for (1) lack of subject matter jurisdiction;

(2) lack of personal jurisdiction; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief may be granted; or (7) failure to join a necessary or indispensable party under F.R.Civ.P. 19 must be made within 20 days after service of the pleading, and before a responsive pleading has been filed. F.R.Civ.P. 12(a),(b), (g). However, (6) and (7) may be made by motion for judgment on the pleadings before trial, or by motion during trial. F.R.Civ.P.12 (h)(2). Because federal courts cannot waive subject matter jurisdiction, (1) above may be raised at any time, including after entry of judgment or even after appeal.

5. Motion under F.R.Civ.P. 14 by a third party plaintiff (a defendant who sues a non-party that may be liable to him for all or part of plaintiff's claim) for leave to serve a third-party complaint: no motion will ordinarily be entertained if defendant waits more than 90 days after serving his original answer. Local Rule 22(a).

6. Motion for a more definite statement or to strike a pleading: within 20 days after service of the pleading to which it is directed, and before a responsive pleading. F.R.Civ.P. 12(e) and (f).

7. Motion for judgment on the pleadings: after the pleadings are closed, but within such time as not to delay the trial. F.R.Civ.P. 12(c).

8. Motion by plaintiff for summary judgment: any time after 20 days from commencement of action, or after opposing party

has served motion for summary judgment. F.R.Civ.P. 56(a). Motion must be made at least 10 days before date fixed for hearing. F.R.Civ.P. 56(c).

9. Motion for summary judgment by defendant: any time after commencement of action, and at least 10 days before date set for hearing. F.R.Civ.P. 56(b) and (c).

10. A 12(b)(6) motion to dismiss for failure to state a claim which is being converted to a Rule 56 summary judgment motion pursuant to F.R.Civ.P. 12(b) can only be done so on 10 days notice in advance of hearing. Crown Central Petroleum Corp. v. Waldman, 634 F.2d 127, 129 (3d Cir. 1980).

11. Motion by defendant to dismiss plaintiff's case in non-jury actions under F.R.Civ.P. 41(b): after close of plaintiff's evidence at trial.

12. Motion by plaintiff or defendant for judgment as a matter of law, (formerly called a motion for directed verdict): at the close of evidence offered by opponent, or at the close of the entire case. F.R.Civ.P. 50(a).

13. Motion for judgment as a matter of law made at the close of all the evidence (formerly called a motion for judgment n.o.v.) by a party who has previously moved for judgment as a matter of law: within 10 days after entry of judgment. F.R.Civ.P. 50(b).

14. Motion for new trial: within 10 days after entry of judgment. F.R.Civ.P. 59(b) and (d).

15. Motion for relief from judgment due to mistake, newly

discovered evidence, fraud, misrepresentation of adversary: within one year after judgment is entered. F.R.Civ.P. 60(b). Other grounds for relief, including that judgment is void, or has been satisfied, must be made "within reasonable time."

F. Oral Argument of Motions

In this District, the movant serves the motion and the opposing party serves an Answer or Response in opposition within 10 days, unless a different schedule is agreed to by the court. [See Local Rule 20(c)]. If oral argument is requested and granted, each judge to whom the case is assigned when the complaint is filed sets a hearing on each motion on an individual basis.

G. Specific Example: Motion For Summary Judgment

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. An issue is "genuine" only if a reasonable jury, considering the evidence presented, could find for the non-moving party. Childers v. Joseph, 842 F.2d 689, 693-94 (3d Cir. 1988). The advantage of summary judgment is that it can provide a faster and cheaper means of resolving a dispute than a full blown trial. Furthermore, no issue is immune to summary judgment. A motion for summary judgment can be made as to any "claim" in a case, including third party complaints, counterclaims, cross-claims, intervention and interpleader. When a motion for summary judgment is granted, the motion results in a final judgment on the merits of the claim and is subject to the rules of res judicata, collateral estoppel and appealability. When a motion is

denied, no prejudice results, but a party is precluded from bringing a second motion for summary judgment on the same legal theory without offering new facts.

(1) Rule 56(a)

Rule 56(a) specifies the time in which the claimant can make a motion for summary judgment:

> (a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

The purpose of waiting 20 days is to allow the defendant time to obtain counsel and to determine a course of action. Filing a summary judgment prior to the expiration of the 20 day time period (unless the adverse party has served a summary judgment motion) will be deemed premature. Generally, a party should wait until the initial discovery is completed so enough information can be gathered to support the motion. A premature motion will probably result in denial or postponement to allow the opposing party a reasonable opportunity to show that a genuine issue of any material fact exists. In addition, a premature motion for summary judgment can be disadvantageous in that it offers the opposing side a detailed look at the facts and legal theories used to support the motion. On the other hand, a summary judgment motion made too close to trial may be denied because the trial date is imminent.

(2) Rule 56(b)

A party against whom a claim, counterclaim or cross-claim is asserted, or a declaratory judgment is sought, may move for summary judgment at any time. Rule 56(b) provides:

> (b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

The motion may even be made prior to the time the defendant responds to the complaint. Hubicki v. ACF Indus., Inc., 484 F.2d 519 (3d Cir. 1973). However, the same considerations discussed above for timing the motion apply to the defending party as well as the movant.

(3) Rule 56(c)

Rule 56(c) provides the standard for granting or denying summary judgment:

> (c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

The rule seems to indicate that the court has no discretion to grant a summary judgment motion when there is no genuine issue of material fact. However, in practice, the court,

exercising discretion, may deny the motion despite the movant's showing of no genuine issue of material fact in order to permit a decision to be made on a more complete factual record. Warner-Lambert Pharmaceutical Co. v. Sylk, 320 F. Supp. 1074 (E.D. Pa. 1970), aff'd, 471 F.2d 1137 (3d Cir. 1972).

In ruling on a motion for summary judgment, the court must determine whether there is any genuine issue as to any material fact. It is not the function of the court to weigh the evidence. Schillachi v. Flying Dutchman Motorcycle Club, 751 F.Supp. 1169 (E.D. Pa. 1990). The court is required to view the evidence in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences therefrom. All reasonable doubts regarding the existence of a genuine issue of material fact must be resolved in favor of the party opposing the motion. In re Asbestos School Litigation, 768 F.Supp. 146 (E.D. Pa. 1991).

The United States Supreme Court has rejected the notion that the moving party must always support the motion with affidavits showing the absence of a genuine dispute over a material fact. In affirming the district court's grant of summary judgment for defendants in an asbestos products liability case, the Court in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), held that under Rule 56(c), after adequate time for discovery had passed, summary judgment was mandated against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case.

Rule 56(c) lists the documents that may be used by the court in deciding a motion for summary judgment. Relevant portions of the record upon which the movant relies must be attached to the motion as exhibits. If the moving party wishes to rely on a document that is not yet part of the record, the document must be referred to in an affidavit and attached thereto as an exhibit. The affidavit must establish the admissibility of the exhibit at trial. An inadmissible document must be promptly objected to or the court will consider it in deciding the motion.

Finally, although Rule 56(c) does not explicitly make a formal hearing mandatory, the general rule is that federal courts will hold a hearing or oral argument before deciding the motion. See Castle v. Cohen, 840 F.2d 173 (3d Cir. 1988), later proceeding (E.D. Pa.) 1988 U.S. Dist. LEXIS 3995 (where trial court was found to have erred in granting motion to dismiss counterclaim based on RICO Statute, which the court considered as one for summary judgment under Rule 56, since court should have given parties benefit of notice and hearing so they could resist motion).

(4) Rule 56(d)

Rule 56(d) provides for "partial summary judgment":

> (d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Pursuant to Rule 56(d), if the court does not make a full adjudication on a motion for summary judgment, it is required, to the extent practicable, to determine what material facts are substantially uncontroverted and to make an order specifying those facts and formulating issues for trial. Connelly v. Wolf, Block, Schorr & Solis-Cohen, 463 F.Supp. 914 (E.D. Pa. 1978). While the court usually initiates this order, the parties may also move the court for partial summary judgment. A motion for partial summary judgment is appropriate where the material facts are uncontested, the contested facts are not material or where one party is entitled to judgment as a matter of law as to at least one claim in the action.

While orders entered pursuant to Rule 56(d) are commonly referred to as "partial summary judgments", they are not, in fact, final judgments. Therefore, they have no binding res judicata or collateral estoppel effect. As a result, a judge can later rescind the order. Kane Gas Light & Heating Co. v. Pennzoil Co., 587 F.Supp. 910, 911 (W.D. Pa. 1984). Partial summary judgments are more properly thought of as "merely a pre-trial adjudication that certain issues shall be deemed established for the trial of the case."

The main advantage of being granted a partial summary judgment is that the losing party has no right to an immediate appeal. Thus, a ruling on summary judgment is the law of the case on the issue decided. Partial summary judgments may also be used to make certain evidence inadmissible at trial and to facilitate settlement of the

litigation. Another advantage is that a partial summary judgment speeds up the litigation by eliminating matters wherein there is no genuine issue of fact before trial and thus decreases the costs of discovery and proof at trial.

(5) Rule 56(e)

Rule 56(e) sets forth the requirements for affidavits:

> (e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The requirements under Rule 56(e) that an affidavit must be made on personal knowledge of facts which would be admissible in evidence and indicate that the affiant is competent to testify to the matters stated in the affidavit, are critical to supporting or deferring the motion. See Carey v. Beans, 500 F. Supp. 580 (E.D. Pa. 1980), aff'd, 659 F.2d 1065 (3d Cir. 1981) (where court refused to consider paragraphs beginning with "I believe" or "Upon information and

belief" in a supporting affidavit. Similarly, the requirement that all papers referred to in an affidavit be sworn or certified copies is strictly enforced. See Fowle v. C & C Cola, 868 F.2d 59 (3d Cir. 1989) (where an expert's report, which was attached to an affidavit of plaintiff's counsel, was not sworn to by the expert, the report could not be considered on motion for summary judgment). Rule 56(e) also requires that the moving party set forth admissible evidence in support of the motion. Once this is done, the burden shifts to the party opposing the motion. The opposing party may not rest on denials in the pleadings, but must set forth admissible evidence raising a genuine issue of material fact. DeLong Corp. v. Raymond Int'l. Inc., 622 F.2d 1135, 1144 (3d Cir. 1980). Unsupported allegations in memoranda and pleadings are insufficient to repel summary judgment. Schoch v. First Fidelity Bancorporation, 912 F.2d 654 (3d Cir. 1990).

Although the language of Rule 56(e) appears to place special emphasis on affidavits, in practice, this is not the case. Affidavits are subject to wide attack, e.g., lack of cross-examination, lack of personal knowledge, self-serving, lack of observation of demeanor, etc. In addition, they are easily controverted. Therefore, generally speaking, relying on a pleading, answer, admission or deposition is preferable.

(6) Rule 56(f)

Rule 56(f) gives the court discretion to deny summary judgment, or order a continuance, if the non-moving party has not had an adequate opportunity to make full discovery:

> (f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A party seeking relief under Rule 56(f) must file an affidavit stating the reasons for his or her inability to present such facts. The affiant should also set forth which facts are in the opposing party's control and who the party wishes to depose to obtain those facts. The sufficiency of the reasons will determine whether the court will apply Rule 56(f). Generally, the rule has been applied liberally. Sufficiency of reasons will be established where the plaintiff has had an insufficient opportunity to obtain opposing materials, Sames v. Gable, 732 F.2d 49 (3d Cir. 1984), or where the moving party has exclusive knowledge or control of the facts. [See Costlow v. United States, 552 F.2d 560 (3d Cir. 1977) (plaintiffs affidavit which established that truck involved in automobile accident belonged to private contractor transporting mail for government and that he had initiated discovery to ascertain the identity of the persons involved in the administration of the contract upon which the government relied. Plaintiff contended that despite contract, government exercised control over activities of driver and additional discovery was needed to oppose motion. District Court held where the facts are in possession of moving party a continuance for purposes of discovery should be granted almost as a matter of course)].

If a party opposing a motion for summary judgment has not been diligent in obtaining material or in discovering facts within the moving party's exclusive knowledge, the courts strictly apply Rule 56(f). See Karas v. Jackson, 582 F. Supp. 43, 45, n.1 (E.D. Pa. 1983) (request for continuance denied where party failed to submit affidavit showing inability to justify opposition to motion and failed to take advantage of opportunity to depose moving party); Hancock Indus. v. Schaeffer, 625 F. Supp. 373, aff'd, 811 F.2d 225 (3d Cir. 1987) (Rule 56(f) motion insufficient where no 56(f) affidavit was filed, no explanation for need for discovery and what material facts movants hoped to uncover to support their allegations; further, motion failed on substantive ground that due to fact that claim had properly been resolved as matter of law on stipulated facts, factual discovery was unnecessary); Lunderstadt v. Colafella, 885 F.2d 66 (3d Cir. 1989) (plaintiff failed to file 56(f) affidavit, did not file notice to take depositions of certain witnesses until after discovery was closed and plaintiff did not adequately explain lack of due diligence).

A motion for continuance will also be denied where the facts are known or information sought should have been equally available to either party, Tesch v. United States, 546 F.Supp. 526 (E.D. Pa. 1982); where the discovery sought was of evidence irrelevant to or merely cumulative on the issue before the court, Mid-South Grizzlies v. National Football League, 550 F.Supp. 558, aff'd, 720 F.2d 772 (3d Cir. 1983), cert. denied, 467 U.S. 1215; where the issue is one of law on undisputed facts for which discovery would be of no help,

Hancock Indus. v. Schaeffer, 625 F.Supp. 373, aff'd, 811 F.2d, 225 (3d Cir. 1987); where further discovery would merely result in a fishing expedition, McVan v. Bolco Athletic Co., 600 F.Supp. 375 (E.D. Pa. 1984); where the opposing party asserts that he can only disclose his evidence at trial, Drake Motor Lines, Inc. v. Highway Truck Drivers & Helpers, 343 F.Supp. 1130 (E.D. Pa. 1972); or where the attorney's busy schedule interfered with discovery, United States v. Johns-Manville Corp., 237 F.Supp. 893 (E.D. Pa. 1965). The court may reluctantly grant the party more time for unavailability of the opposing party or witness but will impose strict limits on additional time allowed. Matlack Inc. v. Butler Mfg. Co., 253 F.Supp. 1972 (E.D. Pa. 1966).

If a 56(f) motion is granted, the discovery allowed will be limited to that required for showing facts sufficient to withstand summary judgment. First Nat'l Bank v. Cities Service Co., 391 U.S. 253 (1968).

(7) Rule 56(g)

Rule 56(g) authorizes sanctions for parties who submit affidavits in bad faith or for the purpose of delay:

> (g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Under Rule 56(g) an offending party may be ordered tc pay the costs and legal fees associated with the bringing of the summary summary judgment motion. However, attorney fees were assessed against both a party and his counsel as the result of plaintiff's filing of affidavits submitted in bad faith. Warshay v. Guiness, 750 F.Supp. 628 (S.D. N.Y. 1990). In addition, incidental and consequential damages, e.g., witness fees and travel expenses, resulting from the improper affidavits may be assessed. The rule also clearly indicates that an offending party or attorney may be held in contempt. There are few cases in which the courts have resorted to Rule 56(g). This appears to be due to the fact that the court was not convinced the party acted in bad faith or solely for the purpose of delay. Mathis v. Philadelphia Newspapers, Inc., 455 F.Supp. 406 (E.D. Pa. 1978); Lowell v. Wantz, 85 F.R.D. 290 (D.C. Pa. 1980)

(8) Scope of Review

In reviewing the grant of a motion for summary judgment, the Court of Appeals exercises plenary review as to legal questions. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 656 (3d Cir. 1990). Where the district court's rulings involve the admissibility of evidence or the weight and sufficiency of the evidence, and those issues are viewed as largely factual, the rulings will be reviewed according to the "clearly erroneous" standard. The court must view the record and inferences from the facts in the light most favorable to the non-moving party. Schoch, supra.

II. INTERLOCUTORY APPEALS

A. Appeals as of Right - 28 U.S.C.A. 1292(a):

The statute provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

Section 1292(a)(1) is explicit in granting courts of appeals jurisidiction in appeals from orders relating to injunctions only. Consequently, the statute has been interpreted to prohibit appeals as of right from the granting or denial of a temporary restraining order. See United States v. Spectro Foods Corp., 544 F.2d 1175 (3d Cir. 1976). Although a detailed discussion is beyond the scope of this article, it is important to note that even though an appeal may be taken from many orders relating to injunctions, the district court retains substantial jurisdiction to continue supervising the prosecution of the underlying action.

The 1292(a) appeals process is the same as that for final orders; in the injunction context, however, it is likely that a stay

pending appeal will be desired. Rule 8 of the Federal Rules of Appellate Procedure sets forth the criteria for obtaining such stays.

B. Appeals By Permission - 28 U.S.C.A. §1292(b)

Section 1292(b) of the Judicial Code provides a means of interlocutory appeal upon permission of both the district court and the court of appeals:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order 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, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: **Provided, however**, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The purpose of the appeal is not to review the correctness of a ruling but rather to avoid harm to the litigants or to avoid unnecessary or protracted proceedings. The federal courts have tended to authorize these appeals only in "exceptional" cases. See Zenith Radio Corp. v. Matsushita Elect. Indus. Co., 494 F.Supp. 1190, 1243-45. (Pa. 1980) (§1292(b) is especially suited to exceptionally complex, protracted and expensive litigation); Mazzella v. Stineman, 472 F.Supp. 432, 435-36 (E.D. Pa. 1979) (§1292(b) is inappropriate for those cases that present only ordinary problems for trial). However, there is no "exceptional" requirement in the language of the statute.

(1) Criteria for Permissive Appeal - District Court

Whether the district court grants permission to appeal is dependent upon the criteria set out in the statute. Appeal is discretionary at the district court level. The district judge must first decide the question. The statute requires that the district judge then provide a written order for appeal. No appeal is available unless the district judge enters the certification. Hodgson v. United States Slicing Mach. Co., 370 F.2d 565 (3d Cir. 1967). In the order, the judge must state that he or she is of the opinion that the order a) "involves a controlling question of law; b) "as to which there is substantial ground for difference of opinion"; and c) "that an immediate appeal may materially advance the ultimate termination of the litigation." Preferably, the court should specify the particular reasons justifying appeal.

(a) Controlling Question of Law

In Katz v. Carte Blanche Corp, 496 F.2d 747 (3d Cir. 1974), cert. denied 419 U.S. 885, the Third Circuit permitted appeal from an order granting class action status. In addressing the issue of whether the order involved a controlling question of law, the court wrote that analysis must go beyond the question of whether the ruling involves trial court discretion, and whether error would require reversal on appeal from final judgment. It is enough that "there exists by virtue of the order appealed from both the possibility of prejudice to a party pendente lite and the possibility of considerable avoidable wasted trial time and

litigation expense." 496 F.2d at 756. A more restrictive approach was taken in Link v. Mercedes-Benz of North America, Inc., 550 F.2d 860 (3d Cir. 1977), cert. denied 431 U.S. 933. There, a panel granted permission to appeal a class action certification but a majority of a closely divided en banc court refused to review the questions certified. The court stated that class action matters should be certified for review only if the particular question is so unusual as to demand the intervention of an appellate court.

(b) Substantial Ground For Difference of Opinion

The mere fact that the appeal would present a question of first impression is not, standing alone, sufficient to show that the question is one on which there is a substantial ground for difference of opinion. Max Daet-Wyler Corp. v. R. Meyer, 575 F.Supp. 280, 283 (E.D. Pa. 1983), 762 F.2d, 290 (3d Cir. 1985), cert. denied, 474 U.S. 980. The mere fact that the court's ruling would have broad implications for other persons, standing alone, is also insufficient. Lorentz v. Westinghouse Elect. Corp., 472 F.Supp. 946, 956-57 (E.D. Pa. 1979).

(c) Appeal Materially Advances the Ultimate Termination of the Litigation

Permission to appeal will be denied:

(i) Where the appeal saves only relatively small amounts of court time. Design Consultants Eng'g Corp. v. Security Ins. Co. of Hartford, 309 F.Supp. 1141, 1143-44 (E.D. Pa. 1970).

(ii) Where there is the possibility that two appeals may be required. Steele v. Wiedemann Mach. Co., 281 F.2d 380, 383-84 (3d Cir. 1960).

(iii) Where the interlocutory appeal would contribute to further delay. Matlack, Inc. v. Hupp Corp., 57 F.R.D. 151, 158-59 (E.D. Pa. 1972).

(iv) Where the certification is sought from a ruling made shortly before a short trial begins. Gross v. McDonald, 354 F.Supp. 378 (E.D. Pa. 1973); First Delaware Valley Citizens Television, Inc. v. CBS, Inc., 398 F. Supp. 917, 924-925 (E.D. Pa. 1975)

(v) Where another claim involving substantially the same evidence would remain to be tried. McNulty v. Borden, Inc., 474 F.Supp. 1111, 1120-22 (E.D. Pa. 1979); In re Magic Marker Sec. Liti., 472 F.Supp. 436 (E.D. Pa. 1979)

(vi) Where there is a lack of a clearly determined factual background SEC v. Penn Central Co., 450 F.Supp. 908, 918 (E.D. Pa. 1978).

(vii). Where a trial is imminent and appeal would result in further delay. Lorentz v. Westinghouse, 472 F. Supp. 946 (E.D. PA. 1979).

(2) Criteria For Permissive Appeal - Court of Appeals

Permission to appeal pursuant to §1292(b) is also required from the court of appeals. The 10 day time limit on filing a request for permission to appeal in the court of appeals is jurisdictional. Inmates of Allegheny Co. Jail v. Wecht, 873 F. 2d

55, 56-57 (3d Cir. 1989). Unless application is made to the court of appeals within ten days after entry of the district court order, no appeal can be taken. (NOTE: Filing a Notice of Appeal with the district court rather than a petition with the court of appeals is not sufficient.)

The court of appeals may authorize an appeal in its discretion or may deny an appeal for any reason, including docket congestion. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). Unlike the district court, the circuit court is not bound by the criteria set forth in §1292(b). The circuit court also has the discretion to vacate an initial grant of permission. After the ten days have expired, the district court may enter a new order, and again certify the question if the district court has genuinely reconsidered the questions presented by the original order. This may be shown by reargument supported by facts or law not previously considered. Note that the statute does not specifically require the district court to specify the controlling question of law involved in the order. The circuit court is not called upon to answer the controlling question of law certified for appeal but rather to decide the appeal. In other words, the appeal is taken from the order of the district court and not its opinion. Therefore, the circuit court is not bound by the district judge's statement of the issue. Johnson v. Alldredge, 488 F.2d 820, 822-23 (3d Cir. 1978), cert. denied 419 U.S. 882. See also Katz v. Carte Blanche Corp., 496 F.20 747, 754 (3d Cir. 1974), cert. denied, 419 U.S. 885. The circuit court has authority to consider all grounds advanced to

support or overturn the order. If the order poses a question that has not been considered by the district court, it will not be considered on appeal. Fact issues also will not be resolved on appeal. Miller v. Bolger, 802 F.2d 660, 666-67 (3d Cir. 1986); Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 962 n.7 (3d Cir. 1983), cert. denied, 465 U.S. 1024.

The procedure for perfecting an appeal under §1292(b) is provided by F.R. App. P. 5. Rule 5(a) explicitly provides that a district court order may be amended at any time to include the prescribed statement for seeking an appeal. If appeal is unsuccessfully attempted under another statute, the Court of Appeals may suggest that certification under §1292(b) be considered on remand. Rule 5 should be consulted for requirements on the content of the petition, the answer in opposition, form of papers, number of copies, grant of permission, cost bond and filing of the record.

C. Appeals, Pursuant to Rule 54(b), From Orders Affecting Less Than All Claims or Parties

The purpose of Rule 54(b) is to facilitate the entry of judgments upon one or more but fewer than all the claims in a multi-claim action or as to one or more but fewer than all the parties in a multi-party action. It avoids the possible injustice of a delay in entering judgment until the final adjudication of the entire case by making an immediate appeal available. Johnson v. Orr, 897 F.2d 128 (3d Cir. 1990). The rule does not require that a judgment be entered but rather gives the court discretion to enter a final judgment. Chalfin v. Beverly Enterprises, Inc., 745 F. Supp. 1117, 1121 (E.D. Pa. 1990). Absent a certification under Rule

54(b), any order in a multi-claim or multi-party action, even if it appears to adjudicate a separable portion of the lawsuit, is interlocutory.

(1) Criteria For Appeal - District Court

If the court decides that an order should be given the status of a final judgment:

(a) The court must make an express determination that there is no just reason for delaying the review of a judgment on fewer than all of the claims or involving fewer than all of the parties. The time for appeal begins to run from the entry of an order that meets the requirements of the rule. Taylor v. Continental Group Change in Control Severance Pay Plan, 933 F.2d 1227 (3d Cir. 1991). Factors in determining whether there is no just reason for delay:

(i) Relationship between the adjudicated and the unadjudicated claims. Deboles v. Trans World Airlines, 552 F.2d 1005 (3d Cir. 1977), cert. denied 434 U.S. 837.

(ii) Possibility that the need for review might be mooted by future developments in the district court. Sussex Drugs Prods. v. Kanasco, Ltd., 920 F.2d 1150 (3d Cir. 1990); Polo Fashions, Inc. v. Haverford Corp., 612 F.Supp. 109 (E.D. Pa. 1985); In re Fiddler's Woods Bondholders Litig., 594 F.Supp. 594 (E.D. Pa. 1984).

(iii) Whether the appeal requires the appellate court to determine questions that are before the trial court with regard to other claims. Shrader v. Granninger, 870 F.2 874 (2d Cir. 1989).

(iv) Possible impact of an immediate appeal on the remaining trial proceedings. Panichella v. Pennsylvania R.R. Co., 252 F.2d 452 (3d Cir. 1958).

(v) Practical effects of allowing an immediate appeal, e.g. prejudice from delay. Curtiss-Wright, 597 F.2d 35 (3d Cir. 1979), rev'd 446 U.S. 1 (1980).

(vi) Any other factor that seems relevant to a particular action.

(b) The court must make an express direction for the entry of judgment, i.e., the court must consider whether the entire case and the particular disposition that has been made and for which the entry of judgment has been sought falls within the scope of the rule.

(c) Certification is a prerequisite to an appeal. Fireman's Fund Ins. Co. v. Myers, 439 F.2d 834 (3d Cir. 1971). If either element is absent, an appeal should be dismissed with leave to seek another appeal should proper certification be granted by the district court. There is no set procedure for obtaining a Rule 54(b) certification. It is best to file a motion requesting that the court make the determination and direction as required by the Rule. The district court must articulate the factors relied upon in certifying the judgment as final. Allis-Chalmers Corp v. Philadelphia Elect. Co., 521 F.2d 360 (3d Cir. 1975). As long as the court's direction and determination are apparent, there should be no question of its intent to certify.

(2) Criteria For Appeal - Court of Appeals

In Curtiss-Wright Corp. v. General Electric Co., 597 F.2d 35 (3d Cir. 1979), rev'd, 446 U.S. 1 (1980), the United States Supreme Court set forth the following guidelines to be used in review of Rule 54(b) certifications:

> There are thus two aspects to the proper function of a reviewing court in Rule 54(b) cases. The Court of Appeals must, of course, scrutinize the District Court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such juridicial concerns have been met, the discretionary judgment of the District Court should be given substantial deference. The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.

The Supreme Court thus limited the power of the Court of Appeals to upset a district court determination of finality. As practioners, however, we must always be concerned whether seeking Rule 54(b) certification will ultimately cost the client more in terms of fees, expenses, and delay then would be gained, and whether the client would be better served by waiting to resolve the entire matter on appeal at the conclusion of trial.

D. Collateral Order Appeals - Cohen and Its Progeny

The United States Supreme Court created collateral order appeals in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Cohen involved the constitutionality of a New Jersey statute requiring shareholder plaintiffs who brought derivitive actions to post security for expenses to be incurred by defendants in the litigation. Pursuant to the statute, the defendant in Cohen

requested that the court require the plaintiff to post security. The court denied the motion. On appeal, the Third Circuit reversed and the Supreme Court granted certiorari. In considering the appealability of the order, the Court stated:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.
>
> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question.
>
> 337 U.S. at 546-47.

Appeals are allowed from orders characterized as final under the collateral order doctrine even though they do not terminate the litigation or any part of it. The finality required is: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important issue completely separate from the merits of the action; and (3) the order must be effectively unreviewable on appeal from a final judgment. If the order at issue fails to satisfy any one of these requirements, it is not appealable under the collateral order exception to §1291. A few examples of "finality" orders are listed below:

1. The order must conclusively determine the disputed question.

The district court must have decided the matter offered for appeal. American Motorists Ins. Co. v. Levolor Lorentzen, Inc., 879 F.2d 1165, 1171 (3d Cir. 1989). If there is a likelihood the district court might alter the ruling, appeal will not be allowed. New York v. United States Metals Ref. Co., 771 F.2d 796, 799 (3d Cir. 1985); Lusardi v. Xerox Corp., 747 F.2d 174, 178 (3d Cir. 1984); Metex Corp. v. ACS Indus., 748 F.2d 150, 153-54 (3d Cir. 1984); Silberline Mfg. Co. v. Internat'l Nickel Co., 569 F.2d 1217 (3d Cir. 1977). Orders which are inherently tentative are not appealable as a collateral order. Gulfstream Aerospace Corp v. Mayacamas Corp., 485 U.S. 271 (1988). See also In re Fine Paper Antitrust Litig., 617 F.2d 22 (3d Cir. 1980) (order that denied a motion to disqualify counsel for a plaintiff class on grounds of conflict of interest); Yakowicz v. Pennsylvania, 683 F.2d 778 (3d Cir. 1982) (order denying an interim award of attorney fees); In re Grand Jury Proceedings, 632 F.2d 1033 (3d Cir. 1980). However, if there is a risk of sufficient hardship, a generalized prospect of reconsideration should not defeat appeal. Gulfstream Aerospace Corp. v. Mayacamus Corp., 485 U.S. 271, 290-91 (1988).

2. The order must resolve an important issue completely separate from the merits of the action.

The decision offered for review must not be a step toward a final judgment in which it will merge. In addition, the decision must not be of a nature as to affect, or to be affected by, a decision on the merits, i.e., the trial court can continue its own

proceedings. See Smith-Bey v. Petsock, 741 F.2d 22 (3d Cir. 1984) (refusal to appoint counsel to indigent plaintiff cannot be appealed since it involves evaluation of the probable merits of the case.) The greater the risk that an important matter may evade review and the greater the risk of hardship if present review is denied, the less strict is the insistence on separability. See Britton v. Howard Sav. Bank, 727 F.2d 315, 320-22 (3d Cir. 1984) (appeal may be taken from an order refusing an attachment for security pending suit, even though the determination whether to issue an attachment requires some consideration of success on the merits).

3. The order must be effectively unreviewable on appeal from a final judgment.

In order for a collateral order appeal to be granted, there must be a risk that the order will evade review on appeal. See United States v. Cianfrani, 573 F.2d 835, 844-45 (3d Cir. 1978) (Newspaper publishers and reporters who intervened in a criminal proceeding to resist a motion to close a pretrial suppression hearing may appeal order granting motion.) Appeal, however, is not available if the harm threatened by the order has already been done. See Lusardi v. Xerox Corp., 747 F.2d 174, 178-79 (3d Cir. 1984) (defendant's objection to an order that notice be sent to potential members of an opt-in class in an age discrimination suit could not support collateral order appeal where several thousand potential members had already been notified of their right to sue.) There must also be a risk that evasion of review will create a risk of significant hardship. There are no clear cut rules

regarding the determination of whether a claimed hardship supports a collateral order appeal. However, the most common examples of hardship are orders that affect conduct outside the litigation, United States v. Cianfrani, 573 F.2d 835, 844-45 (3d Cir. 1978), supra, and orders subject to immediate execution. The mere burden of submitting to trial proceedings that will be wasted if the appellant's position is correct does not support collateral order appeal.

4. Some appellate court opinions add a fourth requirement to the collateral order doctrine. They require that the appeal involve a question too important to be denied review and that the case present a serious and unsettled question of law.

Although the court in Cohen, supra, emphasized the importance of the issue offered for appeal, the Supreme Court frequently states the requirements of the collateral order appeal as a three part test placing minor emphasis on the "important question" element. See Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). See also Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 537 (3d Cir. 1985). This has resulted in inconsistent application of the "important question" requirement. Some courts require that the appeal involve an unsettled question that is important for purposes beyond the instant litigation. United Auto. Workers of America v. National Caucus of Labor Comms., 525 F.2d 323, 325 (2d Cir. 1975). Other courts allow collateral order appeals even though the question is important only to an individual, e.g. review of claims of qualified official immunity. Some appeals are permitted

that do not require a serious, unsettled or generally important question of law, e.g., double jeopardy appeals. Others hold that a collateral order appeal is inappropriate for matters that involve judicial discretion, Click v. Abilene Nat'l Bank, 822 F.2d 544, 545 (5th Cir. 1987), as well as matters of fact (as opposed to questions of law), Sobol v. Heckler Congressional Comm., 709 F.2d 129 (1st Cir. 1983). In view of these arguably inconsistent decisions, the status of the "important question" element should be considered to be chronically unsettled.

SPECIAL PROCEEDINGS --
INJUNCTIONS & SEIZUERS

Prepared By

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IX. SPECIAL PROCEEDINGS -- INJUNCTIONS AND SEIZURES

A. Injunctions - Background

1. Statutory[1]

a. Preliminary Injunctions - Fed.R.Civ.P. 65(a)

b. Temporary Restraining Orders - Fed.R.Civ.P. 65(b)

2. Case Law Modifications

a. General Rule - To obtain a preliminary injunction, the movant must demonstrate:

(1) Likelihood of success on the merits;

(2) The probability of irreparable harm if the relief is not granted; and

(3) No adequate remedy at law. Morton v. Beyer, 822 F.2d 364 (3d Cir. 1987); In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1143 (3d Cir. 1982).[2]

b. Other Relevant Factors

(1) Possibility of harm to other interested parties from granting or denying the requested relief;

(2) How the public interest is affected.

Morton, 822 F.2d at 367 n.3; ECRI v. McGraws-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987).

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1. The Court's equitable powers are established by the All Writs Act, 28 U.S.C. §1651(a), which empowers federal courts to grant all writs "agreeable to the usages and principles of law." See 18 U.S.C. (authorizing injunctions to enforce the RICO forfeiture provisions).

2. The additional element of proof necessary to obtain a temporary restraining order is a showing of the immediacy of harm.

3. Appealability of Injunctions

a. Standard of Review - the appellate court must determine whether the district court: (1) abused its discretion; (2) committed an error of law; or (3) made a clear mistake of the facts.

4. Specific Examples

B. Seizures of Person or Property -- Fed.R.Civ.P. 64

1. Background

The provisional remedies available under Rule 64 are available under the circumstances and in the manner provided by the law of the state in which the district court sits. Thus, the remedies available and the methods of obtaining them in the Eastern District of Pennsylvania are governed by the Pennsylvania Rules of Civil Procedure subject to two explicit qualifications:

a. Any existing statute of the United States governs to the extent which it is applicable. Examples of such statutes include:

(1) 28 U.S.C. §2007 (imprisonment for debt);

(2) 28 U.S.C. §2405 (garnishment by the United States); and

(3) 28 U.S.C. §2463 (property taken under tax laws not subject to replevin).

b. The action in which any of the remedies authorized by Rule 64 is to be used must be commenced and prosecuted in accordance with the Federal Rules of Civil Procedure. Accord Consumers Time Credit, Inc. v. Remark Corp., 227 F. Supp. 263 (E.D. Pa. 1964) (state law does not apply to underlying action to which the provisional remedy is incident).

2. Remedies Available Prior to Judgment

Remedies available under Rule 64 (arrest, attachment, garnishment, replevin and sequestration) are prior to judgment. After a judgment has been entered, any remedial relief is

governed by Fed.R.Civ.P. 69 (Execution) or Fed.R.Civ.P. 70 (Judgment for Specific Acts).

3. Constitutional Limitations

The United States Supreme Court has limited creditors' remedies available pursuant to Rule 64 in ruling that a number of state procedures for prejudgment seizure failed to afford the defendant notice of the proceeding and a fair opportunity to be heard.

a. In Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), the court struck down a Wisconsin statute that permitted defendant's wages to be garnished prior to judgment as a denial of due process.

b. In Fuentes v. Shevin, 407 U.S. 67, reh'g. denied, 409 U.S. 902 (1972), the Sniadach principle was extended to Pennsylvania and Florida prejudgment procedures.

c. In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), a divided court retreated from its decision in Fuentes when it held that a Louisiana prejudgment replevin procedure satisfied due process requirements.

d. In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the court indicated that Fuentes has survived Mitchell by striking down a Georgia garnishment procedure in a commercial setting.

4. Lis Pendens

Definition

a. Lis Pendens is a process by which third persons are given notice that any interest they may acquire in property pending litigation will be subject to the result of the action. 23 P.L.E. Lis Pendens (1959). This procedure does not establish liens on property; rather, it warns all persons that the title to certain property is in litigation and that they, as a potential purchaser, may be bound by an adverse judgment. Dice v. Bender, 383 Pa. 94, 117 A.2d 725 (1955).

Lis Pendens as a Matter of State Substantive Law

b. Although considered for inclusion in Rule 64 by the Advisory Committee, lis pendens is a matter of substantive law affecting state property laws. Therefore, it is governed by state law via Erie v. Thompkins, 304 U.S. 64 (1938). However, lis pendens is available in United States District Courts of Pennsylvania because District Courts are considered courts of competent jurisdiction in this state within the meaning of the Act of June 15, 1871, 17 Pa. Code §1908. Frankel v. Leisure Technology Corp., 71 Pa. D. & C.2d 140 (1975).

Commencement of Action

(1) An action of lis pendens in a federal court must be commenced by filing a complaint. Fed.R.Civ.P. 3. There can be no lis pendens on a summons alone. Pa.R.Civ.P. 1501 and 1007; Hartmann v. Peterson, 438 Pa. 291, 265 A.2d 127 (1970).

(2) The writ must describe the property to which the application of lis pendens is sought.

Indexing

(1) Plaintiff must request the indexing of the writ by praecipe submitted to the prothonotary.

> See In re Tourison's Estate, 321 Pa. 299, 184 A. 95, (1936) (indexing is a necessary requirement so that prospective purchasers or third parties dealing with the land have notice that it is subject to a claim); First Nat'l. Bank of Mercer Co. v. Allstate, 25 Pa. D. & C. 3d 329 (1982) (a lis pendens will not be indexed unless the title to real estate is the subject matter of the action).

(2) Once indexed, the writ will only constitute a lis pendens with regard to

the real property described in the writ. Pa.R.Civ.P. 3104(c).

(3) 28 U.S.C. § 1964 provides that if the law of the state requires notice of an action to be registered in a particular manner, those requirements must be complied with to give constructive notice of the federal action as it applies to real property in the state. A lis pendens initiated in federal court must be indexed in the same manner as an action commenced in a state court. Local Rule 32.

Limitations

Lis pendens may not be predicated upon an action seeking to recover a personal demand. The procedure is only appropriate where the rights to specific property are involved. Press v. McNeal, 568 F. Supp. 256 (E.D.Pa. 1983).

5. Replevin

Definition

An action in replevin is one whereby the owner or person entitled to repossession of goods may recover those goods from one who has wrongfully distrained or taken them. This procedure enables one who has a right to possession to recover property held by another.

Revision of Pennsylvania Rules

The Pennsylvania rules governing actions in replevin were revised in 1975. Pa.R.Civ.P.1071-1087. This revision was necessitated by the United States Supreme Court decisions which held, inter alia, the prejudgment procedures of Pennsylvania, unconstitutional. The new system has four attributes:

1) Judicial supervision, requiring prior petition and allowance for issuance of the ex parte writ of seizure;

2) Specific limited statutory grounds for issuance of the writ of seizure, including protection against waste,

concealment, disposition or removal of the property, and adverse economic effects of continued possession of defendant;

3) An immediate hearing following the seizure upon the sole issue of the existence of the grounds for ex parte seizure; and

4) Damages, including attorney's fees, in favor of the defendant for wrongful issuance of the sex parte writ.

5 Pa. Bull. 5, Feb. 1, 1975.

The 1975 amendments incorporated the above procedures and presently govern the procedure to maintain an action in replevin in Pennsylvania.

Replevin Without Bond

As required by Fuentes, 407 U.S. 67, the writ of replevin with bond was abolished; however, replevin without bond remains an available procedure in Pennsylvania. "Replevin without bond is in the nature of a declaratory judgment proceeding to determine the right to possession of the property." Pa.R.Civ.P. Explanatory Comment-1975. When replevin without bond is deemed an inadequate remedy, seizure is available. However, the use of replevin without bond is explained as:

> "... hav[ing] great practical utility in cases where the plaintiff does not need to seize the property for adequate relief. It will be particularly useful in cases where the defendant has substantial means and can respond to a judgment for the value of the goods, or is of such character that the plaintiff can rely upon his retaining the goods pending disposition of the action."

3 Goodrich-Amram 2d § 1071:2 (1978).

Commencement of Action

All actions in replevin are commenced by complaint only, and any seizure of property is by supplementary procedure to obtain a writ of

seizure. Fed.R.Civ.P.3; Pa.R.Civ.P. 1073. The complaint must include:

1. a description of the property to be replevied;
2. its value;
3. its location if known; and
4. the material facts upon which the plaintiff's claim is based.

Options for Seizure

There are two options for seizure available to a plaintiff in an action for replevin. However, seizure is never obligatory and will only be of use to a plaintiff who suspects the defendant to dispose of the property or is not certain of the financial ability of the defendant to pay a judgment for the value of the goods. 3 Goodrich-Amram 2d § 1075:1 (1978). They are set forth in Pennsylvania Rule of Civil Procedure 1075.1. Writ of Seizure Upon Notice and Hearing and Rule 1075.2. Ex Parte Issuance of Writ of Seizure.

Pa.R.Civ.P.1075.3. Writ of Seizure. Bond

Writs of seizure under 1075.1 or 1075.2 must be issued upon the filing of a bond by the plaintiff. This procedure is similar to the former replevin with bond but includes procedural safeguards. Pa.R.Civ.P. 1075.3(b).

Any objections to the plaintiff's bond must be made in a timely manner. Objector has the burden of proof of insufficiency of the bond. Pa.R.Civ.P.1080.

Evidentiary Issues

In general, the plaintiff in a replevin action must recover on the strength of his title or right, not the weakness of the strength of his title or right, not the weakness of the defendant's title. The [plaintiff's] "right to possession [must be established] by a preponderance of the evidence, whereupon the burden shifts to the defendant to prove his right to retain possession." Petition of Allstate Ins. Co., 289 Pa. Super. 329, 333, 433 A.2d 91 (1981); Blossom Products Corp. v. National Underwear Co., 325 Pa. 383, 191 A. 40 (1937). "The central questions at trial in a replevin action are whether the contract, deed, or other source of right relied upon grants the plaintiff a

right to continued possession of the chattels, and, if so, whether the value of the plaintiff's interest is greater or lesser than the value of the chattels so that the court may properly calculate reimbursement." Associates Commercial Corp. v. L & C Bus Lines, 312 Pa. Super. 250, 253, 458 A.2d 610 (1983); See also Brandywine Lanes, Inc. v. Pittsburgh National Bank, 437 Pa. 499, 264 A.2d 377 (1970).

Limitations

Certain property is not subject to replevin under the Pennsylvania Rules. Examples include: property exempted by statute, contraband property, and property held in custodia legis. Pa.R.Civ.P.1078. See Howell v. United States Marshal, 241 F. 2d 119 (3d Cir. 1957).

6. Attachment

Definition

Attachment is the process by which a plaintiff is given security for the purpose of satisfying any judgment that he may obtain. This security takes the form of a writ issued at the beginning of or during the course of an action which commands the sheriff to seize the property. Pennsylvania statutes formerly included five types of proceedings for attachment:

1. attachment of vessels;
2. domestic attachment;
3. fraudulent debtor's attachment;
4. foreign attachment; and
5. attachment execution.

Attachment of Vessels and Domestic Attachment

1. Attachment of vessels was a proceeding following admiralty procedures which was repealed by the Pa. Judiciary Repealer Act of April 28, 1978.

2. Domestic attachment was a form of action whereby a creditor could attach property of a debtor who was a Pennsylvania resident, but who was absent from the state as a means of defrauding his creditors. This procedure became obsolete with the adoption of the

Federal Bankruptcy Act and the Pennsylvania Insolvency Act of June 4, 1901.

Fraudulent Debtor's and Foreign Attachment

1. The original purposes of attachment procedures were twofold; they were intended to extend the jurisdictional reach of the court to debtors who were not subject to in personam jurisdiction by ordinary process and to secure a lien on the defendant's property. Lebowitz v. Forbes Leasing and Financing Corp., 456 F.2d 979 (3d Cir.) cert. denied, 409 U.S. 843, reh'g. denied, 409 U.S. 1049 (1972). However, in 1976 the Court of Appeals for the Third Circuit decided Jonnet v. Dollar Savings Bank, 530 F.2d 1123, in which it held the Pennsylvania foreign attachment procedure unconstitutional as it summarily deprived a party of an interest in property without notice or an opportunity to be heard. Id. at 1130. In Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 375 A.2d 1285 (1977). The Pennsylvania Supreme Court ruled, based on Jonnet, that foreign attachment was no longer an available remedy in the state. Thus, Rules 1251-1279 and 1285-1292 were rescinded in October 1989 in order to effectuate the courts holdings. Neither fraudulent debtors nor foreign attachment are available remedies in Pennsylvania. Pa.R.Civ.P. 1251-1279, Explanatory Comment-1989.

Attachment Execution - Garnishment

1. Garnishment was formerly known as attachment execution and is the only attachment procedure currently available under the Pennsylvania Rules. Pa.R.Civ.P. 3101-3149. It is the attachment of the property of the defendant that is in the possession of a third person or of debts owing to the defendant. Wheatcroft v. Smith, 239 Pa. Super. 27, 362 A.2d 416 (1976). Because garnishment is only available as a post-judgment remedy under the Pennsylvania Rules, it is governed by Fed.R.Civ.P. 69 in the federal district courts that sit in Pennsylvania.

EVIDENCE

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JURY TRIALS

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VOIR DIRE, OPENING STATEMENTS, AND CLOSING SPEECHES

Preliminary Note

The attached materials were originally prepared by Dennis R. Suplee and Alan M. Lieberman of Schnader, Harrison, Segal & Lewis for the Pennsylvania Bar Institute, and are reproduced here with the kind permission of PBI. The PBI publication number is 1991-633.

Mr. Suplee wrote the sections on voir dire and closing arguments; Mr. Lieberman wrote the section on opening statements.

Voir Dire, Opening Statements, and Closing Speeches

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Voir Dire, Opening Statements and Closing Speeches

These subjects (voir dire, opening statements and closing arguments) are grouped together because, assuming that the Court allows counsel to conduct or participate actively in voir dire, these are the three times when counsel speaks directly to the jurors.

I. Voir Dire

A. Why Ask Questions?

Counsel should know for what purpose he or she is asking each question that is posed to the panel. The selection of the people who will decide your cause is too important a matter to be conducted haphazardly. There are four good reasons to ask questions.

1. To Discover a Direct Connection with the Case.

   It is for this reason that lawyers ask whether any member of the panel knows the parties, the lawyers, the witnesses, anything about the case and so on. Normally, a venireman who knows one of the parties or a witness will be stricken for cause, as will a venireman who knows of the incident giving rise to the case and is predisposed one way or the other.

   These are the most basic kinds of questions, but they are not unimportant. Obviously you do not want the best friend of the opposing party's principal witness on your jury.

2. To Identify Prejudices or Predispositions that Will Make it Difficult or Impossible To Be Fair.

   After the panel members have been given some idea of what the case is about, you can and should ask whether, based upon what has been said about the case, any member of the panel would find it difficult or impossible to be fair to any of the parties. Asking this general, open-ended question may reveal prejudices or predispositions which would not come to light in response to more particular questioning.

   Before or after making that general inquiry, you should consider asking about particular aspects of the case that may arouse prejudices or pre-dispositions. This is often a ticklish matter. Careful thought should be given to whether to raise such subjects and, if so, how to word the questions. There is always the danger that, in asking about a particular subject, you may stir up prejudices that otherwise would never have affected the venireman's/juror's thinking.

   For example, suppose you represent plaintiff, a 70-year-old German who suffered personal injuries in an automobile accident while vacationing in the United States last summer. Which of the following approaches is best for plaintiff on voir dire?

a. "Ladies and gentlemen, would the fact that plaintiff is a citizen of a foreign country make it difficult or impossible for any of you to be fair in deciding this case?"

b. "Would the fact that plaintiff is a German citizen make it difficult or impossible for any of you to be fair in deciding this case?"

c. "Do any of you have strong feelings about the role of Germany in the Second World War which would make it difficult or impossible for you to be fair to plaintiff in this case?"

d. Ask (c) and then, "Do any of you have strong feelings about the Holocaust so that it would be difficult or impossible for you to be fair to plaintiff? Did you lose relatives or friends in the Holocaust?"

e. Do not raise the issue.

Probably most lawyers would favor approaches (a), (b) or (e). It might be argued that (a) does not go far enough because a venireman who is prejudiced against Germans, but not foreigners generally, will not answer affirmatively. Approach (b) solves that problem but some lawyers would say that it zeros in too much on the fact of Germanness. It is likely that most lawyers would reject approaches (c) and (d) because they are likely to arouse prejudices that otherwise would not have come into play. Indeed, they could suggest that plaintiff was a war criminal.

There is much to be said for approach (e). Some issues are best dealt with by ignoring them. If you treat the nationality of your client as a non-issue, the panel may do the same.

Take another simple example that illustrates the difficulty of determining whether and how to raise a potentially troublesome subject. You represent the defendant-drug manufacturer in a product liability case. Which of the following approaches would you take on voir dire for the defendant?

(a) "Would the fact that the defendant manufactures and sells drugs make it difficult or impossible for you to be fair in this case? Would you be more inclined to decide the case in favor of plaintiff by reason of that fact?"

(b) "Do any of you have strong feelings about drug companies? Would such feelings make it difficult or impossible for you to be fair to the defendant or more inclined to decide this case in favor of plaintiff?"

(c) "Do any of you have the view that drug manufacturers do not treat the public fairly?"

(d) Ask (c) and then, "Do any of you believe that drug manufacturers gouge and exploit the public by establishing exorbitant prices at many times the cost of the product?"

(e) Do not raise the issue.

The comments made with respect to the first example are readily adaptable to this one.

Often judges will not allow you to ask about prejudice in the abstract but insist that you tie it into the case. Thus, some judges would not allow questions (c) and (d) of the immediately preceding example unless counsel asked whether such views (a) would make it difficult or impossible for the venireman to be fair, or (b) would make the venireman more inclined to decide the case for the other party.

3. To Identify Prejudices or Predispositions that You Want the Venireman to put Aside.

Some questions on voir dire are asked primarily for the purpose of reminding the veniremen that they have certain prejudices or predispositions that they must put aside if they are selected as jurors.

For example, counsel for plaintiff may ask whether anyone has views that would prevent him or her from returning a full and complete verdict for plaintiff if the liability issue were resolved in his favor. The question rarely elicits an affirmative response. But it serves to remind the veniremen that they should not allow any negative feelings that they may have about very large verdicts to affect their thinking as jurors in this case.

Similarly, counsel for a corporate defendant may inquire whether the veniremen would be more inclined to decide the case for plaintiff by reason of the fact that (a) plaintiff suffered personal injuries in the accident, or (b) plaintiff is an individual and defendant a well known, large corporation. Most people would be inclined to favor the injured party simply because he was injured, particularly if the defendant were a large corporation. But, again, these questions rarely yield affirmative answers. One suspects that the real purpose of asking them is not to discover prejudices or predispositions, but to acknowledge their presence and ask that they be put aside.

4. To Plant the Seeds of Your Legal and Factual Theories.

Other counsel may object to questions of this kind or the judge may on his or her own initiative cut off such questioning. But most lawyers will test the waters to see how far they can get. The more the question sounds like one intended to discover prejudice, the better your chances are.

Consider this example of an attempt by counsel for plaintiff to advance a fact contention:

"You will hear conflicting testimony from witnesses about how the accident happened. Our witness, Mr. Johnson, will tell you that plaintiff had the green light but Officer Smith will say that the light was red.

> Would any one of you be inclined to accept Officer Smith's testimony simply because he is a policeman even though Mr. Johnson was in a better position to see the accident?"

If the judge cuts you off and says that is material for your opening, comment that you will cover the subject then and move to another subject. (When you reach the subject in your opening, you may remind the jurors that you had said you would discuss it with them then).

Counsel may attempt to inject legal theories by couching the question in terms of willingness to follow the judge's instructions. For example, counsel for defendant may ask:

> "Suppose you decide on the facts presented and the instructions given to you by Judge Thomas (on our defense that plaintiff by his actions assumed the risk of the injury which occurred) that your verdict should be for defendant. Would any of you refuse to follow that instruction and find for plaintiff?"

As a tactical matter, you may save a couple of clearly proper voir dire questions. If the judge should terminate your efforts to delve into your fact and legal theories, you can then use the questions you have saved so that your questioning will not end with a perceived reproach by the judge.

Keep in mind that there are few "rules" about voir dire. One judge may rebuke counsel for asking a question that another will regard as perfectly proper.

B. Procedures.

1. The Role of the Court and Counsel.

An increasing number of judges take the position that they, rather than counsel, should conduct voir dire. One judge explained his position this way:

> "If the objective of voir dire and jury selection is to secure a fair and impartial jury, my experience of 48 years, half as a practicing lawyer and half as a judge, convinces me that lawyers' participation in the voir dire, in most cases, is inconsistent with that objective. The true advocate's objective is to pick a winning jury not a neutral one."

Will, *Judicial Independence and Voir Dire,* Litigation Vol. 11, No. 4 (Summer 1985).

There is no doubt that each lawyer's objective is to select a winning jury. What's wrong with that? Each lawyer's objective when he or she presents testimony is to win the case. Yet no serious suggestion is made that this objective so taints the process that the judge should take over the questioning of witnesses. Why then should he or she take over the questioning of veniremen? Why not limit the judge's role there to ruling on objections, just as with the interrogation of a witness?

The major difficulty with having the judge conduct voir dire is that you can see how the veniremen react to him or her, but not how they react to you.

Lawyers should press judges to allow the lawyers to take the lead role in voir dire. The points to be made are these: first, all counsel would prefer that the lawyers do it (if that is the case); second, the lawyers are anxious to see how the jurors react to their voices and mannerisms; and, third, there will be no shenanigans. Of course, if your opponent is likely to push things too far and is difficult to control, you may prefer to leave voir dire in the judge's hands.

2. General and Individual Voir Dire.

What do you do when you ask a very general question of the panel and someone puts up his or her hand, indicating a possible problem? Suppose, for example, in response to a general inquiry as to the ability to be fair a hand is raised. In some courts, the lawyers ask their follow-up questions in the presence of the entire panel. The problem with such a procedure is that as counsel probes, the venireman may blurt out an answer that will contaminate the whole panel. (*E.g.*, "I could not be fair to the defendant in this sexual harassment case because the same thing happened to my friend when she worked there"); if counsel does not probe, he or she may remain in the dark as to the nature of the juror's concern.

The better procedure is to note which veniremen answer questions and affirmatively (as to possible prejudice or predisposition) and, after the general voir dire is completed, conduct an individual voir dire of each of them out of the hearing of the others so that the other members of the panel will remain insulated from their views.

C. Striking.

1. What is Your Opponent Doing?

Pay attention to your opponent's strikes. What kind of people is he or she striking? Men? Everyone under 40? If you are content with a jury that is all men or all women or all old or all young, fine. But your first recognition that you have such a jury should not be after the striking process is complete and eight men over 40 have taken their places in the box.

2. Should You Use your First Peremptory Strike to Eliminate the Worst Venireman?

Many say yes. But there is something to be said for holding that person until last, particularly if what troubled you was not that the venireman appeared to favor the other side, but that he or she acted somewhat strangely. What troubled you may also disturb opposing counsel and he or she may strike that person if you wait.

3. Should you Strike the Person who Indicated Possible Prejudice Against your Client?

   The answer is not always yes. For example, as counsel for a defendant-drug manufacturer, you may be willing to accept as a juror a seemingly bright and fair person who acknowledges that he or she does not like drug companies generally, but who makes a commitment to judge the facts of this case fairly.

D. Voir Dire References.

1. J. T. Frederick, *Social Science Involvement in Voir Dire*, 2 Behavioral Sci. & L. 375 (1984).
2. P. R. Lees-Haley, *Psychology of Jury Selection*, 28 Res Gestae 650 (June 1985).
3. M. Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 St. Mary's L.J. 575 (1985).
4. L. M. Ring, *Voir Dire: Some Thoughtful Notes on the Selection Process*, 19 Trial 72 (July 1983).
5. J. Kelner, *Jury Selection: The Prejudice Syndrome*, 19 Trial 48 (July 1983).
6. M. R. McGarry, *Do-It-Yourself Voir Dire*, Litigation, Vol. 10, No. 2 (Winter, 1984).
7. F. M. Barron & L. A. Blue, *Voir Dire in the Occupational Disease Case*, 19 Trial 44 (April 1983).
8. A. Werchick, *Method, Not Madness: Selecting Today's Jury*. 18 Trial 64 (December 1982).
9. P. Perlman, *Jury Selection in the Products Case*, 18 Trial 59 (November 1982).
10. Wiseman, *Lawyer Voir Dire* Litigation, Vol. 11, No. 2 (Winter 1985).
11. Will, *Judicial Independence and Voir Dire*, Litigation Vol. 11, No. 4 (Summer 1985).

II. Opening Statements

A. In A Nutshell.

Chief Justice von Moschzisker of the Pennsylvania Supreme Court wrote about the opening statement:

Your opening speech should be concise and to the point; simply tell the jury — just as you would naturally relate a story, without overemphasis what your case is — what you propose to prove, but not how you intend to prove it. Leave something to the jurors' curiosity, and don't tire them out before they start the trial. If you explain in detail exactly how your witnesses will testify, the jurors are apt to lose interest during the taking of the testimony. Then, again, it may be that certain of the witnesses will not come up to your expectations, and, should this happen, the jurors will probably think, either that you have failed to prove your case to that

extent, or, possibly, that you practiced a deception on them in your opening. The object of the opening speech is not to advise the jury concerning the testimony of your various witnesses, but to let them know what the case is about, so they may understand the purpose and effect of the evidence, when produced. (von Moschzisker — Trial by Jury § 185 (George T. Bisel Co. 1922))

B. Additional Principles Worth Emphasis.

1. Be concise and clear.
2. Do not dwell on the law.
3. Do not "make promises" you cannot keep.
4. Leave something to the jurors' imagination.
5. Be candid.

C. Preparation.

1. Make an outline.
2. Give the address before a mirror, videotape, colleague or spouse.
3. Revise the outline – shorten it.
4. Find out from colleagues with experience before a particular judge what that judge expects of counsel addressing the jury.

D. Rules and Practices.

1. In many jurisdictions, if the attorney for a plaintiff makes an opening address to the jury, counsel for a defendant is at liberty, if he chooses to exercise his right, to make an opening address in reply before any testimony is taken; provided, if the privilege is exercised, defendant's counsel shall not be precluded thereafter from offering evidence as to any matters of defense not specifically referred to in his opening address.
2. The attorney for a defendant may reserve his opening for delivery at the beginning of the defense's case.
3. Obtain leave of court or a stipulation for the use of exhibits or graphic displays in your opening.
4. In many state courts, opening addresses are not recorded unless requested by counsel. If addresses are not being recorded, be certain that counsel's objections and comments by the court are recorded.
5. Arguments or objections should be at side-bar or in chambers. Consider reserving objections until your opponent has concluded his or her address. Determine beforehand the practice the court wants you to follow.

E. Reserving the Opening Address.

1. Scientific surveys of jurors suggest that many jurors decide the case on opening addresses. Reservation of the opening by defense counsel could result in an insurmountable advantage to the plaintiff.
2. Be certain court will permit you to reserve.

3. Opening immediately after plaintiff's counsel can counter the effectiveness of his or her address.

4. An effective opening by your opponent should be balanced by your address before it is too late.

5. If your opponent's opening is weak or you have a strong case to put on (or anticipate effective cross-examination of plaintiff's witnesses) reserving your opening can be the better strategy.

F. Your Opponent's Opening — Objecting and Preserving the Record.

1. Consider whether you need to move pretrial to limit counsel's address as to certain subjects.

2. Do not interrupt your opponent's address unless his or her remarks are clearly inappropriate *and* you have something to gain by objecting. Consider preserving the error at side-bar after the speech is concluded. Some judges require counsel to object during the address. Determine the procedure with the judge beforehand. If appropriate, move for a mistrial. Opening addresses are not always recorded. You may request to have the addresses taken down by the court reporter. If they are not, be sure that all objections and interruptions by counsel or the court are recorded.

3. Watch the judge. From his facial expression or other mannerisms you may be able to detect the court's reaction to your opponent's address and whether an objection is likely to be sustained.

4. Be vigilant and take notes. Your opponent in his or her opening may provide material for your closing argument.

G. Some Considerations on Content.

1. Explain briefly (if it has not already been done) the trial process.

2. In preparing for trial you will have developed a theme of defense or prosecution. In the opening you should begin to sound the theme of your case.

3. Attempt to involve the jury with you in the search for the truth.

4. Avoid expressly placing your personal credibility in issue.

5. If you believe a chart or some other visual aid to be essential, request the court's permission, beforehand, to use it.

6. Avoid argument, prejudicial or inappropriate statements and repetition. They are likely to evoke a negative comment by the court or an objection sustained by the court, both of which undermine the image you want the jury to have of you — that of a competent, credible and fair attorney.

7. "Good faith" use of exhibits or documents before their admissibility has been determined is permitted by some courts. Use of exhibits whose admissibility is in doubt can be risky. It is wise to ask the permission of the court before you begin.

8. Prepare the jury for any extraordinary event that will occur during the trial, explain the function of non-fact witnesses, such as experts, and your reason for calling them.

9. Face up to the weaknesses in your case. To preserve your credibility and the jurors' confidence in you it is essential to face damaging facts directly. Acknowledging damaging facts tends to lessen their sting. If possible, couple them with favorable evidence that refocuses the issue.

H. Caveats.

1. In striving for candor, avoid admissions that are dispositive of liability or of an essential element of your case. For collected cases *see, Annotation*, 5 ARL 3d 1405.

2. Where damages are unliquidated, avoid reference to the amount of damages.

3. Avoid reference to prejudicial events that, although probative, might be excluded from evidence by rulings of the court. Avoid overstating factual elements of your case. *See Government of Virgin Island v. Turner*, 409 F.2d 102 (3d Cir. 1969).

I. The Covenant.

The opening address is the trial lawyer's covenant with the jury. While not express, the lawyer is making promises and predictions. He or she is providing a road map through the trial, a guide to help the jury to understand the case and render a fair and just verdict. The opening is, also, the bridge between the voir dire and the presentation of evidence. You should strive to continue and to enhance the relationship you began during jury selection. You and your opponent are each trial advocates. The jurors expect more. Which of you combines his advocacy with candor? Which of you has better kept his or her promises to them?

J. Opening Statement References.

1. W. A. Trine, *Motivating Jurors Through Opening Statements*, 18 Trial 80 (December 1982).

2. *Opening Statement: Structure Issues, Techniques*, M. F. Colley, 18 Trial 53 (November 1982).

3. A. S. Julien, *Opening Statements in Product Cases: Communicating the Chain of Liability*, 19 Trial 40 (July 1983).

4. C. J. Faruki, *Clear Openings in the Business Case*, 10 Litigation, Vol. 10, No. 4 (Summer 1984).

5. Julien, *Opening Statements* (1985).

6. L. Decof, *The Art of Advocacy: Opening Statement* (Bender 1985).

III. Closing Speeches.

A. Preparation (Before the Trial).

1. Scouting Other Counsel.

Talk to other lawyers who have tried cases against your opponent. (This, of course, is helpful on every aspect of the trial, not just closings). What do they remember about his closing? Did he get angry? Or was he low-key throughout? Did he distort the evidence? Did he use any colorful analogies? What were the strong and weak points of his approach?

If you can obtain a transcript of one of his closings, that will give you a good sense of the kind of argument you are likely to face.

2. Scouting the Judge.

Talk to other lawyers who have recently tried cases before the judge to whom you are assigned. (Again, this can be helpful on other aspects of the trial). Does the judge impose time limits on closing? What are they? Does he interrupt the closings on his own initiative? For what purpose? What is his reaction to objections during closings? That is, does he tend to get annoyed by them? Did he get irritated by anything that the lawyers did during their closings? What was it? If you can obtain a transcript of his charge in a similar case, that may be helpful to you in addressing the jury. At the least, you can be sure that you do not say something that will be at odds with his general comments to the jury.

B. Preparation (During the Trial).

1. Note Keeping.

Your preparation for your closing should not begin the night before you are to give it. You should, of course, have an outline of your closing before the trial begins. But your preparation should continue during the trial. If something of particular significance is said during the trial, put a capital C in the margin of your notes. At the conclusion of each day, you can quickly scan your marginal notations and prepare a running list of points you want to include in your closing.

2. The Court Reporter.

If a witness says something that is so critical that you want to read it to the jury in your closing, at the next break or at the end of the day ask the court reporter to transcribe that segment for you. If you do not think about this sort of thing until the night before your closing, you may not be able to reach the reporter to make your request; even if you do, he or she may have difficulty locating the particular testimony that you have in mind.

C. Preparation (The Night Before).

1. Simplify.

In outlining your speech, keep in mind that you cannot cover in 20 to 90 minutes (the range of most closings) everything that was said during the trial. Do not try. Select the most critical disputed points in the case and the best arguments for your side. You can tell the jurors that you are not going to try to cover everything, just what you see as most important, and that you leave it to them to deal with matters you do not discuss.

2. Acknowledge Undisputed Facts.

In most cases, many facts will not be disputed by either side. If that is the case, say so. Your willingness to organize the facts shows that you have confidence in your position. For example, in a simple motor vehicle accident case, in less than a minute, you can remind the jury that neither side denies the basic facts of the accident: the directions of the vehicles; the width of the streets; the established speed limits; the location of the damage on each vehicle; the length and location of the skid marks.

3. Focus the Jury's Attention.

After you have acknowledged facts that are not disputed, focus the jury's attention on the one, two or three critical facts that are in dispute. Of course, there may be many discrepancies in the parties' versions of the facts. But you cannot discuss them all. Select the key ones.

4. Order of Topics.

Although your speech should be well organized, it need not be logically organized. For example, one would normally expect counsel to discuss liability first and then damages. However, in a case where liability is hotly disputed but the damages are admittedly serious, some defense lawyers prefer to deal with damages first — almost as a preliminary matter — make quickly the couple of points they have, and then, after telling the jurors that damages are not what the case is all about, move to a more complete discussion of liability. The rationale for such an approach is that counsel for defendant in such a case does not want the last words he leaves ringing in the jurors' ears to be on the subject of damages.

5. Organization of Arguments.

Start strong and end strong.

When you get to the substance of what you want to say, your first argument should be a strong one, perhaps your very best one. You are most likely to have the jurors' full attention at the beginning of your speech.

Your last argument should also be one of your better ones. If you end with a relatively weak argument, the jury may conclude that you are

running out of ammunition and that, even aside from the constraints of time, there is little left to be said for your position.

6. Tie in Your Opening.

Your opening and closing should fit together. In your opening, you told the jury what you would prove. Now you will tell them what you did prove. If you are making different points in your closing from those made in your opening, then it is probable that you made a poor opening or the trial went badly for you.

Remind the jury that in your opening you said that you would prove certain things and show them that you have done so.

D. Delivering the Speech.

1. Strive for Spontaneity.

It is difficult to deliver with spontaneity a speech you have worked on carefully. The more thoroughly you have prepared, the greater the danger that you will sound wooden.

You may be able to strike a more natural tone by making a reference to something that happened in the courtroom that morning. For example, if the testimony ended that morning, and you are counsel for plaintiff, you may be able to say early in your speech that the testimony of the last witness should resolve any open questions. And then explain how. But do not force it. Using the technique where it does not apply will detract from spontaneity, not add to it.

Pay attention to how the judge explains the role of closing speeches if he or she does. You may be able to use what he or she says as a natural jumping off point.

If you represent defendant, you can achieve spontaneity by, as you must, taking into account the remarks of counsel for plaintiff as you deliver your closing.

In giving the rebuttal for plaintiff, you may want to start where counsel for defendant ended. That is, begin your speech by answering his last argument. Proceeding that way forces you to be spontaneous. If you want to show anger, that is a good way to start. The jury may get the sense that you are so indignant that you are not content to take things in a more logical order.

2. Pay Attention to Events in the Courtroom.

What is your opponent doing while you are addressing the jury? The Judge? The parties?

You cannot deal with those things if you do not know what is happening in the courtroom.

3. Use Rhetorical Questions.

Rhetorical questions can be effective in closing speeches, perhaps because they are invitations to the jury to think along with you. For example, counsel for plaintiff might ask, "Did you hear any answer to our testimony that this defect existed in defendant's sidewalk for

many months before the accident happened?" Obviously you should not ask such a question, at least not worded that way, if there was conflicting testimony. Like any good thing, this should not be overdone.

4. Let the Jurors Draw their Own Conclusions.

   You do not have to present each argument in perfect syllogistic form. If you have developed your points well, consider ending by saying something like "What conclusion do you reach on those facts?" Of course, if there is any doubt about what inference you want them to draw, spell it out.

   Be careful about commenting on the credibility of a witness. You may believe it is clear that witness X lied to the jury. But that fact may not be as clear to the jury. Even if it is, jurors may resent your saying, "Witness X committed perjury!", "Witness X lied!" Instead, you should point out inconsistencies and problems in the testimony and then say, "Can you rely on that testimony?" Or, "Do you accept that testimony?" Or, "Do you find that testimony credible?" You can, of course, be more affirmative and say, "I submit that you should not find such testimony credible." But you should at least consider letting the jurors draw their own conclusion.

E. Closing Statement References.

1. J. D. Lee, *Painting the Whole Picture at Summation*, 19 Trial 63 (July 1983).
2. R. E. Cartwright, *Winning Psychological Principles in Summation*, 16 Trial Law. Q. 4 (1984).
3. L. J. Smith, *The Art of Advocacy: Summation* (Bender 1984).
4. S. Baldwin, *Jury Argument: How to Prepare and Present a Winning Closing Argument*, 20 Trial 58 (April 1984).

IV. Expect Anything.

No matter how well you have prepared, any trial has its own surprises. Be flexible. You will not find all the answers, no matter how many articles you read.

What would you do in each of the following situations?

A. At the very start of voir dire, in a voice loud enough to be heard by all, opposing counsel says to you, "The first eight look fine to me. Do you have any objection to them?"

B. You represent the defendant. The veniremen have been ushered into the courtroom. There is a delay while the judge swears in five recent law school graduates as members of the bar. In a voice loud enough for the veniremen to hear, the judge jokingly comments to the new lawyers, "I hope you all win $1 million in your first case."

C. You are a lawyer in a large firm and represent defendant. After asking if any of the veniremen knows you, counsel for plaintiff comments that you have a number of partners and associates and he or she wants to be

sure that none of the veniremen knows any of them. He or she then starts to read all 125 names on your letterhead.

D. One of the veniremen, Mrs. O'Brien, lives at 56th and Whitby in West Philadelphia. Opposing counsel in addressing her inquires, "Is that DeSales or Blessed Sacrament parish?"

E. You represent plaintiff. On voir dire, your opponent, a former state senator, introduces himself by saying, "I'm Senator Claghorn. Do any of you know me or my work?"

F. You are counsel for plaintiff in a suit against the local taxi cab company. During the course of counsel for defendant's closing, he says to the jury, "You heard counsel for plaintiff in his closing refer to our making the poor cab driver sit through the trial. What did he mean by that—the poor cab driver?" He then turns to you, addresses you, and says, "What did you mean by that, Mr. X?"

G. As you are making your closing, you realize that opposing counsel is smirking at the jury and shaking his head in apparent derision of your arguments.

H. As you are making your closing, you realize that the judge is unconsciously making facial reactions to your arguments.

I. You represent defendant in a serious medical malpractice case. Plaintiff is a ten-year-old girl who, among other things, suffers from cerebral palsy. As you are giving your closing, the plaintiff accidentally drops a pencil which lands a couple of feet to your left. Her lawyer appears not to notice. Do you pick it up? If so, what do you do with it? (Remember that if you return it to her, she may, because of her condition, drop it again—and again).

J. You represent defendant. As you are returning to your chair after your closing, counsel for plaintiff (with whom you have never had a case before) stage whispers, "No matter how many times you give that same speech, I always enjoy it."

WITNESS EXAMINATIONS, OBJECTIONS & EXHIBITS

FOR JURY TRIALS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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I. WITNESS EXAMINATION: DIRECT & CROSS

Certainly more dry a subject than opening statements and closing speeches of lawyers, the examination of witnesses is nonetheless an important part of what the lawyer must be prepared to do at the trial of his case. Indeed, most of the hours spent in a courtroom with a jury involve communication through questions asked and answers given in Direct and Cross Examination. Relatively speaking, the statements and arguments take much less total time. Despite this, the effort put into preparing Openings and Closings would seem to far outweigh the time spent in organizing and thinking through witness examinations. The consequence of that approach may be a less than effective presentation of the evidence. When thought through, however, a good direct or cross can have almost the persuasive impact of a stirring speech and more importantly it is the stuff necessary to prove your case.

Here are some suggestions on how to get ready for examinations.

A. DIRECT EXAMINATION: What am I trying to accomplish with this witness? What does he add to my case or the theory of my case:

1. Go through the who, what, when, why, where and how in your mind. Once the function of the witness is clear, you'll have a better sense of what to ask.

a) Remember that through your witnesses you must establish the elements of your cause of action or defense: make sure the testimony of your witnesses does that!

b) In thinking about your direct examination use as a model proposed points for charge. They will guarantee you cover what must be proved.

2. Outline your questions so that they can be asked in a clear concise order that will make the witnesses testimony simple to follow. Don't write out questions except where specific language is required by the elements of your case. Write out the answers you expect: that may guide you in terms of questions you need to ask.

3. Make questions simple -- you want the witness to follow them and the jury to follow them.

4. Organize your examination somehow: chronologically, topically.

5. Keep in mind that Federal Rule of Evidence §611 allows you to ask leading questions on direct only in certain limited circumstances. Your questions otherwise must (and should!) be open ended. If you are on direct it is your witness who should be the star, not you.

6. The judge -- or the circumstances -- may limit the amount of time you have to do a direct. Be mindful that Federal Rule of Evidence §611 also allows the judge to impose parameters on direct.

a) Think through/find out what the judges courtroom rules are; will the judge let you stand to examine? Will the judge let you move from counsel table? Federal judges have a tendency to be more restrictive than their state court counterparts.

b) Do you need every person who knows a fact to testify to it or can you limit the evidence, save time and be persuasive through efficiency?

7. Be creative. Every direct examination seems to start; "Would you please state your name for the record." "Please tell us where you live." While this information may be important and/or relevant, asking rote questions leads to a boring examination.

8. Persuade. The entire focus of a trial is to be persuasive. That concept need not be applicable only to speeches but should be incorporated into the questioning process as well, both through the substance of questions and the way they are delivered.

9. The direct examination of expert witnesses seem to create special problems: they shouldn't.

a) The direct of an expert is no different than the direct examination of any other witness -- it should be thought out, organized and presented with clear concise questions.

b) Presentation of the expert's qualifications should proceed presentation of the substance of his/her testimony. As is the general practice in state court, after you qualify and offer your expert, he/she should be offered to your opponent for cross on qualifications.

c) Unlike state court practice, the Federal Rules of Evidence (§704) allow an expert to render an opinion on the "ultimate issue". No need for cumbersome hypotheticals or even to use "magic words".

Theoretically the questioning might be:

"Doctor, you've been qualified as an expert in this case, what is your opinion about the care given my client by the defendant?"

Assuming the answer satisfies your burden of proof requirements, no further examination is technically necessary. (But was it persuasive that way?)

d) The thing that really makes expert testimony frightening is whether you can present it in clear understandable

terms. The ability to do that is dependent on only one thing: is what your expert's saying clear and understandable to you?

10. Anticipate objections. Think through whether or not your questions are objectionable. If they are (or may be) be prepared to change them or respond to the objection when made.

11. End strong -- or at least up -- your closing series of questions should have a clear direction and purpose.

12. Some don't's:

a) Don't prepare a script;

b) Don't tell your witness everything you're going to ask, some of his/her answers should show spontaneity; and

c) Don't ignore problems, you may be able to soften the blow through good direct.

B. <u>CROSS EXAMINATION</u>: Again, think through what you're likely to do at this phase of the trial -- What can be accomplished through cross? If nothing, then don't,...cross examine that is.

1. Lead, lead, lead. No cross-examination question should be open ended (with exception, of course, of the exceptions). Sometimes people don't know what it means to ask leading questions; if you don't, learn! (It is not generally taught in law school except in Trial Advocacy courses.)

2. Stay in control of the witness -- and yourself. Have a game plan and don't stray from it. Remember you are, in effect, dancing with the enemy.

3. Don't be rude, argumentative or patently hostile to the witness -- juries don't like it, and neither do judges.

4. Don't assume that cross-examinations must be hostile, some of the best information can come from your opponent's mouth -- especially with a little kindness.

5. Know the Rules of Evidence. Many evidentiary rules are actually cross-examination tools, i.e.:

a) Rule of Evidence §609: impeach with prior convictions.

b) Rule of Evidence §608(b): impeachment with prior bad acts.

c) Rule of Evidence §613: impeachment with prior inconsistent statements.

6. Cross-examination is thought of as an "art form" and probably is -- as a result there are fewer rules to suggest. If you think of your cross as a speech, periodically punctuated with a declaratory question, such as "Isn't that true?", it may help guide your preparation.

II. OBJECTIONS

A. First there was evidence, then there were depositions -- between the two, most lawyers learn quickly what a technically objectionable question sounds like. But does that mean you should object? Perhaps not. Objections like rudeness are something neither jurors nor judges like a whole lot. Try this for a "Rule": Don't object unless the answer will hurt. That means don't worry about leading,

or hearsay unless the evidence elicited is doing damage to your case. If you follow this "Rule" three things will happen:

1) The trial moves more smoothly and frequently more quickly;

2) Jurors -- and judges -- are less inclined to see you as difficult and disruptive; and

3) Your opponent will probably extend you the same courtesy (and you will get into evidence that troubling bit of testimony that you want to get in, but which is technically hearsay).

B. Of course you will probably have reason to object during any trial (your opponent is, after all, trying to get in evidence that will hurt you) so when you do remember:

1) Stand when addressing the court;

2) State your objection and if requested, your concise basis. Most judges don't want -- or like -- speeches. If a judge wants -- or needs -- your input, he/she'll ask; and

3) Don't whine, grimace or react to the question (or the ruling); it's unprofessional.

III. EXHIBITS

Everything physical is, or can be, an exhibit; a gun, a statement, a car, a photograph, an x-ray, a model, a blow-up, a machine -- what to do with tangible evidence is often the measure of whether a lawyer is controlling his or her environment or the environment is controlling the lawyer. Once the exhibit is in your hands you've got to know what to do with it. Is it evidence? Is it real evidence or demonstrative evidence? Is it intended to instruct,

demonstrate or contradict? Figure out what you're doing and then follow a drill.

A drill? Every exhibit should have a litany involving:

1) Marking the exhibit:

2) Showing the exhibit to your opponent;

3) Presenting the exhibit to the witness; and

4) Laying a foundation for its admissibility.

The trouble always comes with #4. What's the foundation for this particular exhibit? Is it being offered as the real thing? Demonstrative of the real thing? Demonstrative of a theory? Is it intended to impeach? Will you be moving its admission?

Once the foundation is established move it into evidence. Properly no exhibit can be talked about, read or shown to the jury until it is admitted into evidence (a rule often ignored in local state courts).

The litany you follow needs to be planned out so that stumbling and fumbling (a common problem) can be avoided in the courtroom.

CONCLUSION

While a powerful speech is always the goal of preparation, successful outcomes may/will be a result of how the evidence got to the jury. Examinations, objects and real evidence need the same careful attention that the more glamorous role of opening and closing does.

NON-JURY TRIALS

Prepared By

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NON-JURY TRIALS

Elizabeth Ainslie and Alexander Kerr[1]

I. INTRODUCTION

When you have a choice, some factors to consider in evaluating whether to proceed with a non-jury trial as compared with a jury trial include: more flexible scheduling, time to trial is usually quicker, and juries may be swayed by emotion.

The most important thing to remember about a non-jury trial is that it is not a jury trial.

II. OCCASIONS FOR NON-JURY TRIALS

A. Injunctions - Rules 65 & 52(a)

1. Temporary Restraining Order - Rule 65(b)

(a) Preconditions: May be granted without notice to adverse party if immediate irreparable harm will result before hearing, and counsel certifies in writing his attempts at notice and reasons it should not be required.

(b) Terms: Order must on its face have date and time of issuance, define injury and why notice was unwarranted, and provide time for expiration not to exceed ten days unless otherwise directed by court.

(c) Mechanics: When complaint with motion for TRO filed, clerk will ordinarily refer counsel directly to chambers of judge to whom it has been assigned. Counsel should be prepared to proceed with the requisite showing at that time. If known, counsel should have the name and phone number of opposing counsel in the event judge wishes to speak with him/her.

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[1] The authors wish to acknowledge their debt to the materials published in the previous Basic Civil Practice Courses in 1981 and 1986. The 1981 materials were prepared by the late Chief Judge Alfred L. Luongo; the 1986 materials were prepared by William H. Eastburn, III, Gordon W. Gerber, Edward F. Mannino, and William J. O'Brien.

Order may issue without findings of fact and conclusions of law; proceedings often informal in chambers.

(d) Extensions: TRO extended beyond ten-day period must become preliminary injunction. Extensions by consent are allowed and also for good cause. Rule 65(b). Unless preliminary injunction entered, party may assume TRO has expired. Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 444-445 (1974).

(e) Security: Counsel must be prepared to post security as required by Rule 65(c). Order may not issue without security.

2. Preliminary Injunctions - Rule 65(a)

(a) Preconditions: Opposing party must have notice. Rule 65(a)(1). At a minimum, moving party must show (1) probability of success on merits in the litigation, and (2) that irreparable injury will occur pendente lite if injunction does not issue. District court must further consider possibility of harm from grant or denial of injunction, and the public interest. Constructor's Association of Western Pennsylvania v. Kreps, 573 F.2d 811, 815 (3d Cir. 1978); Oburn v. Shapp, 521 F.2d 142, 147 (3d Cir. 1975).

(b) Terms: Order must set forth on its face "the reasons for its issuance." Rule 65(d). It must be "specific in terms," and "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Id. This requirement applies to "any equitable decree compelling obedience under the threat of contempt." International Longshoremen Association v. Philadelphia Marine Trade Association, 389 U.S. 64, 75 (1967).

(c) Mechanics: When complaint with motion for preliminary injunction attached is filed, it should have a proposed order for the judge to specify a date and time for hearing on the motion, which is then served with the complaint. The docket clerk will usually call the judge to whom the case has been assigned, and send counsel to chambers to confer on a date for hearing. If known, counsel should have the name and phone number of opposing counsel in the event judge wishes to confer with him/her. Hearing is held, at which testimony is heard. Court must make findings of fact and conclusions of law. Rule 52(a). Findings should be filed before or contemporaneously with issuance of injunction. Gibbs v. Buck, 307 U.S. 66, 78 (1939), but failure to file findings contemporaneously does not deprive court of its powers of enforcement. Bethlehem Mines Corp. v.

United Mine Workers, 476 F.2d 860 (3d Cir. 1973). Counsel seeking quick action by court should have proposed findings prepared at time of hearing. Counsel should address themselves to the criteria for issuance of a preliminary injunction.

(d) Security: Counsel must be prepared to post security as required by Rule 65(c). Preliminary injunction may not issue unless security posted.

(e) Consolidation: Before or after hearing commences, court may order trial on merits to be consolidated with hearing on application. Rule 65(a)(2). This is device for speeding resolution of case. Evidence admitted at hearing is admissible at trial and need not be repeated, although some repetition may be necessary or desirable. (Notes of Federal Rules Advisory Committee, 1966 Amendments.) Consolidation may not be employed to deprive party of right to jury trial. Rule 65(a)(2).

3. Permanent Injunctions

(a) Purpose: A permanent injunction is a remedy available to the district court when it concludes that a party has established that it is entitled to permanent equitable relief. Court has broad, inherent powers to fashion equitable relief as case may require. Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971); United States v. Spectro Foods Corp., 544 F.2d 1175 (3d Cir. 1976).

(b) Mechanics: Permanent injunction must necessarily be supported by findings of fact and conclusions of law, since such an action is "tried upon the facts without a jury." Rule 52(a); Chas. Pfizer & Co. v. Zenith Laboratories, Inc., 339 F.2d 429 (3d Cir. 1964).

(c) Terms: Order must set forth on its face reasons for issuance in reasonable detail. Rule 65(d).

B. The Court as Trier of Fact

1. When Permitted - Rules 38 & 39

(a) Jury Trial of Right: Rule 38(a) provides that right of jury trial preserved under rules in all instances guaranteed by Constitution. (For scope of right see generally 5 Moore, Federal Practice, ¶¶38.11, 38.12 (1980).)

(b) Demand: Rule 38(b) requires that demand for jury trial be made not later than ten days after service of the last pleading directed to such issue.

Demand may be endorsed upon a pleading.

(c) Issues: Party must specify issues on which jury trial demanded, or else he is deemed to have demanded jury for all issues so triable. Opposing party, within ten days of demand, may demand jury trial on appropriate issues for which jury was not demanded by opponent. Rule 38(c).

(d) Waiver: Failure to demand jury trial constitutes a waiver of the right. Rule 38(d). If party waives, district court has nonetheless discretion to grant jury trial, Rule 39(b), but mere inadvertence or lack of diligence by counsel ordinarily will not compel relief. See, e.g., Crawford v. Dominic, 85 F.R.D. 33, 34 (E.D. Pa. 1979); Biesenkamp v. Atlantic Richfield Co., 70 F.R.D. 365 (E.D. Pa. 1976). In a case submitted to the jury for a special verdict under Rule 49(a), if the court fails to include an issue of material fact in its instructions to the jury, and neither party objects to the omission, each waives his right to jury determination of the issue. The court may then make a finding, or will be deemed to have done so consistent with the judgment it enters on the special verdict. Rule 49(a).

(e) Withdrawal: If either party has demanded jury trial, the demand may be withdrawn if both parties consent to trial without a jury. Rule 39(a)(1). Court may hesitate to agree to non-jury trial if motion to withdraw comes late in proceedings and court has been involved in settlement negotiations or other sensitive pretrial matters.

(f) Motion to Strike: Upon motion, or sua sponte, court may strike demand for jury trial if it finds that a right to a jury does not exist under the Constitution or federal statutes. Rule 39(a)(2). Whether there is a right to jury trial is a question of federal law. Byrd v. Blue Ridge Rural Electric Co-op., 356 U.S. 525 (1958).

(g) Parties' Consent to Jury Trial: When no right to jury exists, except where the United States is a defendant, parties may consent to trial by jury whose verdict has same effect as if there were a right to jury trial. Rule 39(c).

(h) Advisory Jury: In actions not triable by jury, court may, upon motion or sua sponte, impanel an advisory jury to assist it in trial of case. Rule 39(c). The findings of an advisory jury are not binding upon the court, Wilson v.

Prasse, 463 F.2d 109 (3d Cir. 1972), Greenwood v. Greenwood, 234 F.2d 276 (3d Cir. 1956), and the court still must file findings of fact and conclusions of law. Rule 52(a). It may, however, adopt the jury's findings as its own. Greenwood, supra.

2. Non-Jury Trial Required when United States a Defendant.

(a) There is no constitutional right to a jury trial if the United States is a defendant. Glidden Co. v. Zdanok, 370 U.S. 530, 572 (1962) (plurality opinion).

(b) Congress has prohibited jury trials in most cases where the United States is a defendant, 28 U.S.C. §2402, although it has power to provide jury trials where it sees fit. E.g., 28 U.S.C. §1346(a)(1), pertaining to tax refund suits.

III. CONDUCT OF NON-JURY TRIALS

A. General

1. Counsel has opportunity to educate factfinder in advance with memoranda, etc. Particularly useful to allow judge to read documents in advance if crucial to case.

2. Somewhat less formality; less posturing by lawyers; counsel more likely to address legal issues rather than sidelights designed to appeal to jury.

3. Examination of witnesses more direct; court can intervene in questioning and in argument more frequently without fear of swaying jury; court can direct counsel's attention to particular issues.

4. Evidence rules somewhat more relaxed; court can hear questionable evidence and exclude it later without fear of prejudice.

5. Court will sometimes advance alternate grounds for decision, pointing out why party would not prevail even if certain evidence were admitted or were accepted as true.

6. Trial likely to conclude more quickly.

B. Opening Statements

1. Use of opening statement

(a) Several Federal Courts have held that in non-jury civil cases "the matter of permitting argument is within the Court's discretion." Peckham v. Family Loan Company, 262 F.2d 422, 425 (5th Cir. 1959), cert. denied 80 S.Ct. 70, 361 US 824. See also, Yap v. Immigration and Naturalization Service, 318 F.2d 839, 841 (7th Cir. 1963).

(b) It has also been noted that "the trial judge in non-jury cases will often dispense with the opening statement. A good judge will have informed himself of the contents of the pleadings and other components of the record." ALI-ABA Civil Trial Manual (1980), p. 577.

(c) Items such as pleadings and pre-trial memoranda often obviate the need for an opening statement in non-jury civil cases.

C. Presentation of Direct Case

1. Reception of evidence

(a) Evidence rules are not applied as strictly in non-jury cases as in jury cases, since a judge is more easily able to disregard potentially prejudicial information. United States v. 1,291.83 Acres, Adair and Taylor Counties, Kentucky, 411 F.2d 1081 (6th Cir. 1969).

(b) The admission of incompetent evidence in a non-jury trial does not constitute reversible error where such evidence has not been considered or has no possible effect on the result of the case.

(c) The presumption in non-jury cases is that incompetent evidence has been disregarded by the Court and that the factual issues are determined only from consideration of competent evidence.

D. Cross Examination

1. Be focused.

2. Once point is made, move on.

3. Avoid dramatics.

E. Examination by the Court

1. Do not resist.

2. Follow up.

F. Depositions

1. Will not be read aloud.

2. Importance of designations.

3. Avoid over-designation.

G. Exhibits

1. Copies for the court.

2. Visual aids.

3. Keep as lean as possible.

H. Experts

I. Closing Arguments

1. Use of Closing Argument

(a) In non-jury cases the matter of permitting argument is within "the Court's discretion." Feeley v. United States, 337 F.2d 924 (3rd Cir. 1964); Peckham v. Family Loan Company, 262 F.2d 422, 425 (5th Cir. 1959).

(b) The basic structure of the closing may be the same in both jury and non-jury trials. The purpose is to persuade the Court to rule in your client's favor.

2. Structure of the Closing

(a) Preliminary remarks: Set the framework of the argument and quickly dispose of certain matters that can be treated quickly if appropriate, for example: if the other side drops certain claims.

(b) State to the Court what are not issues. This often allows the attorney to immediately get to the critical issues.

(c) Frame the issue(s) to be decided in their broadest sense, then refine them to the more narrow issues that allow you to discuss the evidence in relation to those issues.

(d) Show how the evidence fits or does not fit each issue. Rather than merely summarizing what each witness said or the significance of certain documents, it often is more helpful to focus the evidence on specific issues and analyze it in those terms, i.e., how it supports your position.

(e) Explain your theory so the Court can integrate the evidence into the overall picture.

(f) If appropriate, explain how your theory as set forth in your opening was proven by the evidence, and if you can, show how your opponent failed to do so.

(g) Give the Court enough information to understand the issues without too many details. Your proposed findings and conclusions of law can do that.

(h) Use the visual aids that you prepared for the trial. You should not use too many so as to detract from the Court's concentration. You should be selective - perhaps summary displays on major points.

(i) You can concentrate on the law, especially if it helps you. In a jury case, you would not generally talk about the law in your closing. In a non-jury case, you can and should, if given the opportunity.

(j) Do not read your closing, take advantage to convince and persuade. Remember you are somewhere in between making a jury argument to those not trained in the law and making an appellate argument.

(k) Remember that in your closing you have a unique opportunity to address questions or issues that the Court may have raised during the trial: you have a window into the mind of the Court.

(l) Finally, you should be planning your closing before the trial. It will help you to organize your flow of evidence so that you do not miss anything.

IV. FINDINGS OF FACT

1. Requests for Findings of Fact and Conclusions of Law

(a) Not required by Federal Rules, but required by Local Rule 21(d)(4)(c). Rule requires that they be submitted in duplicate at chambers at start of trial, or as judge otherwise directs. Judge will sometimes allow counsel to submit proposed findings after conclusion of trial. Unwise to delay as detail from trial fades from judge's and counsel's memory with passage of time. Particularly important to have requests prepared in support of motion for preliminary injunction to enable court to act swiftly.

(b) Findings prepared in advance can serve as a checklist for proof counsel needs to present at trial; prevents error in presentation of case.

(c) Requests should adequately identify the parties; set forth the relevant facts in sufficient detail, with references to exhibits where possible; and state conclusions of law which address the relevant legal issues. See Zimmerman v. Montour R. Co., 296 F.2d 97 (3d Cir. 1961), cert. denied, 369 U.S. 828; Feeley v. United States, 337 F.2d 924 (3d Cir. 1964). Counsel should avoid being argumentative in the proposed findings themselves, and save arguments for accompanying memoranda of law. Counsel should also avoid inordinately lengthy requests.

2. Findings by Court - Rule 52

(a) Required by Rule 52(a) if:

1. Hearing on preliminary or permanent injunction

2. Trial on merits

3. If motion is granted under Rule 41(b) to dismiss plaintiff's case after plaintiff rests.

Not required for motions generally (e.g., class certification, Rule 12 motions).

Findings optional if court failed to submit an issue to a jury rendering a special verdict. Court may make findings, or will be deemed to have done so in accordance with judgment entered on jury's verdict. Rule 49(a). See B1(d), supra.

(b) Purpose:

1. Give parties and reviewing court clear understanding of judgment, Feeley v. United States, 337 F.2d 924 (3d Cir. 1964).

2. Cause trial judge to give case careful consideration, United States v. Merz, 376 U.S. 192 (1964).

3. Define issues decided by the court for purposes of estoppel and res judicata, 9 Wright & Miller, Federal Practice §2571 (1971).

(c) Mechanics:

1. Findings and conclusions may be delivered by the judge orally, in open court, at conclusion of trial. In such case, counsel may if necessary for appeal order transcript of judge's presentation from court reporter. Or, judge may take matter under advisement, and issue written findings and conclusions at a later date.

2. Findings need not be separately numbered, if they appear in body of memorandum or opinion. Rule 52(a).

3. Court cannot waive requirement of specific findings, even with consent of parties. Berguido v. Eastern Air Lines, Inc., 369 F.2d 874 (3d Cir. 1966).

4. District court may not simply adopt the exact findings proposed by counsel; the court's own viewpoint and reasoning must appear in its findings. Roberts v. Ross, 344 F.2d 747 (3d Cir. 1965); United States v. Howard, 360 F.2d 373 (3d Cir. 1966).

(d) Effect of Findings by Trial Court:

"Clearly erroneous" standard - findings of trial judge stand unless clearly erroneous, and deference must be accorded the trial judge's opportunity to assess credibility of witnesses.

What is clearly erroneous?

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 394-395 (1948).

"[T]here must exist a stronger basis for overthrowing a finding of fact than a mere difference in personal judgment. Such evidentiary weight and such convictional certainty must be

present that the appellate court does not feel able to escape the view that the trial court has failed to make a sound survey of or to accord the proper effect to all the cogent facts, giving due regard, of course, to the trial court's appraisal of witness credibility where that factor is involved." Nee v. Linwood Sec. Co., 174 F.2d 434, 437 (8th Cir. 1949).

Findings by a master accepted by the district court are also subject to the "clearly erroneous" standard. Rule 52(a). See generally Rule 53.

(e) Failure to Make Findings:

As a general rule, failure to file findings will result in a remand to the district court as the Court of Appeals will be unable to exercise its reviewing function. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 319 (1940).

A lack of findings, however, does not deprive the Court of Appeals of jurisdiction and it may examine the record to determine if a full understanding of the question may be obtained without specific findings. E.g., Tomlin v. Ceres Corp., 507 F.2d 642 (5th Cir. 1975).

(f) Amendment of Findings - Rule 52(b):

Not later than ten days after entry of judgment, upon motion of a party, court may amend its findings or make different findings, and amend judgment.

Such motion may be combined with motion for new trial under Rule 59, notwithstanding that they seek different types of relief.

Failure to seek amendment does not bar party from challenging sufficiency of evidence on appeal.

A timely motion under Rule 52(b) destroys the finality of the judgment entered, so that the time for taking an appeal begins to run from the date of the order disposing of the motion. In re D'Arcy, 142 F.2d 313 (3d Cir. 1944).

3. Delays in Deciding Submitted Cases

(a) Reasons for delay.

(b) Reporting system as means of inducing judges not to delay decision of submitted cases.

JUDGMENTS, POST TRIAL MATTERS & APPEALABILITY

Prepared By

Richard F. Stevens, Esquire

BASIC CIVIL PRACTICE BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Judgments, Post-Trial Matters and Appealability

Richard F. Stevens, Esquire

I. INTRODUCTION

At this point in our study, one of two things has occurred. Either you, or your opponent, has been successful in his/her initial presentation to either a court or a jury. Since we assume that you each believed in your positions absolutely (otherwise a reasonable settlement would have occurred), one of you is probably going to file post-trial motions and/or appeal the final judgment.

II. JUDGMENTS- F.R.C.P. 54(b), 58, 79(a)

28 U.S.C.A. Section 1291 provides, inter alia, that the courts of appeals have jurisdiction of appeals from final judgments of the district courts.[1] F.R.C.P. 54(a) defines judgment to include "a decree or any order from which an appeal lies." It seems clear from the case law and committee notes that the term "judgment" means only final judgments and appealable interlocutory orders and judgments. See Moore's Federal Practice, Volume 6, Sections 54.02 and 58.02.

Generally, a judgment is "an act of the court," including the official "ministerial acts" of the Clerk of the Court. See Commissioner of Internal Revenue v. Bedford's Estate, 325 U.S. 283, 65 S.Ct. 1157, 89 L.Ed. 1611 (1945). A court may "render" judgment, either written or oral, when it demonstrates a present intention to "decide and announce an adjudication of the matter," but one must be careful to distinguish between the filing of a court's opinion and the entry of judgment in a case. See Syntex Pharmaceuticals International, Ltd. v. K-Line Pharmaceuticals, Ltd., 905 F.2d 1525 (Fed. Cir. 1990) (party could not challenge, on appeal, the court's statement that a patent is valid until adjudged invalid because it was part of the district court's opinion and not a judgment under Rules 54 and 58). See also In Re Forstner Chain Corp., 177 F.2d 572 (1st Cir. 1949).

Pursuant to Rule 58, the district court must set forth its judgment, in writing in a separate document.[2] Furthermore, the judgment remains ineffective until the clerk enters it on the docket pursuant to Rule 79(a). See Levin v. Wear-Ever Aluminum, Inc., 427 F.2d 847 (3d Cir. 1970). See also Ellis v. Heckler, 569 F.Supp. 792 (E.D. Pa. 1983). The notation of the judgment in the civil docket constitutes the entry of judgment and should be

distinguished from the recording of the judgment and the filing of the judgment. See Rule 79(b). In cases where the jury has rendered a general verdict, Rule 58 provides that the clerk shall immediately "prepare, sign and enter the judgment without awaiting any direction by the court." See Form 31 "Judgment on Jury Verdict." See also Marshall v. Perez-Arzuaga, 866 F.2d 521 (1st Cir. 1989). Similarly, where the rendition of judgment is by decision of the court for a sum certain, costs or denial of all relief, Rule 58 provides that the clerk may immediately enter judgment thereon.

Where, however, the jury renders a judgment by special verdict or a general verdict accompanied by interrogatories or the court grants relief other than a sum certain, costs or a total denial of relief, the court must first approve the form of the judgment before the clerk may enter judgment thereon. See generally, Moore's Federal Practice, Volume 6A, 58.04. Rule 58 expressly provides that the clerk is not to delay entry of judgment for determining taxation of costs. See Danzig v. Virgin Isle Hotel, Inc., 278 F.2d 580 (3d Cir. 1960). That rule is equally applicable to the determination of attorneys fees. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed. 178 (1988). It should also be noted that the clerk's

action remains subject to two further qualifications: (1) Rule 54(b) concerning multiple claims and multiple parties[3] and (2) the court's order to the clerk to refrain from entering the judgment.

Once a party has obtained a valid and enforceable judgment in a federal action and the clerk enters that judgment pursuant to Rule 79(a), that party may take steps to enforce that judgment. At the start and during the course of an action, Rule 64 provides that the law of the state where the district court sits (in this instance, Pennsylvania) will govern any seizure of persons or property for the purpose of securing satisfaction of a judgment prior to the entry of such judgment. See Pennsylvania Rules of Civil Procedure and applicable statutes governing actions for foreign attachment; fraudulent debtors' attachment; garnishments and replevin. Rule 64, however, provides for the following exceptions to the application of state law to certain property: (1) property of the United States; (2) property of a national bank; (3) a Federal Reserve bank, the Federal Deposit Insurance Corporation; and (4) certain other federal corporations. See relevant federal statutes regarding certain immunities from pre-judgment attachment. It appears that the substantive law of Pennsylvania governs the filing and docketing

entry of judgment, then the court remains limited to that same time period to order a new trial in the case.

A closer reading of the provision reveals, however, that, under certain circumstances, the court may have a period of time beyond the ten days immediately following the entry of judgment in which to order a new trial. Where a party has already made a Rule 59 motion and, in so doing, has destroyed the finality of the judgment and tolled the time for appeal, the second sentence of Rule 59(d) "makes it clear that after giving the parties notice and an opportunity to be heard, the trial court has the power to grant a new trial, on its own initiative, more than ten days after the entry of judgment." See Volume 6A, Chapter 59, pp. 59-255 to 59-256. See also Valtrol Inc. v. General Connectors Corp., 884 F.2d 149 (4th Cir. 1989) and Slaughter v. Philadelphia National Bank, 12 F.R.S. 2d 1308 (E.D. Pa. 1968). The result reached, though, is perfectly just. If the trial court is aware or becomes aware that an error of sufficient import has occurred, then regardless of when and how presented, it should be cured.

Unlike Rule 50(b), Rule 59(c) permits the use of affidavits to support the motion for a new trial. Time wise, you have the same ten days for affidavits that you have for the

motion itself. Then, your opponent has ten days, or upon agreement or leave of court, twenty days to serve opposing affidavits. The court has discretion to allow additional affidavits thereafter by the original moving party, presumably upon motion, although it remains somewhat unclear. The Rule does not establish a specific time limit for reply affidavits, but one would expect that matter to have coverage in the court order if the court decides to grant leave to file reply affidavits in the first instance.

An order for a new trial, basically, reopens designated issues for retrial on the ground that those issues were improperly decided at the original trial. It seeks retrial of those issues as opposed to a final determination of the action by the court. Although a Rule 59 new trial motion is not a prerequisite for appeal, an order granting or denying said relief is not appealable.

The final provision of Rule 59, Rule 59(e), provides for a motion to alter or amend a judgment and this rule is similar to Rules 59(b) and (d), in that it must be served within ten days of the entry of judgment to be timely. See Rivera v. M/T Fossarina, 840 F.2d 152 (1st Cir. 1988). Like the other provisions of Rule 59, a Rule 59(e) motion also destroys the finality of the

judgment. At any rate, it remains clear that Rule 59(e) does not authorize the court to alter or amend a judgment entered upon a jury verdict in a manner that would constitute a reexamination of the facts found by a jury in contravention of the Seventh Amendment. See Abeshouse v. Ultragraphics, Inc., 754 F.2d 467 (2d Cir. 1985) and McGee v. U.S., 17 F.R.S. 2d 1093 (E.D. Pa. 1972).

C. Rule 52 - Findings by the Court; Judgment on Partial Findings

In many respects, Rule 52 parallels Rule 50 and governs post-trial motions in non-jury trials, including trials utilizing an advisory jury. The primary aim of Rule 52(a) is to eradicate any barriers to appellate review in cases tried to the court rather than to a jury by requiring that the court make special findings of fact and separate conclusions of law in all actions tried before it. In addition, Rule 52(a) eliminates confusion surrounding the appropriate standard of review regarding said findings of fact by clearly stating that such findings "shall not be set aside unless clearly erroneous." "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Ragen Corp. v. Kearny & Trecker Corp., 912 F.2d 619 (3d Cir. 1990). In

other words, a reviewing court may not set aside a finding merely because it would have viewed the facts differently or given different weight to certain evidence. Hadco Products, Inc. v. Frank Dini Co., 401 F.2d 462 (3d Cir. 1968).

Rule 52(a) itself does not speak to the particularity or specificity necessary to constitute sufficient findings. It is clear, however, from the case law that the judge need only make brief, definite and pertinent factual findings and legal conclusions and need not overelaborate the facts. Findings have been deemed adequate where they are "sufficiently comprehensive to form a basis for decision and whether they are supported by evidence." If the trial court fails, totally, to make findings or to make findings as to material issues, an appellate court will usually vacate the judgment and remand for appropriate findings. See Adkins v. GAF Corp., 923 F.2d 1225 (6th Cir. 1991) and Bradley v. Pittsburgh Board of Education, 910 F.2d 1172 (3d Cir. 1990).[8]

More pertinent to the matter at hand, Rule 52(b) provides that not more than ten days after entry of judgment a party may serve a motion requesting the court to amend its findings or to make additional findings. As with a Rule 50(b) motion, a party may combine a Rule 52(b) motion with a new trial motion and a Rule 52(b) motion similarly destroys the finality of

the judgment and tolls the time for appeal. Unlike a Rule 50(b) motion, however, it appears that neither a request for findings nor a Rule 52(b) are prerequisites to appellate review of the findings, conclusions and judgment. Despite that, it seems that the better practice would be to make a Rule 52(b) motion if the findings are inadequate because the appellate court will not require the trial court to make additional findings for its review. Instead, if the appellate court determines that the findings are inadequate, it will ordinarily remand to the trial court rather than make the findings adequate. See National Metal Finishing Co. v. Barclays American/Commercial Inc., 899 F.2d 119 (1st Cir. 1990). Whether or not a party has made a Rule 52(b) motion in a non-jury case, it is clear that it may raise, or appeal, the question of the sufficiency of the evidence to support the findings. See Monaghan v. Hill, 140 F.2d 31 (9th Cir. 1944).

Rule 52(c) replaces former Rule 41(b) (involuntary dismissal) and parallels Rule 50(a) (pre-verdict motions for judgment as a matter of law in jury trials) and governs such motions in non-jury trials. Former Rule 41(b) authorized the trial court in a non-jury case to dismiss a plaintiff's case at the close of the evidence for failure to meet the necessary

burden of proof. Rule 52(c) appears to be broader in scope inasmuch as it applies to both the plaintiff and the defendant, whereas Rule 41(b) was limited in its application to plaintiffs. In addition, Rule 52(c) is not restricted in its use to the close of the evidence of the party against whom judgment was entered.

D. RULE 60 RELIEF FROM JUDGMENT OR ORDER

Before moving on with appellate procedures, we should not overlook the use of Rule 60(b) as a post-verdict tool to remedying an unjust verdict. Rule 60(b) includes an old portion of Rule 59 that provided for a new trial on the grounds of after discovered evidence.[9] Rule 60(b) provides six grounds that may support a motion for relief from a judgment or order of the trial court. A word of warning: unlike the previous post-trial motions that I have discussed a Rule 60(b) motion does not destroy the finality of the district court's judgment and, therefore, does not toll the time for appeal. The six grounds for which relief may be sought under Rule 60(b) are as follows: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation or other misconduct of an adverse party; (4)

of lis pendens in federal actions as well.

Rule 69 governs the enforcement of money judgments and basically, provides that execution on a judgment shall be in accordance with practice and procedure under Pennsylvania law. See 42 Pa. C.S.A. Sections 4305 and 4306(f). In keeping with the liberal discovery rules utilized in federal court, Rule 69 allows broad discovery in aid of execution and enforcement of judgment from any person, including a judgment debtor. See Pennsylvania Rules of Civil Procedure 3101-3260. It is important to note that both Pennsylvania and federal statutes provide numerous exemptions of property from execution.

Rule 70 governs judgments for specific acts and vesting of title. This rule provides that where a judgment directs a party to execute conveyance of land or deliver a deed or other documents to transfer title and that party fails to comply, the court in its discretion may direct that the acts be done at the cost of the disobeying party by some other person appointed by the Court with the same effect as if done by that party. In addition, the prevailing party may apply for a writ of attachment of property of a defendant to the clerk to compel the disobedient party to obey the judgment. An application for contempt also remains an available channel for enforcement.

III. POST-TRIAL MOTIONS

The clerk's entry of judgment in a particular case is crucial because the date of such entry constitutes the reference point for determining the time period for filing post-trial motions and notices of appeal as well as the time period that triggers the availability of Rule 62 stay provisions and the time for moving for relief under Rule 60(b). The time periods for filing and serving post-trial motions run from the entry of judgment and since they destroy the finality of the district court's judgment, the filing of such motions further affects the time for filing a notice of appeal.

A. Rule 50 - Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

Rule 50 governs motions for judgment as a matter of law (formerly called a judgment notwithstanding the verdict) in all civil jury trial cases.[4] Pursuant to Rule 50(b), where you have previously moved for judgment as a matter of law pursuant to Rule 50(a) at the close of your opponent's case and the court denied your motion, you may renew that motion by serving and filing it in accordance with Rules 4(a)(4) and 5 of the F.R.A.P. not more

than 10 days after the entry of judgment. Rule 50(b) further provides that you may join a Rule 59(b) New Trial Motion with your Rule 50(b) Motion or request a new trial in the alternative. Your Rule 50(b) motion must be in writing and the making of a Rule 50(a) motion at the close of all the evidence remains a prerequisite to making a Rule 50(b) motion after the trial is over. If you failed to make the earlier motion, the rules preclude you from making a Rule 50(b) motion, but you may still raise the issue of the plaintiff's insufficient evidence by your motion for a new trial.[5] You are not, therefore, out of court, but if you are right that your Rule 50(b) motion should have been granted, your client is not going to be pleased about the retrial expenses and you may well have educated your opponent for the second time around.

There exists no formal requirement in the Rules for the form of a motion for a judgment as a matter of law at the close of the evidence and, therefore, it remains somewhat unclear as to whether that motion must be in writing or may be made orally during trial. It is our opinion that Rule 7(b)(1) would apply and enable you to make an oral Rule 50(b) motion, but it is our view that the safer practice is to make a written motion.

Again, since the motion must be made first at the close

of all of the evidence, remember to remake it in those cases where the court has permitted a party to reopen for rebuttal a case you thought was over and in which you had already filed your motion prior to reopening. Obviously, a motion made at the end of the plaintiff's case under Rule 50(a) is not sufficient to meet the requirements of the Rules if further testimony occurs.

When you file the motion for judgment as a matter of law, or for a new trial, or in that regard, any other post-trial motions, do not overlook Local Rule 20. That Rule states that,

> (a) Every motion shall be accompanied by a form of order which, if approved by the court, would grant the relief sought by the motion.
>
> (b) Every uncontested motion shall be accompanied by a certificate of counsel that such motion is uncontested.
>
> (c) Every motion not certified as uncontested shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion. Unless the parties have agreed upon a different schedule and such agreement is set forth in the motion, or unless the court directs otherwise, any party opposing the motion shall serve a brief in opposition, together with such answer or other response as may be appropriate, within ten (10) days after service of the motion and supporting brief. (note: pursuant to F.R.Civ.P. 6(e) an additional three (3) days shall be allowed if service is made by mail.) In the absence of timely response, the motion may be treated as uncontested. The court may require or permit further briefing if appropriate.
>
> (d) Every motion not certified as uncontested shall be accompanied by a written statement as to the date and manner of service of the motion and supporting brief.

> (e) Within ten (10) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial by a writing delivered to the official court reporter, or (b) file a verified motion showing good cause to be excused from this requirement. Unless a transcript is thus ordered, or the movant excused from obtaining a transcript, the post-trial motion may be dismissed for lack of prosecution.
>
> (f) Any interested party may request oral argument on a motion. The court may require oral argument, whether or not requested by a party. The court may dispose of a motion without oral argument.
>
> (g) Motions for reconsideration or reargument shall be served within ten (10) days after the entry of the judgment, order, or decree concerned.

While this Rule gives you ten days after filing the original motion, so that it could be twenty days from entry of the verdict, the better practice is to do both simultaneously so that you do not accidentally overlook Rule 20.

Remember, you cannot simply call the reporter and tell him to transcribe the record. You need an order from the Judge. Even in those cases where daily transcriptions have been procured, you are still not safe from this Rule. In those cases, however, you should utilize Section (ii) of the Rule. While the Local Rule does not require dismissal of the appeal if you forget about it, it does permit the court to do that. To avoid the necessity of a sleepless night while you are waiting for the ruling, follow the rule.

While many persons state as so-called hornbook law (including this author) that you must include in your motion for judgment as a matter of law all of the grounds upon which you rely or you will be banned from raising such issues on appeal, it is the opinion of this author that this is not a correct reading of the rule. But how often have we seen motions with a phrase "and such other reasons as will be stated within ten days after the record has been transcribed" and orders granting permission for same. It is, however, the opinion of this writer that the motion is merely a repetition of the Rule 50(b) motion that was filed during trial. Unless you had the reasons in your original motion, it is too late to think of them, we submit, after the trial. See Kutner Buick, Inc., v. American Motors Corp., 868 F.2d 614 (3d Cir. 1989) (post-trial motions can only be granted on grounds advanced in pretrial motion). Therefore, any arguments omitted from the earlier motion are deemed waived. We submit that the plain reading of the rule also supports that view. The Rule states, inter alia, ". . . the court is deemed to have submitted the action to the jury subsequent to a later determination of the legal questions raised by the motion" (emphasis added). We submit, therefore, that the motion referred to in Rule 50(b) can only refer to the motion, not the Rule

50.b). Thus, we recommend that the trial motion be as full and complete as you can possibly make it and that you avoid pro forma motions.

In considering a Rule 50(b) motion, the court applies the following standard in the light most favorable to the party who secured the jury verdict: "when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment," judgment as a matter of law is appropriate. See Williamson v. Consolidated Rail Corporation, 926 F.2d 1344 (3d Cir. 1991) and Simone v. Golden Nugget Hotel & Casino, 844 F.2d 1031 (3d Cir. 1988). If the trial court grants the Rule 50(b) motion, then what? The court must first rule on any new trial motions filed in accordance with Rule 50(c)(1) by determining whether it should grant a new trial if judgment is thereafter vacated or reversed. See Motter v. Everest & Jennings, Inc., 883 F.2d 1223 (3d Cir. 1989) (the court should rule on both motions). The court must also specify the grounds relied upon in granting or denying the new trial motion. The reason for this Rule, of course, is obviously that the appellate court needs to know what the district court's thinking was so that if they decide that there were some errors, they do not just rule on a new trial necessarily in a vacuum without

thinking of the district court. This ruling, however, is conditional and is not a grant of a new trial generally.[6]

In the event that the plaintiff has not made a motion for a new trial, and the defendant has not made a motion for a new trial, of course, Rule 50(c)(1) does not apply. If, however, the Court has granted the Rule 50(b), then the losing party has the right to make a motion for a new trial within ten days after the entry of the judgment in accordance with the Rule. Thus, the losing party even though they did not move within the original ten days, is not harmed by not having filed a motion initially. Also, it has the advantage (sometimes) of keeping this portion of the case at the trial court level. There is no requirement that it stay at the trial court level. The new trial issue may still be dealt with first on the verdict winner's side at the appellate level.

The conditional grant of a new trial under Rule 50(c)(1) has no effect unless the Judgment as a matter of law is reversed on appeal. The harsh effects of that result are somewhat ameliorated by the option of the appellate court to remand to the trial court for reconsideration of the earlier motion for a new trial. Two alternative dispositions remain viable where the appellate court reverses the lower court's grant of a party's

Rule 50(b) motion: (a) it can simply remand for a new trial or (2) it can reverse the conditional grant of the new trial and enter judgment on the verdict below. See Williamson v. Consolidated Rail Corp., 926 F.2d 1344 (3d Cir. 1991).[7]

If the trial court denies the Rule 50(b) motion and the losing party appeals, the winner can argue that even should the court determine that judgment as a matter of law is warranted, the least it can do for the winner is to give him a second chance and award him a new trial. The appellate court has the further option of either remanding to the lower court for a new trial or remanding to the lower court for reconsideration of the verdict loser's motion for a new trial pursuant to Rule 50(d). There exists good reason to send it back to the trial court for a new trial because the trial judge is in a better position to make that determination inasmuch as he possesses firsthand knowledge of the witnesses' testimony and the issues of the case. See Iacurci v. Lumbus Co., 387 U.S. 86, 87 S. Ct. 1423, 18 L.Ed. 2d 581 (1967). See Neely v. Martin K. Eby Construction Company, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed. 2d 75 (1967) (no constitutional or statutory bar exists to the appellate court directing entry of judgment itself). See generally, Moore's Federal Practice, Volume 5A, Chapter 50.

It is also important to note that the denial of a Rule 50(b) motion is not an order that the losing party can appeal from. Rather, the losing party must appeal from the judgment on the verdict. Palm Beach Atlantic College, Inc. v. First United Fund, Ltd., 928 F.2d 1538 (11th Cir. 1991). Similarly, where the court denies a party's Rule 50(b) motion, but grants a motion to set aside the verdict, vacates the judgment and orders a new trial, the losing party has no right to appeal the order granting the new trial because such an order remains interlocutory and non-appealable. Dostal v. Baltimore & Ohio Railroad, 170 F.2d 116 (3d Cir. 1948).

B. Rule 59 - New Trials; Amendment of Judgments

Although the more common practice remains that of combining a Rule 50(b) motion with a motion for a new trial or requesting a new trial in the alternative, sometimes, defendants and occasionally plaintiffs will move separately for a new trial pursuant to Rule 59 without tying it to a Rule 50(b) motion. Pursuant to Rule 59(b), the verdict loser has 10 days from the date of entry of judgment in which to make a separate new trial motion. However, the court has the discretion to consider an untimely Rule 59 motion as a Rule 60(b) motion where the moving

party has set forth appropriate grounds for such relief. Unlike a Rule 50(b) motion the new trial motion does not require the added procedural step of a prior motion, during the trial of the case. A Rule 59 new trial motion, like the Rule 50(b) motion, does destroy the finality of the judgment and toll the time period for taking an appeal. There exist some advantages to moving for a new trial as opposed to a judgment as a matter of law. The standard for a new trial is such that a court has the discretion to grant a new trial motion even where substantial evidence exists that would preclude granting judgment as a matter of law. In addition, the court has the discretion to grant a new trial on the ground that the verdict was against the weight of the evidence even where the evidence was so insufficient as to warrant granting judgment as a matter of law. See Deas v. Paccar, Inc., 775 F.2d 1498 (11th Cir. 1985) and Zegan v. Central R.R. Company of New Jersey, 266 F.2d 101 (3d Cir. 1959).

Rule 59(a) indicates that the party moving for a new trial must allege appropriate grounds entitling it to a new trial. While the Rule itself does not speak to any requirement of particularity, or specificity, in the motion, Rule 7(b)(1) clearly applies and requires that the moving party list all of the reasons he feels entitle him to another opportunity to

present the case. Thus, you will have to list in your motion all of the myriad disasters that occurred during the trial that caused the jury to misunderstand the merits of the case. Theoretically, you have been taking copious notes and are completely aware of each individual error as of the time that it occurred.

While those things are fine in theory, most likely you have not and, therefore, the ten day requirement seems somewhat unfair, particularly if you have not had the luxury of daily copy. If, however, your appeal is directly to the trial court, there will be a greater understanding of what you are trying to convey to that court since it also went through the same trial that you did, and, therefore, if you are a little vague as to what the particular error is, without the help of the record, the trial court is more likely to interpret it in the way that you actually would have phrased it had you had the record right in front of you.

In order to fulfill the underlying purpose of reducing the occurence of unjust verdicts, this Rule gives the court broad discretion to grant a new trial . The court may grant a new trial as to "all or part of the issues" and "to any or all of the parties." See Rule 59(a). The court has the power to grant a

new trial on almost any grounds imaginable that show a mistake or error during the trial that has harmed and/or prejudiced the moving party in some way. For example, the courts have found the following grounds sufficient to grant a new trial: (1) verdict against the weight of the evidence (2) damages excessive or inadequate (3) judicial error in the admission or rejection of certain evidence (4) misconduct of court officials, counsel, parties, witnesses, or a third person and (5) jury misconduct. See generally, Moore's Federal Practice, Volume 6A, 59-77 to 59-218.

Rule 59(d) provides that the trial court may grant a new trial on its own initiative and for reasons not stated in the moving party's Rule 59 motion. See Harkins v. Ford Motor Co., 437 F.2d 276 (3d Cir. 1970). See also Scott v. Plante, 641 F.2d 117 (3d Cir. 1981). While the parties must be given notice and an opportunity to be heard before the court can exercise its power under Rule 59(d), if you realize that you previously overlooked a grievous error in your Rule 59 motion, you may be able to persuade the court to exercise its Rule 59(d) power and allow the presentation of the issue. The ten day time limit for making a Rule 59 motion for a new trial applies equally to a court initiated Rule 59(d) order. Therefore, if neither party has made a Rule 59 motion during the 10 days subsequent to the

void judgment; (5) judgment satisfied, released or discharged, or a prior judgment upon which it was based was reversed or it is no longer equitable; or (6) any other reason justifying relief from the operation of the judgment.[10] With the promulgation of Rule 60(b), the Committee sought to balance two competing interests: (1) the interest in the eventual conclusion to controversies and (2) the interest in the correctness of decisions. Rule 60(b) also furnishes a party with two procedures in which to get their grievance heard: (1) by motion in the Court that entered the judgment and (2) a new and independent action to obtain relief.

In order to accomplish that purpose, you must proceed under Rule 62(b) which governs stays pending disposition of post-trial motions. Rule 62(a) provides a ten day automatic stay, but said stay does not apply to final judgments in actions for injunctions, receiverships, and accountings in actions for patent infringement. Upon appeal, Rule 62(c) provides that the court may, in its discretion, suspend, modify or grant an injunction during the pendency of an appeal. The court also has the discretion to require the moving party to post security to protect the interest of the adverse party during the pendency of the stay of enforcement. See Marcelletti & Son Construction Co. v. Mill Creek Township Sewer Authority, 313 F. Supp. 920 (W.D. Pa. 1970). Rule 62(d) governs the stay pending appeal when the

appellant posts a supersedeas bond. Subject to the previously listed exceptions in Rule 62(a), the stay becomes effective upon posting of the supersedeas bond. Rule 62(f) provides that a judgment debtor may have a stay where it would have been entitled to a stay had the action been held in state court.

You will note that the ten-day time limitation strictly enforced under Rules 50, 52 and 59 are not followed under Rule 60(b). Rather, Rule 60(b) provides for a maximum one year time limitation for asserting grounds (1), (2) and/or (3) and allows "a reasonable time" for asserting grounds (4), (5) and (6).[11] It is also important to note at this time that a Rule 60(b) motion is not a substitute for appeal even though a timely Rule 60(b) motion will allow the court to grant relief even on judicial errors. The better and more prudent course might be to take an appeal in addition to asking the district court for relief. See Page v. Schweiker, 786 F.2d 150 (3d. Cir. 1986). Keep in mind also that the Third Circuit subscribes to the traditional rule that the district court must first obtain the approval of the appellate court before entertaining a Rule 60(b) motion once the judgment in a case is appealed. See Venen v. Sweet, 758 F.2d 117 (3d. Cir. 1985). Rule 7(b)(1) is equally applicable to Rule 60(b) motions and the use of affidavits to support these motions

are common. Additionally, the moving party must also comply with the notice provisions of Rule 5(b). See generally, Moore's Federal Practice, Volume 7, Chapter 60, Part IV.

IV. FEDERAL APPEALS

Rules 3 and 4 of the Federal Rules of Appellate Procedure govern the manner and time for filing a notice of appeal from a judgment entered in the district court. The majority of appeals may be taken as of right, and Rule 3 provides that such appeals may be taken by filing a Notice of Appeal within 30 days of the entry of judgment by the clerk of the district court.[12] It is important to remember at this point that where a party has filed post-trial motions under Rules 50(b), 52(b), and/or 59, the time for appeal is tolled until the entry of the order on such motions is made. Therefore, you have 30 days from the entry of the order granting or denying the post-trial motions within which to file a notice of appeal.

Furthermore, if a party filed a post-trial motion after a notice of appeal has already been filed, said notice becomes a nullity and the filing party must file a new notice upon disposition of the post-trial motions. See Rule 4(a)(4). Once a party has filed a timely notice of appeal, Rule 4(a)(3) allows any other party to file a notice of appeal within one of two time periods:

(1) within 14 days of the date the original notice of appeal was filed or (2) within the period provided under Rule 4(a) whichever last expires. Rule 4(a)(5) provides that upon motion and for good cause shown or excusable neglect, the court may extend the time for filing a notice of appeal.

The 1991 amendments to the Rules of Appellate Procedure added subdivision (6) to Rule 4(a). Rule 4(a)(6) gives a party a limited opportunity for relief where the party did not receive the notice of entry of judgment or received it so late that it could not file a timely notice of appeal. See also Rule 77(d). Rule 4(a)(6) is as follows:

> (6) [Effective on Dec. 1, 1991. See also, subd.(a)(6) above.] The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may,upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

The Committee notes following the amendment encourage winning parties to send their own notice of entry of judgment to the other parties so as to reduce the likelihood of an adverse party prevailing on grounds of non-receipt. If the court grants the motion for an extension, then the moving party has only 14 days

from the entry of the order reopening the time for appeal in which to file a notice of appeal.

Rule 7 governs the filing of bonds for costs on appeal in civil cases. The purpose of such bonds is to give the appellee security for the payment of costs that he may be awarded later. Pursuant to 28 U.S.C. Section 1920, a prevailing party may recover the following costs: (a) fees of clerk and marshal, (b) court reporter for all or any part of transcript obtained for use, (c) printing and witness costs, (d) exemplifications and copies of papers necessarily obtained for use (e) docket fees, (f) costs of court appointed experts, interpreter's salaries, fees, expenses and costs of special interpretation under 28 U.S.C. Section 1828. Rule 54(d) provides that a prevailing party may obtain costs, as of course, unless express provision is made by statute or rule, with exceptions applicable where the United States is a party. Costs may be taxed on one day's notice by the clerk, who retains considerable discretion in reviewing and allowing such taxation. See Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275, 66 S. Ct. 1105, 90 L. Ed. 2d 1230 (1946).

Keep in mind, however, that Local Rule 42 provides for the objection to such taxation by giving five days written notice of the objections to the clerk and all parties, including the

grounds therefore and serving a copy of the specification of objections on the party seeking the costs within five days of the notice of taxation.

Rule 8 governs stays and injunctions pending appeal. It must be read in conjunction with Rule 62 because a party must make motion to the district court first for a stay. Only when the district court fails to grant the stay or grants it on unacceptable terms, does Rule 8 come into play. See Local Rules 27 and 32(b) for the style and form of the motion.

In order to proceed with an appeal, the appellant must then file the record on the appeal and docket the appeal per Appellate Rules 10, 11 and 12, including the transmission of the lower court record to the appellate court. 28 U.S.C. Section 753 governs the preparation of transcripts. A court reporter will record all proceedings in open court in civil matters unless otherwise agreed to and upon payment of a fee, a party may obtain a transcription of the original records in the case along with a certificate from the court reporter.[13]

It is the responsibility of the appellant to ensure that the record is complete - i.e., contains all papers necessary for determination of the issues on appeal. Within ten days of filing the notice of appeal, the appellant must order the part of the

transcript necessary for inclusion in the record. The more prudent attorney might request the entire transcript. If the appellant intends to order some part less than the whole, he must serve on the appellee a statement of the issues he intends to present along with a description of the portion of the record he has ordered. In addition, the appellant must file a copy of his order with the clerk within the above-referenced ten days or if there is no record, a certificate to that effect. Within ten days of service of said description and statement, the appellee must file and serve on the appellant a statement of additional portions to be included. If the appellant fails so to do, the Rule gives the appellee another ten days within which to either order the additional parts himself or move the district court to order the appellant to do so. Once the appeal is docketed and the record filed, the appellate court can effectively plan for the prompt disposition of the case.

ENDNOTES

1

28 U.S.C.A. Section 636(c)(3) provides that an appeal from a judgment entered upon direction of a magistrate in proceedings under Rule 73 will also lie to the courts of appeals.

2

The 1963 amendment to Rule 58, requiring that the judgment be set forth in a separate document was clearly meant to eliminate the potential for confusion by making it easy for parties to recognize a judgment. It adds further support for the position that the term "judgment" includes only final judgments and appealable orders.

3

Where a case involves multiple claims or parties, one must construe Rule 58 in conjunction with Rule 54(b). Where the judgment affects only some claims or parties, but not all, the court may only direct the clerk to enter said judgment where it has determined that no just reason for delay of entry exists. Without such direction from the court, such judgment remains interlocutory and non-appealable.

4

The rule retains the same standard as for directed verdict motions and Motions for JNOV and merely simplified the language so that a misnomer is merely a formal error and the court will go on to decide the party's motion in accordance with Rule 50.

5

Said failure will, however, preclude you from challenging the sufficiency of the evidence on appeal. See Belber v. Lipson, 905 F.2d 549 (1st Cir. 1990) and Follette v. National Tea Company, 460 F.2d 254 (3d Cir. 1972).

6

The conditional grant of a new trial does not affect the finality of the judgment and, therefore, if the court reviews the Rule 50(b) motion on appeal, the trial court shall proceed with the new trial. If the new trial is denied, the appellee may assert it as error on appeal and if the judgment is reversed, the appellate court will determine subsequent proceedings.

7

It should be noted that if the trial court fails to rule on the new trial motion where it grants the Motion for Judgment as a matter of law, the appellate court will consider that failure a conditional grant of a new trial. See Motter, supra.

8

The Third Circuit has, however, invoked its supervisory powers to require the district court to explain the legal basis for its determinations. See e.g. Sowell v. Butcher & Surger, 926 F.2d 289 (3d. Cir. 1991) and Vadino v. A. Valey Engineers, 903 F.2d 253 (3d. Cir. 1990).

9

Rule 60(a) provides that the court, on its own initiative or by a motion of a party, may correct clerical errors and the like appearing in judgments, orders or other parts of the record at any time, even during the pendency of an appeal, with leave of the appellate court.

10

A failure to obtain relief through other channels does not fall

within the parameters of Rule 60(b)(6). Rather, it is a residual clause to cover unforeseen contingencies.

11

It is also important to note that one year is the "maximum" allotted time for making a Rule 60(b) motion and you are not given an absolute one year time frame in which to so move. Rather, laches or undue delay may preclude you from doing so. In addition, if new evidence was discovered or could have been discovered in time to make a Rule 59 motion, you must file a Rule 59 motion. You cannot delay and file a Rule 60(b)(2) motion instead.

12

Where the United States is a party, the appellant must file such notice within 60 days of said entry. Further, Rule 5 governs appeals from interlocutory orders under 28 U.S.C. Section 1292(b) and provides that an aggrieved party must file a petition for permission to appeal with proof of service on all other parties within 10 days of the entry of judgment to be timely. Official form 1 of the Appellate Rules sets forth a simple notice in the suggested form. Another important thing to note is that a notice mailed within the 30 day appeal period, but received after it is

untimely. See United States v. Doyle, 854 F.2d 771 (5th Cir. 1988).

13

Local Rule 39 governs the preservation of records, files and exhibits and Local Rule 40 governs the disposition of videotapes.

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