1995 Federal Civil Practice And Procedure Update For Seventh Circuit Practitioners

John R. Maley*

Introduction

Indiana practitioners litigating in federal court during 1995 experienced a year of continued adjustment to drastic changes imposed in recent years. With the sweeping revisions to the Federal Rules of Civil Procedure taking effect December 1, 1993, with local rules changes and civil justice reform plans in effect, and with numerous important decisions from the Seventh Circuit and Indiana district courts, it was no easy task for practitioners to remain current in federal civil procedure. This Article analyzes these developments to assist Indiana attorneys in their federal civil litigation.

The subjects are presented in the order in which they often arise in litigation. Complex or difficult issues are thoroughly analyzed, while straightforward but novel developments are merely highlighted. For ease of future reference, the following table of contents outlines the subjects discussed:

I. Removal

Although it should be a simple process, removal continues to be a hotly litigated matter. Several 1995 decisions reveal the challenges confronting practitioners involved in removing actions from state to federal court.

---

* Associate, Barnes & Thornburg, Indianapolis; Chair, Local Rules Committee, U.S. District Court, Southern District of Indiana; Adjunct Professor, Indiana University School of Law—Indianapolis; Lecturer, PEC Indiana Bar Review. B.A., 1985, University of Notre Dame; J.D., *summa cum laude*, 1988, Indiana University School of Law—Indianapolis; M.B.A., Indiana University, 1994; Law Clerk to the Honorable Larry J. McKinney, U.S. District Court, Southern District of Indiana, 1988-90.

In *Macri v. M&M Contractors*,[1] Judge Miller remanded a removed action to state court due to procedural defects, and assessed costs on remand. The decision provides a good summary of important removal principles.

In *Macri*, plaintiff had filed a breach-of-contract action in state court. Defendant removed on the basis of diversity jurisdiction within the thirty-day limit of 28 U.S.C. § 1446(b), but failed to sign the petition, file a copy in state court, or serve plaintiff. Plaintiff moved to remand, and defendant tried to cure these procedural defects.

Judge Miller rejected the attempt to cure the removal defects, reasoning that defendant failed to cure during the thirty-day removal period. He held that such procedural defects can be cured within thirty days from receipt of the complaint, but thereafter remand is required unless plaintiff waives the defects.[2]

Judge Miller also ordered defendant to pay plaintiff's costs and fees in obtaining remand. Pursuant to 28 U.S.C. § 1447(c), remand orders "may require payment of just costs and actual expenses, including attorney fees, incurred as a result of removal." Noting that other courts have assessed costs on remand where removal was procedurally defective, defendant was ordered to pay full costs and fees, even though Judge Miller did not find bad faith.[3]

Another removal battle arose in *Reason v. General Motors Corp.*,[4] in which Judge Hamilton issued a comprehensive opinion with important holdings. To understand the case, some background is necessary. Plaintiffs, husband and wife, filed suit in state court against GM alleging personal injuries from a car accident. The wife alleged enhanced injuries from her seat- belt. The husband asserted a loss of consortium claim. In compliance with Indiana Trial Rule 8(A)(2), plaintiffs did not allege a specific dollar amount of damages.[5]

GM timely removed the action, stating in its removal notice that plaintiffs were residents of Indiana, that GM was a citizen of Delaware and Michigan for diversity purposes, and that "[b]ased on the allegations of plaintiff's Complaint, if proved, the amount in controversy exceeds $50,000."[6] Plaintiffs' complaint alleged "severe injuries, including but not limited to, injuries to her head and mouth, a broken nose, a broken left knee, a broken left leg, and a broken right wrist," as well as "great physical and emotional pain and suffering."[7]

Plaintiffs timely filed a motion to remand, contending that the amount in controversy did not exceed $50,000. Plaintiffs submitted an affidavit stating that they were not seeking damages in excess of $50,000 against GM. Plaintiffs also stated that they had settled their claim against the other driver for $42,500. GM responded, asserting that unless plaintiffs were seeking less than $7,500 from GM,

---

1. 897 F. Supp. 381 (N.D. Ind. 1995).
2. *Id.* at 383.
3. *Id.* at 384-85.
4. 896 F. Supp. 829 (S.D. Ind. 1995).
5. *Id.* at 830-31.
6. *Id.*
7. *Id.* at 835.

jurisdiction was present.[8]

The following subparts analyze the holdings in *Reason.*

A. Citizenship

Although not the main focus of the opinion, Judge Hamilton noted that the removal notice did not establish diversity of *citizenship*, but instead spoke to residence. Although many diversity filings—complaint or removal notice—refer to residence of the parties, diversity jurisdiction requires diversity of citizenship, and citizenship and residence are not the same test (although they oftentimes suggest the same result).[9] The Seventh Circuit has harped on this issue before,[10] so practitioners are advised to speak exclusively in terms of citizenship in the diversity jurisdiction context.

B. Post-Removal Affidavits

Following the Seventh Circuit's directive in *In re Shell Oil Co.*,[11] Judge Hamilton held that plaintiffs' post-removal affidavit attempting to limit their damages to $50,000 was of no moment.[12] As the Seventh Circuit explained in *Shell*, "litigants who want to prevent a removal must file a binding stipulation or affidavit with their complaints."[13]

C. Specificity In Removal Notice

After plaintiffs moved to remand, GM relied on the allegations of the complaint, the size of plaintiff's settlement with the non-party driver, and citations to cases involving large jury awards for enhanced injuries in seat-belt cases. GM did not otherwise offer any evidence on the amount in controversy. Although he observed that there was a "possibility" that the amount at issue exceeded $50,000, Judge Hamilton ruled that GM's removal notice did not meet the standard for establishing to a *reasonable probability* that the amount in controversy exceeded $50,000.[14]

The court strictly applied the reasonable probability standard. As a result, practitioners seeking to stay in federal court should do more to demonstrate that plaintiff's damages exceed $50,000. Possible options include submitting medical records, medical expenses, discovery responses, or other evidence.

D. Aggregation of Consortium Claims

Although criticized by commentators, federal law appears settled that separate

---

8. *Id.* at 831.
9. *Id.* at 834-35.
10. Poulos v. Naas Foods, 959 F.2d 69, 70 n.1 (7th Cir. 1992).
11. 970 F.2d 355 (7th Cir. 1992).
12. *Reason,* 896 F. Supp. at 831-33.
13. *In re Shell Oil Co.,* 970 F.2d at 356.
14. *Reason,* 896 F. Supp. at 833-34.

and distinct claims cannot be aggregated for computing the amount in controversy.[15] In *Reason* the issue thus arose as to whether the wife's claim and the husband's consortium claim were separate and distinct so as to preclude aggregation. Analyzing Indiana law, Judge Hamilton concluded that consortium claims are separate and distinct. Thus, the two could not be added together to surpass the $50,000 threshold.[16]

E. Aggregation of Non-Party Settlement

Finally, the court ruled that where plaintiff has settled with a non-party for $42,500, that does not establish that the amount in controversy as to the remaining defendant exceeds $50,000. The court refused to aggregate the claims, again relying on the "separate and distinct" rule that precludes aggregation.[17]

Three months later Judge Hamilton again addressed removal in *Harmon v. OKI Systems*,[18] holding that: (1) defects in defendants' failure to allege the parties' citizenship were waived by plaintiff's failure to raise them within 30 days of removal; (2) such defects could be cured post-removal; and (3) defendants' failure to allege more than $50,000 in controversy was also waivable and could be cured where plaintiff failed to timely raise the issue, and where the evidence demonstrated that, at the time of removal, the amount in controversy exceeded $50,000.

The *Macri*, *Reason,* and *Harmon* opinions are important for federal practitioners involved in removal or remand. Because remand decisions are rarely reviewable, there is sparse Seventh Circuit law on the subject, therefore these decisions stand as strong precedent in Indiana federal courts.

II. DEFAULTS—DON'T ALWAYS MEAN VICTORY

Judge Miller's decision in *Larance v. Bayh*,[19] serves as a reminder that defaults do not always result in victory. Three prisoners sued their keepers, who failed to answer. A default was entered, which prompted a motion to set aside the default. Judge Miller granted the motion, reasoning that "even after default it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law."[20] Because plaintiff's complaint failed to state a cognizable claim for relief, Judge Miller vacated the default and dismissed the action with prejudice.[21]

---

15. *E.g.*, Griffith v. Sealtite Corp., 903 F.2d 495, 498 (7th Cir. 1990).
16. *Reason,* 896 F. Supp. at 833.
17. *Id.* at 831.
18. 902 F. Supp. 176 (S.D. Ind. 1995).
19. No. 3:94-cv-182RM, 1995 WL 46718 (N.D. Ind. Jan. 18, 1995).
20. *Id.* at *1.
21. *Id.*

III. TRANSFER

Motions to transfer actions from one district to another, though rarely granted, are often filed. A rare but possibly more successful motion, however, is the motion to transfer from one *division* within a district to another *division.*

Such a motion was filed by the defense in *Maddry v. NBD Bank*,[22] and transfer from the Hammond Division to the South Bend Division was granted by Magistrate Judge Rodovich. In *Maddry* plaintiffs filed a diversity action in the Hammond Division. NBD's principle office was in Elkhart, within the South Bend Division. NBD sought to move the action to the South Bend Division, contending that it would be more convenient for the parties and witnesses, pursuant to 28 U.S.C. § 1404(a), to litigate in South Bend.[23]

Judge Rodovich agreed in a case of first impression in the Seventh Circuit, reasoning that although venue was proper anywhere in the Northern District (including Hammond), it would be more convenient for the parties and witnesses to litigate in South Bend. Indeed, none of the parties or witnesses resided in the Hammond Division, and none of the actions complained of occurred in the Hammond Division. By contrast, NBD was located in the South Bend Division, potential defense witnesses were located in the South Bend Division, and plaintiffs resided in Wisconsin and California, thus requiring them to travel substantial distance regardless of whether the action proceeded in South Bend or Hammond. In balancing these factors, Judge Rodovich concluded that South Bend was a more appropriate forum.

IV. DISCOVERY—RULE 35 EXAMS

In *Taber v. Central Rent-A-Crane*,[24] a 1992 unpublished decision reported on Westlaw in 1995, Magistrate Judge Pierce ordered plaintiff to submit to a Rule 35 physical and mental examination. Plaintiff resisted the exam, contending that the doctors selected by defendant were not independent. The court rejected this argument. Notably, nothing in Rule 35 requires the examining doctor to be "independent," and indeed in most cases the doctor is retained by and paid for by defendant and, presumably, not independent. Rule 35 exams are powerful discovery tools for defendants, and should be considered in any case involving physical or mental damages.

V. EXPERTS

As discussed in prior Articles,[25] the Supreme Court's 1993 decision in

---

22. No. 2:94-cv-155 (N.D. Ind. Feb. 14, 1996).

23. Section 1404(a), commonly invoked in efforts to transfer cases to other districts, also applies by its plain language to intra-district divisional transfers, stating: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district *or division* where it might have been brought." (emphasis added).

24. No. S91-66, 1992 WL 712781 (N.D. Ind. March 5, 1992).

25. *E.g.*, John R. Maley, *1993 Federal Practice and Procedure Update for Seventh Circuit*

Daubert v. Merrell Dow Pharmaceuticals, Inc.[26] changed the standard for addressing the admissibility of expert testimony. The old *Frye* rule of "general acceptance" was abandoned in favor of a more flexible but probably more restrictive standard focusing on the scientific, technical, or otherwise specialized basis of the testimony.[27] *Daubert* also emphasized the district judge's responsibility to serve as "gatekeeper" and screen out expert testimony that does not satisfy the *Daubert* standards.

As expected, there has been much litigation on the issue since *Daubert*, and the real battlefield is in the trial court. The following cases illustrate the profound effects of *Daubert*:

(a) In *Buckner v. Sam's Club, Inc.*,[28] a slip-and-fall case, the Seventh Circuit affirmed Judge Tinder's exclusion of proffered expert testimony regarding causation. Plaintiff claimed to have slipped on a small object on the floor, but that object was never seen nor found. In resisting summary judgment, Plaintiff offered an affidavit from a safety management expert, who opined that Plaintiff had fallen "as a direct result of stepping on a watch that had been dropped or knocked off the display." In granting and affirming summary judgment for Sam's Club, both Judge Tinder and the Seventh Circuit excluded this conclusory affidavit because it "provided no scientific or technical knowledge that would assist the trier of fact."[29]

(b) In *Deimer v. Cincinnati Sub-Zero Products, Inc.*,[30] a nurse tripped over an electric cord on a hypothermia machine, and sued the manufacturer for negligence and products liability. At trial, the district court excluded the plaintiff's liability expert. On appeal, the Seventh Circuit affirmed, reasoning that the expert "did not conduct any studies or analysis to substantiate his opinion."[31] He merely offered "unverified statements that were unsupported by any scientific method," thus making his opinion inadmissible under *Daubert*.[32]

(c) In *Gruca v. Alpha Therapeutic Corp.*,[33] the Seventh Circuit held that the district court erred by failing to conduct the *Daubert* gatekeeper analysis in admitting expert testimony. The *Gruca* decision

---

Practitioners, 27 IND. L. REV. 813, 833-36 (1994).

26. 509 U.S. 579 (1993).
27. The *Frye* rule stemmed from Frye v. United States, 293 F. 1013 (1923).
28. 75 F.3d 290 (7th Cir. 1996).
29. *Id.* at 293.
30. 58 F.3d 341 (7th Cir. 1995).
31. *Id.* at 344.
32. *Id.* at 345.
33. 51 F.3d 638 (7th Cir. 1995).

confirms that, as directed by *Daubert*, district courts cannot abdicate their responsibilities to ensure that expert testimony is properly scrutinized.

(d) In *Smith v. Ford Motor Co.*,[34] Judge Lee held that plaintiff's liability expert in a products liability action satisfied the *Daubert* standards. The decision shows that defendants do not always prevail in the *Daubert* battle.

(e) In *A Woman's Choice-East Side Women's Clinic v. Newman*,[35] Judge Hamilton applied the *Daubert* criteria and allowed an expert to testify regarding the burdens that Indiana's abortion statute could impose on those seeking abortions. The opinion is a good example of an Indiana district judge applying the *Daubert* standards to a relatively unique situation.

(f) Other notable *Daubert* decisions include the following: (i) expert testimony regarding herbicides causing personal injury was rejected due to lack of sufficient empirical evidence;[36] (ii) proffered expert testimony regarding hedonic damages was excluded in a case of first impression in the Seventh Circuit;[37] (iii) due to a lack of supporting evidence and analysis, an expert was prohibited from testifying that a transdermal nicotine patch caused plaintiff's heart attack;[38] and (iv) a doctor was prohibited from offering his subjective beliefs based solely on his own personal observations.[39]

VI. Summary Judgment Deadlines

In an opinion that begins by quoting the 1959 song: "what a difference a day makes . . . twenty-four little hours," the Seventh Circuit affirmed summary judgment in a civil-rights action based in part on the non-movant's failures to timely file his summary judgment materials. The decision in *Spears v. City of Indianapolis*[40] is a reminder that federal judges, though often very patient, can be pushed too far on missing deadlines, and that the consequences for late filings can be severe.

The case, filed in the Southern District of Indiana in 1991, proceeded through "two years of swimming in the sea of discovery."[41] Then, on January 3, 1994, the

---

34. 882 F. Supp. 770 (N.D. Ind. 1995).
35. 904 F. Supp. 1434 (S.D. Ind. 1995).
36. Schmaltz v. Norfolk & W. Ry., 878 F. Supp. 1119 (N.D. Ill. 1995).
37. Ayers v. Robinson, 887 F. Supp. 1049 (N.D. Ill. 1995).
38. Rosen v. Ciba-Geigy Corp., 892 F. Supp. 208 (N.D. Ill. 1995).
39. Zarecki v. National Railroad Passenger Corp., 914 F. Supp. 1566 (N.D. Ill. 1996).
40. 74 F.3d 153 (7th Cir. 1996).
41. *Id.* at 156.

City filed a properly supported motion for summary judgment. Plaintiff's response was due fifteen days later pursuant to the Southern District of Indiana Local Rule 56.1. Plaintiff sought an extension, and over the City's objection, Judge Tinder gave plaintiff until February 22, 1994, to respond.[42]

Plaintiff did not meet the deadline, this time seeking an extension due to an intervening federal holiday (President's Day) and the number of exhibits he desired to file. Over the City's objection, Judge Tinder granted the extension until March 1, 1994.[43]

On that date, plaintiff filed a brief, but it did not include affidavits or other documentary evidence contravening the movant's evidence as required by Local Rule 56.1. Citing a "catastrophic computer failure," plaintiff filed an "emergency" motion asking for one extra day to file his evidence.[44] Some supporting documentation was filed the next day, but the filings did not end. A week later, an amended response brief and amended designation of evidence was filed. The City objected and moved to strike the materials.[45]

In a comprehensive decision, Judge Tinder granted summary judgment, and in so doing addressed the belated filings. First, the court denied the "emergency" motion for more time. Second, he granted the motion to strike the new supporting materials, but denied the motion to strike the amended brief. The court thus did not consider evidence filed after the March 1 due date, and accordingly accepted the City's facts as true.[46]

On appeal, the Seventh Circuit approved of Judge Tinder's rulings, finding no abuse of discretion. The panel noted that we "live in a world of deadlines," and that the "practice of law is no exception."[47] Although both Judge Tinder and the Seventh Circuit expressed sympathy with counsel's problems, the Seventh Circuit wrote, "[I]t seems to us that the problem was really that he waited until the last minute to get his materials together. [He] apparently neglected the old proverb that 'sooner begun, sooner done.'"[48] The Seventh Circuit added that "[d]eadlines, in the law business, serve a useful purpose and reasonable adherence to them is to be encouraged."[49]

The lessons of *Spears* are obvious, but are worth repeating. Deadlines in federal court should not be taken lightly, and when it appears that extensions are necessary, they should be sought well before the deadline if possible, and should include the reasons an extension is necessary. Notably, the *Spears* decision is not the first of its type; Indiana courts are strict on summary judgment, forbidding late designation of evidence at summary judgment hearings.

---

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 157.
48. *Id.*
49. *Id.*

VII. TRIAL

A. Peremptory Strikes

In *Purkett v. Elem*,[50] the Supreme Court held that no *Batson*[51] violation occurred where the prosecution struck two black prospective jurors. The Court accepted the prosecution's proffered explanation that the strikes were made because of the jurors' unkempt hair, looks, moustaches, and beards, and were thus race-neutral. The Court held that the race-neutral explanation need not be persuasive or even plausible. The opponent of the strike must ultimately prove purposeful discrimination.

B. Special Verdict Forms

In *Blue Cross v. Marshfield Clinic*,[52] the Seventh Circuit—in the midst of an important antitrust decision that is a must read on that narrow score for health-care practitioners—addressed the broader subject of special verdicts. In this complicated case, the jury answered a special verdict form containing eighteen questions. Chief Judge Posner had this to say about the format of the special verdict form:

> As a detail, we urge the bench and bar of this circuit not to imitate the special verdict on liability that went to the jury in this case. The verdict form contained 18 questions. If the jury wanted to find for the plaintiff on every contested point, all it had to do (and all it did do) was write "yes" 18 times. A verdict so configured, like a plea colloquy in which the answer that the defendant is expected to give to every one of the judges's questions is 'yes,' invites rote answers rather than the careful consideration of the structure of the plaintiff's case that the use of a special verdict is intended to foster. None of the purposes ascribed to the giving of a special verdict, of which probably the most important is to minimize the likelihood or scope of a retrial in a case in which there is more than one independent ground for recovery, are served by a verdict form that does not invite the jurors to use their heads.[53]

Although critical of the form, the court did not find error on this basis. Judge Posner explained:

> Given the broad discretion of the trial judge in the formulation of special verdicts, and the fact that no objection was made to the form employed here, we do not suggest that this form would have constituted reversible error if the point had been argued; we merely offer for what it is worth our belief that it is not the best possible form, because it does not force jurors

---

50. 115 S. Ct. 1769 (1995).
51. Batson v. Kentucky, 476 U.S. 79 (1986).
52. 65 F.3d 1406 (7th Cir. 1995).
53. *Id.* at 1416-17 (citations omitted).

to think before filling it out.[54]

VIII. POST-JUDGMENT

A. Post-Judgment Rules

Rules 50, 52, and 59 of the Federal Rules of Civil Procedure were amended in 1995 to provide a uniform filing date for these post-judgment rules. Under the current version of the rules, these motions are due within a ten-day period, but the rules differ on what must be done within ten days. One rule requires the motion to be "served," another "made," and still another "served and filed."[55]

Fortunately this unnecessary confusion was cured effective December 1, 1995. Under the amendments to Rules 50, 52, and 59, each of these post-judgment motions, if pursued, must be *filed* within ten days of entry of judgment. Note well that as under current law, these ten-day time periods *cannot* be extended per Federal Rule of Civil Procedure 6(b).

Also, note that Federal Rule of Appellate Procedure 4(a) is amended to reflect that the timely *filing* of a post-judgment motion tolls the time for appeal. The prior version of the rule stated that the timely making of such a motion tolled the time for appeal.

B. Fee Petitions

In *Johnson v. Lafayette Fire Fighters*,[56] the prevailing plaintiffs sought attorneys fees in the trial court under 42 U.S.C. § 1988, but did not timely file their petition within the provisions of amended Federal Rule of Civil Procedure 54(d) (requiring fee petitions to be filed within fourteen days of judgment unless otherwise provided by statute or "order of court"). Chief Judge Sharp allowed the petition and granted fees, reasoning that the Northern District's local rule providing for ninety days to file fee petitions was an "order of court" falling within Rule 54(d)(2)'s exception.[57]

On appeal, the Seventh Circuit affirmed, holding that "at least for the purposes of Fed. R. Civ. P. 54(d)(2)(B), a local rule is an order of the court."[58] Curiously, the Seventh Circuit did not mention that in other parts of the 1993 rules package, the amended rules specifically mention orders of court and local rules separately (e.g., Federal Rule of Civil Procedure 26(a)(1)), which would lead to a reasonable argument that when Rule 54(d) mentions only "order of court" as an exception to the 14-day limit, it thus excludes local rules.

In any event, the Seventh Circuit has spoken on the issue. Nonetheless, parties seeking fees should still seek to file their fee petitions within fourteen days,

---

54. *Id.* at 1417.
55. *See* FED. R. CIV. P. 50, 52 & 59.
56. 51 F.3d 726 (7th Cir. 1995).
57. *Id.* at 728.
58. *Id.* at 729.

or seek an extension (through an "order of court"), which is permissible under the rule.

IX. APPEALS

A. Docketing Statement

During 1995, Seventh Circuit Rule 3(c) was amended to change the name of the initial "jurisdictional statement" filed with the notice of appeal to a new "docketing statement." This statement is due at the time of filing the notice of appeal in the district court. Significantly, the amended rule provides that counsel will be fined $100 for failure to file the docketing statement within fourteen days of the notice of appeal. Furthermore, if the statement is not filed within twenty-eight days of the notice, the appeal will be dismissed.[59]

B. Standard of Review

Seventh Circuit Rule 28(k) formerly required the appellant's brief to contain a statement of the standard of review. This has been deleted from Circuit Rule 28, but the requirement remains found in Federal Rule of Appellate Procedure 28.

C. Specificity In District Court Orders

Seventh Circuit Rule 50 was amended to provide that whenever a district court issues an order terminating the litigation or otherwise renders an appealable order, the judge shall specify the reasons either orally on the record or in writing. When the district court fails to do so, the Seventh Circuit "urges the parties to bring to this court's attention as soon as possible any failure to comply with this rule."[60]

Presumably the Seventh Circuit wants to know about such deficiencies as early as the filing of the notice of appeal so that, if necessary, the Seventh Circuit can direct the district court to promptly supplement its ruling.

D. Cross Appeals

With an amendment to Seventh Circuit Rule 28(g), cross-appellants will no longer automatically have the right to file three briefs (e.g., appellee's brief, cross-appellant's brief, and cross-appellant's reply brief). The court will designate which party is to file the opening brief when a cross appeal is filed, and the responding party will have only one opportunity to file a combined fifty-page response brief resisting the other party's appeal and setting forth its own appeal. Although it sounds confusing, the net effect is that the party who is designated by the clerk for the "opening brief" can file two briefs, while the other party will only get to file one. There is some concern among the bar that this will lead to a race to the courthouse in an effort to obtain the lower numbered appeal (thus in theory enhancing the prospects of being the party designated to file the opening brief).

---

59. 7TH CIR. R. 3(c).

60. 7TH CIR. R. 50.

It remains to be seen whether this fear is justified. The amended rule does provide that the court will entertain motions for realignment of the briefing schedule and enlargement of page limitations when the norm established by the rule proves "inappropriate."

Finally, amended Seventh Circuit Rule 28(g) specifically warns that "it is improper to take a cross-appeal in order to advance additional arguments in support of a judgment."[61] Cross-appeals are proper only when the cross-appellant seeks to enlarge its rights under the judgment.

E. Deficient Briefs: Filers Beware

In *United States v. Sosa*,[62] appellant obtained two extensions to file his brief. On the due date, he filed a three page document that lacked most of the required components of an appellate brief. Then, seven days later, he filed a slightly longer but still deficient brief.

The Seventh Circuit rejected the purported brief and ordered the appellant to show cause why the appeal should not be dismissed. The panel explained that although a 1994 amendment to Federal Rule of Appellate Procedure 25 prohibits the clerk from rejecting filings, when a purported brief does not meet the requirements for appellate briefs, it will be disregarded and no automatic seven-day extension to cure will be granted. The court concluded, "[p]arties to litigation in this court will not be permitted to obtain an automatic seven-day extension of time for filing briefs by filing a document that pretends to be a brief, hoping that we will allow the real brief to be filed seven days later."[63]

F. Honest Statement of Facts

In *Avitia v. Metropolitan Club of Chicago*,[64] Chief Judge Posner offered the following passage, which appellate counsel should heed:

> As a reminder to future appellants, we point out that a statement of facts which, as the Club's does, treats contested testimony of the losing party's witnesses as 'facts' violates Cir. R. 28(d)(1). We have not yet stricken a brief for a violation of this rule, but let this opinion be a warning that we have the power, and may one day have the inclination, to do so. We are not sticklers, precisians, nitpickers, or sadists. But in an era of swollen appellate dockets, courts are entitled to insist on meticulous compliance with rules sensibly designed to make appellate briefs as valuable an aid to the decisional process as they can be. A misleading statement of facts increases the opponent's work, our work, and the risk of error.[65]

---

61. 7TH CIR. R. 28(g).
62. 55 F.3d 278 (7th Cir. 1995).
63. *Id.* at 279-80.
64. 49 F.3d 1219 (7th Cir. 1995).
65. *Id.*

G. Appeals of Class Certification Orders

An order certifying or refusing to certify a class action is not a final appealable order under 28 U.S.C. § 1291. Nonetheless, in *In re Rhone-Poulenc Rorer, Inc.*,[66] a divided panel of the Seventh Circuit took the extraordinary measure of granting a writ of mandamus, and ordered the class decertified. The complicated case is a must read for anyone involved in class litigation.

H. Appellate Sanctions

Rule 38 of the Federal Rules of Appellate Procedure allows appellate courts to award "just damages and single or double costs to the appellee" for a frivolous appeal. In *Ashkin v. Time Warner Cable*,[67] the Seventh Circuit assessed Rule 38 sanctions against plaintiff and her appellate counsel for seeking reversal based essentially on factual issues.

The case was tried to Magistrate Judge Endsley, who found as a factual matter that Time Warner did not discriminate against Ashkin in her termination. After trial, Time Warner's counsel wrote Ashkin's trial counsel, alerting her of the Seventh Circuit's decision in *Rennie v. Dalton*,[68] in which an Indianapolis attorney was assessed Rule 38 sanctions for asking the Seventh Circuit to reverse based on credibility issues. Time Warner's counsel included a copy of the *Rennie* decision, and warned that Rule 38 sanctions would be sought if an appeal was taken.[69] Apparently mindful of *Rennie*, Ashkin's trial counsel did not pursue the appeal. Ashkin initiated the appeal pro se, and later hired Chicago counsel to pursue the appeal.

As in *Rennie*, the Seventh Circuit affirmed the trial court judgment, and proceeded to assess Rule 38 sanctions because the "instant case is indistinguishable" from *Rennie*.[70] The court wrote, "Once the magistrate judge concluded that Ashkin was not credible, and had therefore failed to prove the elements of her claim, the possibility of success on appeal was virtually non-existent."[71] The Seventh Circuit specifically noted that Ashkin had been warned of *Rennie*, and that trial counsel had declined to participate in the appeal. Thus, the court ordered Ashkin and her counsel to each pay half of Time Warner's appellate costs and fees.[72]

The lessons of *Ashkin* are three-fold. First, if an appeal essentially seeks to re-weigh evidence, it is a candidate for quick affirmance and Rule 38 sanctions. Second, after obtaining a judgment involving underlying factual determinations, providing opposing counsel with a warning letter with copies of *Rennie* and *Ashkin* enhances the probabilities of Rule 38 sanctions. Finally, when trial counsel

---

66. 51 F.3d 1293 (7th Cir. 1995).
67. 52 F.3d 140 (7th Cir. 1995).
68. 3 F.3d 1100 (7th Cir. 1993).
69. *Ashkin*, 52 F.3d at 146.
70. *Id.*
71. *Id.*
72. *Id.*

withdraws from the case, extra caution and scrutiny is warranted before pursuing the matter further on appeal; this is often a sign that the appeal is doomed.

X. Sanctions

In *Hedrick v. Comptroller*,[73] an unpublished decision, the Seventh Circuit affirmed Judge Dillin's award of Rule 11 sanctions against plaintiff's counsel. First, the court ruled that the sanctions motion was timely, having been filed within a reasonable time after discovery of the violation.[74] Second, the court found that plaintiff's motion to compel discovery was inherently defective because the underlying subpoenas were clearly defective, and were improperly served without sufficient advance notice.[75] Although the case was decided under the more stringent pre-1993 version of Rule 11, it serves as a reminder that federal courts are not tolerant of frivolous filings.

XI. Miscellaneous

A. Standing Orders

Rule 83 of the Federal Rules of Civil Procedure was amended in 1995 to include the following new subdivision:

> A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. § 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.[76]

The same limitation is now found in amended Federal Appellate Rule 47(b).

These amendments stem from the proliferation of unpublished standing orders and directives in many courts. With the amendment, parties and their counsel cannot be bound by such directives and standing orders unless they were given actual notice of those requirements in the case at issue.

B. State-Law Privileges

In *In re March 1994 Special Grand Jury*,[77] Chief Judge Barker addressed an interesting privilege issue. A federal grand jury was investigating allegations that a claimant made false claims in pursuing two slip-and-fall cases. One of those cases was mediated by a mediator/attorney under Indiana's Alternative Dispute Resolution Rules (ADR). The federal prosecutor subpoenaed the mediator to

---

73. 68 F.3d 477 (7th Cir. 1995).
74. *Id.*
75. *Id.*
76. Fed. R. Civ. P. 83.
77. 897 F. Supp. 1170 (S.D. Ind. 1995).

testify before the grand jury regarding statements made by the claimant during mediation. The mediator moved to quash the subpoena, relying on the mediator privilege of the ADR Rule 2.12.[78]

Judge Barker denied the motion to quash, reasoning first that the ADR rule on its face does not apply to criminal proceedings. She further ruled that state privileges, although entitled to consideration in federal court as a matter of comity, are not binding in federal cases where state-law does not serve as the governing law. Finding that the federal interest of federal law enforcement and fact-finding would be hindered by application of the state-law privilege, Judge Barker declined to apply the Indiana rule.[79]

78. *Id.* at 1172.
79. *Id.* at 1172-73.