1996 Federal Civil Practice and Procedure Update for Seventh Circuit Practitioners

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Federal practitioners enjoyed a relatively quiet year during 1996 in federal civil procedure. Few major decisions were handed down, and statutory or rule changes were modest. Nonetheless, important developments transpired, as outlined in this Article. For ease of future reference, the topics are discussed in the order they often appear in litigation, as follows:

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I. Filing

A. Increase in Filing Fee

As part of the Federal Courts Improvement Act of 1996,[1] Congress increased the filing fee for commencing an action in federal court from $120 to $150.[2] This amendment to 28 U.S.C. § 1914(a) took effect December 18, 1996, sixty days after the date of enactment.

B. Electronic Filing—Rule 5(e)

Rule 5(e) defines "filing," and, under the amended rule, allows the filing of papers by "electronic means" if authorized by local rules.[3] The rule, as amended December 1, 1996, provides:

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1. Pub. L. No. 104-317, 110 Stat. 3847 (1996).
2. *See* 28 U.S.C.A. § 1914(a) (West Supp. 1997).
3. Fed. R. Civ. P. 5(e).

> A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.[4]

The key change in Rule 5(e) is that federal courts no longer need await the Judicial Conference to establish a procedure for electronic filing. Instead, each district court can proceed as it sees fit.

The Southern District of Indiana, for instance, has an Automation Committee chaired by Judge Tinder, and a subcommittee has been investigating electronic filing. To date, however, the Southern District has not promulgated a local rule, and it appears that it will still be some time before electronic filing is adopted here. Only a few districts have been experimenting with electronic filing.[5]

Notably, electronic service of documents by the court or by parties is not yet authorized by the Federal Rules of Civil Procedure, despite specific discussion of the issue by the Judicial Conference of the United States. The Judicial Conference has concluded—for now anyway—that "it seems better to await developing experience with electronic filing before pursuing the potentially more difficult problems that may surround electronic service."[6] There is, however, nothing to prevent parties from agreeing to electronic service, and there could be substantial benefits to implementing electronic service for those seeking to develop the "paperless" office.

II. SERVICE OF PROCESS

Two decisions during 1996 announced important new holdings regarding service. First, in *Panaras v. Liquid Carbonic Industries Corp.*, the Seventh Circuit joined other circuits in holding that the 120-day service mandate of Federal Rule of Civil Procedure 4(m) has two components.[7] Specifically, when service is not effected within 120 days, the court must first ask whether there was good cause for the failure.[8] If there was good cause (which is narrowly construed), the court has no choice but to extend the period for service.[9]

Even if there was not good cause, however, the court is not finished. The court must then ask "whether a permissive extension of time for service [is]

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4. *Id.*

5. For example, the Northern District of Ohio requires electronic filing in maritime asbestos cases originating after January 1, 1996. *See Focus on Electronic Filing: Shocking Developments*, FED. LAW., June 1997, at 40.

6. ADVISORY COMMITTEE ON CIVIL RULES, JUDICIAL CONF. OF THE UNITED STATES, DRAFT MINUTES (Apr. 20, 1995) *available in* WESTLAW, 1995 WL 870910, at *6.

7. 94 F.3d 338, 340-41 (7th Cir. 1996).

8. *Id.* at 340.

9. *Id.*

warranted under the facts of [the] case."[10] According to the drafters of Rule 4(m), "Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service."[11]

In *Bonaventura v. Leach*,[12] the Indiana Court of Appeals decided a service issue that affects Indiana and local federal practice. Plaintiff served defendant by certified mail, return receipt requested, at his place of business. Service was received and signed for by an employee of a consolidated mailroom serving the defendant's office building. Defendant contended he never received the complaint and was not properly served.[13]

The Indiana Court of Appeals disagreed. It held that service was proper under Indiana Trial Rule 4.1, which allows for service upon an individual by, among other methods, "sending a copy of the summons and complaint by certified mail to [defendant's] place of business with return receipt requested and a return showing receipt of the letter."[14] The court rejected the argument that defendant himself must receive and sign for the complaint and summons.[15] The court explained, "If Bonaventura acquiesced in the mail system which allowed a hospital employee to sign for certified mail, then service of process was satisfactory."[16]

The holding is important to federal practice in Indiana because Federal Rule of Civil Procedure 4(e)(1) allows service, among other methods, pursuant to the law of the forum state.

III. JURISDICTION

A. Diversity Jurisdiction Increased To $75,000

As part of a bill that received sparse media coverage, Congress recently increased the amount-in-controversy requirement for diversity jurisdiction. Specifically, under the Federal Courts Improvements Act of 1996, Congress amended 28 U.S.C. § 1332 to increase diversity jurisdiction from amounts exceeding $50,000 to amounts exceeding $75,000.[17] The Act was signed by President Clinton October 19, 1996, and the diversity increase took effect ninety days later, on January 17, 1997.

The following maxims should be of assistance as practitioners cope with this amendment:

1) "Plaintiffs receive the benefit of all doubt: a court may not dismiss the claim unless it 'appear[s] to a legal certainty that the claim is

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10. *Id.* at 341.
11. *Id.* (quoting FED. R. CIV. P. 4(m) advisory committee's note).
12. 670 N.E.2d 123 (Ind. Ct. App. 1996), *trans. denied.*
13. *Id.* at 126.
14. *Id.* at 126-27.
15. *Id.* at 127.
16. *Id.*
17. 28 U.S.C.A. § 1332 (West Supp. 1997).

really for less than the jurisdictional amount.'"[18]

2) However, a party claiming diversity jurisdiction "cannot just appeal to the judge's druthers; [that party] must show how the rules of law, applied to the facts of [the] case, could produce such an award."[19]

3) The amount in controversy must *exceed* the statutory minimum.[20]

4) Prejudgment interest and attorneys' fees may be included in the amount in controversy *if* there is a legal basis for such awards.[21]

5) In declaratory judgment or injunctive relief cases, the amount in controversy is measured by the value of the right or interest at issue.[22]

B. Removal

As part of a separate bill, Congress amended 28 U.S.C. § 1447(c) dealing with removal and remands. The old version provided in part: "A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a)."[23]

The new version reads: "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)."[24] The legislative history of this amendment[25] explains cryptically:

> The intent of the Congress is not entirely clear from the current wording of 28 U.S.C. § 1447(c), and it has been interpreted differently by different

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18. Schlessinger v. Salimes, 100 F.3d 519, 521 (7th Cir. 1996) (alteration in original) (quoting St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938)). *But see* Roman v. Grafton Transit, Inc., 948 F. Supp. 736, 788 (N.D. Ill. 1996) (using "reasonable probability" as standard); Reason v. General Motors Corp., 896 F. Supp. 829, 934 (S.D. Ind. 1995) (same).

19. *Schlessinger*, 100 F.3d at 521 (citation omitted).

20. Bradford Nat'l Life Ins. Co. v. Union State Bank, 794 F. Supp. 296, 297-98 (E.D. Wis. 1992) (no diversity jurisdiction where amount at issue was exactly $50,000 under pre-amended § 1332).

21. *Id.* at 298.

22. Gould v. Artisoft, Inc., 1 F.3d 544, 547 (7th Cir. 1993). *See also* Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 347 (1977) ("In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation."); Webb v. Investacorp, Inc., 89 F.3d 252, 256-67 (5th Cir. 1996); Freeman v. Sport Car Club, Inc., 51 F.3d 1358, 1362 (7th Cir. 1995).

23. 28 U.S.C. § 1447(c) (1994).

24. 28 U.S.C.A. § 1447(c) (West Supp. 1997).

25. HOUSE JUDICIARY COMM., UNITED STATES DISTRICT COURT: REMOVAL PROCEDURE, H.R. REP. NO. 104-799, *reprinted in* 1996 U.S.C.C.A.N. 3417.

courts. S. 533 clarifies the intent of Congress that a motion to remand a case on the basis of any defect other than subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under 28 U.S.C. § 1446(a).[26]

It is the author's opinion that this amendment makes no significant change, and that for most cases the analysis and results under § 1447(c) will be the same.

C. Class Actions/Counterclaims/Supplemental Jurisdiction

Judge Easterbrook's decision in *Channell v. Citicorp National Services, Inc.*,[27] contains a complicated discussion of the role of counterclaims in class actions and touches on supplemental jurisdiction as well. The decision is an important read for class-action practitioners. For everyone else, the key points from *Channell* are that: (a) 28 U.S.C. § 1367[28] permits district courts to entertain an action against a pendent party even without a claim exceeding $50,000 (now $75,000);[29] (b) § 1367 permits the adjudication of a claim by a pendent party that does not have a federal question or jurisdictional basis;[30] and (c) § 1367 has extended supplemental jurisdiction to the limits of Article III, meaning that "'[a] loose factual connection between the claims' can be enough."[31]

D. Federal Question Jurisdiction

In *Sebring Homes Corp. v. T.R. Arnold & Associates, Inc.*,[32] Judge Miller provided a good overview of federal question jurisdiction. Plaintiff makes recreation vehicles and manufactured homes. Defendant provided consulting services, some of which were regulated by federal law.[33] The federal government sued plaintiff in a separate action alleging violations of the Act. Plaintiff then filed a separate indemnity action in state court against defendant-consultant. The consultant then removed the indemnity action asserting federal question jurisdiction.[34]

On its own motion, shortly before a bench trial, the court ordered briefing on jurisdiction, and then remanded the case for lack of federal question jurisdiction.[35] Noting that federal jurisdiction must exist from the face of the complaint, Judge

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26. *Id.* at 2, *reprinted in* 1996 U.S.C.C.A.N. at 3418.
27. 89 F.3d 379 (7th Cir. 1996).
28. (1994).
29. *Id.* at 385.
30. *Id.*
31. *Id.* (quoting Ammerman v. Sween, 54 F.3d 423, 424 (7th Cir. 1995)).
32. 927 F. Supp. 1098 (N.D. Ind. 1995).
33. 42 U.S.C. § 5401 (1994).
34. *Sebring*, 927 F. Supp. at 1099-1100.
35. *Id.* at 1100, 1104.

Miller ruled that plaintiff's claims did not arise under federal law.[36] Instead, the claims merely alleged an indemnity claim, which is a creature of state law.[37]

E. Abstention and Remand

In *Quackenbush Insurance Co. v. Allstate.*,[38] the Supreme Court decided two important, but technical, questions of federal procedure. First, the Court held that an abstention-based remand of an action to state court *is* appealable as a collateral order under 28 U.S.C. § 1291,[39] notwithstanding the "no review" provisions of 28 U.S.C. § 1447(d).[40] Second, the Court held that federal courts have the power to dismiss or remand cases based on abstention principles when the relief sought is equitable or otherwise discretionary but not if it is a damages action.[41]

IV. DIVISIONAL TRANSFER

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

Such a motion was filed by the defense in *Maddry v. NBD Bank*, and transfer from the Hammond Division to the South Bend Division of the Northern District of Indiana was granted by Magistrate Judge Rodovich.[42] In *Maddry*, the plaintiffs filed a diversity action in the Hammond Division.[43] NBD's principal office was in Elkhart, within the South Bend Division. NBD sought to move the action to the South Bend Division, pursuant to 28 U.S.C. § 1404(a),[44] contending that it would be more convenient for the parties and witnesses to litigate in South Bend, and asserting that the action was related to a prior action involving NBD which was litigated in that division.[45]

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.[46] Indeed, none of the parties or witnesses resided in the Hammond Division, and none of the actions complained of occurred in the Hammond Division.[47] By contrast, NBD was located in the South Bend Division,

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36. *Id.* at 1102.
37. *Id.*
38. 116 S. Ct. 1712 (1996).
39. (1994).
40. *Id.* at 1717-20.
41. *Id.* at 1723.
42. Maddry v. NBD Bank, No. 2:94-cv-155 (N.D. Ind. Feb. 14, 1996) (order granting motion to transfer).
43. *Id.* at 1.
44. (1994).
45. *Id.* at 2.
46. *Id.* at 8.
47. *Id.* at 7-8.

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.[48] In balancing these factors, Judge Rodovich concluded that South Bend was a more appropriate forum.[49]

V. JOINDER

In *Hammond v. Clayton*,[50] the Seventh Circuit applied Federal Rule of Civil Procedure 19 to hold that certain parties were not indispensable. Plaintiff was purchasing a farm on contract from sellers. Plaintiff claimed that defendants maliciously prosecuted him, leading to his inability to make payments on the farm. Plaintiff contended that the sellers were indispensable parties under Rule 19.[51]

The Seventh Circuit disagreed, holding that complete relief could be accorded to plaintiff without the seller in the case.[52] Specifically, if plaintiff prevailed against defendants, "his damages award would reflect any loss of property caused by [defendants]."[53]

VI. DISCOVERY

A. Ex Parte Interviews

Several recent federal decisions interpret Rule 4.2 of the Indiana Rules of Professional Conduct (RPC) and its potential effect on ex parte interviews with former employees. First, in *Owen v. Kroger Co.*,[54] Magistrate Judge Shields denied Kroger's motion to bar testimony from one of its former managers due to plaintiff counsel's ex parte interview with the manager.[55] The case involved plaintiff's claim for breach of an alleged contract. The Kroger manager who had allegedly made the contract was no longer employed by Kroger. Prior to filing suit, plaintiff's counsel interviewed the former manager, inquiring about the discussions that allegedly gave rise to a contract.[56]

Suit was filed, and during discovery plaintiff's counsel produced a transcript of the ex parte interview. Defense counsel sought to exclude the manager from testifying, or alternatively sought return of all copies of the transcript, due to a claimed violation of RPC 4.2 and the comments thereunder, which imply that ex parte interviews of those with managerial authority or who can bind the company

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48. *Id.* at 8.
49. *Id.* at 5-8.
50. 83 F.3d 191 (7th Cir. 1996).
51. *Id.* at 192.
52. *Id.* at 195.
53. *Id.*
54. 936 F. Supp. 579 (S.D. Ind. 1996).
55. Owen v. Kroger Co., No. IP94-2103-CB/S (S.D. Ind. Apr. 8, 1996) (order on motion to bar testimony due to ex parte interview).
56. *Id.* at 1.

are improper.[57]

In denying the defense motion, Judge Shields reasoned that Rule 4.2 did not preclude the ex parte interview. Following the majority view across the country,[58] Judge Shields concluded that the former manager was not a "party" under Rule 4.2.[59] Judge Shields also followed *Brown v. St. Joseph County*, which held that Rule 4.2 does not apply to former employees.[60]

Similarly, in *Bussell v. Minix*,[61] Judge Miller granted plaintiff counsel's request to conduct ex parte interviews of three defense employees prior to deposing them. As to two of the co-employees, Judge Miller succinctly ruled that they had no managerial authority and thus could be interviewed ex parte.[62] However, Judge Miller specifically instructed counsel to comply with RPC 4.3.[63] Rule 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.[64]

As to the third employee, the chief of detectives for the county, defendant argued that he had managerial authority such that he should not be subject to ex parte interview.[65] As a matter of proof, Judge Miller found that the chief detective had no managerial authority and that his actions could not be imputed to the defendant.[66] Judge Miller, therefore, allowed the ex parte interview.[67]

B. Ex Parte Physician Interviews

In a related context, in *Shots v. CSX Transportation, Inc.*,[68] Magistrate Judge Hussmann ruled that defense counsel could conduct an ex parte interview of plaintiff's physician where plaintiff had put his medical condition at issue and had not indicated any medical condition that was unrelated to his accident or that was "potentially embarrassing or ruinous."[69] Judge Hussmann also ordered plaintiff

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57. *Id.* at 2.
58. This issue has not yet been addressed by an Indiana appellate court.
59. *Owen*, No. IP94-2103-CB/S, at 3-4.
60. 148 F.R.D. 246, 252-53 (N.D. Ind. 1993).
61. 926 F. Supp. 809 (N.D. Ind. 1996)
62. *Id.* at 810.
63. *Id.*
64. IND. R. PROF. COND. 4.3.
65. *Bussell*, 926 F. Supp. at 810.
66. *Id.* at 811.
67. *Id.*
68. 887 F. Supp. 206 (S.D. Ind. 1995).
69. *Id.* at 207-08.

to execute an authorization for release of medical information.[70]

Judge Hussmann reasoned that federal courts have discretion to allow ex parte interviews of treating physicians.[71] Although Indiana law precludes such interviews,[72] Judge Hussmann ruled that even in diversity cases federal law governs discovery.[73] Although Judge Hussmann encouraged defense counsel to offer plaintiff's counsel the opportunity to be present, he stopped short of mandating that plaintiff's counsel be present.[74]

C. Admissions

In *Kohler v. Leslie Hindman, Inc.*,[75] the Seventh Circuit held that an admission in one case "cannot be a judicial admission in another. It can be evidence in the other lawsuit, but no more."[76]

In *Walsh v. McCain Foods Ltd.*,[77] the Seventh Circuit held that admissions made by one party are not admissions of another party, unless there was an agency relationship at the time of the admission. In this case, one of the plaintiffs had failed to respond to requests for admission, and defendant attempted to introduce a resultant admission at trial against another plaintiff. Because there was no longer an agency relationship between the plaintiffs at the time the admission was deemed to have been made, the Seventh Circuit held that the trial court correctly excluded the admission at trial.[78]

D. Is Personal Service Required For Third-Party Discovery?

Rule 30 allows for depositions of any person, and "attendance of witnesses may be compelled by subpoena as provided in Rule 45."[79] Rule 34 allows for requests for production of documents to be used against parties,[80] and then provides that nonparties "may be compelled to produce documents . . . as provided in Rule 45."[81] How, then, is service to be effected under Rule 45?

Rule 45(b)(1) in turn provides that a "subpoena may be served by any person who is not a party and is not less than 18 years of age," and adds that "[s]ervice of a subpoena . . . shall be made by delivering a copy thereof to such person."[82] In

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70. *Id.* at 207.
71. *Id.* at 208.
72. *See* Cua v. Morrison, 626 N.E.2d 581 (Ind. Ct. App. 1993), *aff'd*, 636 N.E.2d 1248 (Ind. 1994).
73. *Shots*, 887 F. Supp. at 207.
74. *Id.* at 208.
75. 80 F.3d 1181 (7th Cir. 1996).
76. *Id.* at 1185 (citation omitted).
77. 81 F.3d 722 (7th Cir. 1996).
78. *Id.* at 726-27.
79. FED. R. CIV. P. 30(a)(1).
80. FED. R. CIV. P. 34(a).
81. FED. R. CIV. P. 34(c).
82. FED. R. CIV. P. 45 (b)(1).

recent years several courts have addressed whether such "delivery" requires personal service. As summarized below, there is a split of authority on this issue.

E. The Split

Within the Seventh Circuit, *Doe v. Hersemann*[83] is the only reported decision on the subject of whether "delivery" under Rule 45(b)(1) requires personal service. In a well-reasoned opinion, Judge Moody held that service of a subpoena pursuant to Federal Rule of Civil Procedure 45(b)(1) can be accomplished by certified mail.[84] In reaching this holding, Judge Moody noted the following key points:

1) The Federal Rules of Civil Procedure are to be interpreted to "'secure the just, speedy, and inexpensive determination of every action'" according to Rule 1;[85]

2) Nothing in Rule 45(b)(1) expressly requires personal service;[86]

3) Delivery is defined in *Black's* as "the act by which the res or substance thereof is placed within the actual . . . possession or control of another";[87]

4) Delivery by certified mail assures "delivery" of the document;[88]

5) The drafters of the Rules knew how to use the term "personal service" as reflected by Rule 4(e)(1), but chose not to use that term here.[89]

Similarly, in the case, *In re Shur*,[90] the court held that Rule 45(b)(1) does not require personal service of subpoenas on nonparties. Expressly following Judge Moody's decision in *Doe*, the court rejected the holdings of other district court decisions mandating personal service.[91]

By contrast, several 1995 decisions require personal service. In *Smith v. Midland Brake Inc.*,[92] the court summarily stated that service of a subpoena shall not be by mail, citing *FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson*.[93] As Judge Moody pointed out in *Doe*, however, the D.C. Circuit's statement in

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83. 155 F.R.D. 630 (N.D. Ind. 1994).
84. *Id.*
85. *Id.* (quoting FED. R. CIV. P. 1).
86. *Id.*
87. *Id.* (quoting BLACK'S LAW DICTIONARY 428 (6th ed. 1990)).
88. *Id.*
89. *Id.* at 630-31.
90. 184 B.R. 640 (Bankr. E.D.N.Y. 1995).
91. *Id.* at 642.
92. 162 F.R.D. 683 (D. Kan. 1995).
93. 636 F.2d 1300 (D.C. Cir. 1980).

FTC that personal service is required is dicta.[94] Similarly, in the case, *In re Nathurst*, the court summarily stated, "It needs no elaborate citation of authorities to support the proposition which is self-evident that a subpoena cannot be effectively served by mail even if sent by certified mail."[95]

F. The Practical Answer

Doe, the Northern District of Indiana decision appears to be the best reasoned approach to this issue, and is likely to be followed within federal courts in Indiana. Elsewhere, however, the issue is unresolved. When there is no urgency and the third-party is not expected to resist, delivery by any reasonable means, such as certified mail, FedEx, UPS, or even first-class mail, will ordinarily suffice. When the third-party might resist the subpoena, however, personal service would be advisable to avoid any dispute, particularly when the subpoena commands attendance at a deposition. At a minimum, certified mail should be used.

G. Case Management/Disclosure

In *Jones-Bey v. Wright*,[96] a pro se plaintiff failed to file witness lists, exhibits lists, and contentions in compliance with the court's scheduling order issued pursuant to Rule 16(b). Judge Sharp adopted the magistrate judge's report and recommendation[97] and denied defendant's motion to dismiss, but precluded plaintiff from calling any witnesses other than himself.[98] The magistrate's report found no "good cause" for the failure to file.[99] The report further noted that "deadlines must have teeth," and that pro se litigants do not have unbridled license to disregard clearly communicated court orders.[100]

VII. EXPERTS

A. Expert Reports

In *First Source Bank v. First Resource Federal Credit Union*,[101] Judge Miller addressed several important issues in connection with expert reports, which are now mandatorily disclosed under Rule 26(a)(2).[102] First, Judge Miller ruled that where an economic expert's report stated merely that the expert "'is expected to testify concerning plaintiff's calculation of pre-judgment interest,'" that portion

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94. *Doe*, 155 F.R.D. at 631.
95. *In re* Nathurst, 183 B.R. 953, 955 (Bankr. M.D. Fla. 1995).
96. No. 3:94CVO218AS, 1996 WL 441786 (N.D. Ind. July 22, 1996).
97. *Id.* at *1.
98. *Id.* at *5.
99. *Id.* at *3.
100. *Id.* at *4.
101. 167 F.R.D. 61 (N.D. Ind. 1996).
102. FED. R. CIV. P. 26(a)(2).

of the report was deficient.[103] Moreover, Judge Miller precluded the expert from testifying at trial to pre-judgment interest.[104] The court explained, "[L]isting a subject on which an expert is expected to testify is not the same as giving the expert's opinion and bases for the opinion."[105]

Second, Judge Miller ruled that there is no inherent opportunity to cure deficient expert reports.[106] Although sympathetic to the argument that there should be a chance to cure defects in expert reports, the court explained that "no mechanism exists for a disclosing party to test the sufficiency of its disclosure."[107] Instead, "[t]he disclosing party must simply await a motion in limine or trial objection, and hope to argue successfully that the disclosure was adequate."[108] Judge Miller concluded with this important warning: "[C]ounsel would seem well advised to err on the side of over-inclusiveness in making disclosures under Rule 26(a)."[109]

In *Walsh v. McCain Foods Ltd.*,[110] the Seventh Circuit found no error in a district court's decision to limit an expert's testimony at trial to the substance addressed in his report and deposition. The Seventh Circuit explained:

> Rule 26(a)(2) explicitly requires an expert witness to provide a report containing his opinions as well as the basis and reasons for those opinions. Subsections (a)(2)(C) and (e)(1) of that rule require that the expert's disclosure be supplemented if there are any modifications or additions to the information previously disclosed. This duty extends "both to the information contained in the expert's report and to the information provided through deposition of the expert." Additionally, if a party fails to comply with Rule 26, a trial court has the discretion to impose sanctions, including the exclusion of evidence. Thus, the district court's decision to limit [the expert's] testimony to that previously disclosed to plaintiffs in his report and deposition was nothing more than a warning that the court would not allow [defendant] to violate Rule 26 at trial. [Defendant] cannot legitimately argue that [the expert] should have been allowed to testify about matters not previously disclosed to the plaintiffs.[111]

B. Dealing With Daubert

As discussed in prior Articles, the Supreme Court's 1993 decision in *Daubert*

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103. *First Source Bank*, 167 F.R.D. at 66.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 67.
108. *Id.*
109. *Id.*
110. 81 F.3d 722 (7th Cir. 1996).
111. *Id.* at 727 (citations omitted).

v. Merrell Dow Pharmaceuticals, Inc.,[112] changed the standard for the admissibility of expert testimony. The old *Frye*[113] 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.[114] *Daubert* also emphasized the district judge's responsibility to serve as "gatekeeper" and screen out expert testimony that does not satisfy the *Daubert* standards.[115]

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*.

1. Air Jordan.—In *Tucker v. Nike, Inc.*,[116] which is a unique application of the teachings of *Daubert*, Magistrate Judge Springmann rejected a podiatrist's opinion that an Air Jordan sneaker caused plaintiff's achilles tendon to rupture. In *Tucker*, plaintiff ruptured his achilles tendon while playing basketball in Nike Air Jordan sneakers ("it must be the shoes"). Plaintiff sued Nike alleging that the shoes were defective in design. To support his claim, plaintiff submitted the expert testimony of a podiatrist, and offered no other evidence of causation.[117]

Nike moved for summary judgment, contending in part that the podiatrist's opinions were inadmissible. In a well-reasoned opinion, Judge Springmann agreed.[118] After outlining the *Daubert* standards,[119] Judge Springmann went straight to the podiatrist's methodology, which was limited to the following:

> [The doctor] testified that, in his opinion, the back tab pull caused [plaintiff's] achilles tendon to rupture. [His] hypothesis was based on his examination of the shoe in this case. When [he] examined the shoe, he used a ruler, his eyes and his hands. He also brought to bear his many years of experience as a podiatrist. [The doctor] performed no other tests on the shoe. Based upon this examination, he concluded that the shoe was defective. . . .[and that] the defective design of the back tab pull caused [plaintiff's] achilles tendon to rupture.[120]

In rejecting the podiatrist's opinion, Judge Springmann noted that the "most troubling aspect of [the doctor's] testimony is his failure to consider other causes of the accident."[121] Indeed, although he acknowledged in his deposition that many factors can cause the achilles tendon to rupture, the podiatrist never sought to

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112. 509 U.S. 579 (1993).
113. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
114. *Daubert*, 509 U.S. at 586-87.
115. *Id.* at 596-97.
116. 919 F. Supp. 1192 (N.D. Ind. 1995).
117. *Id.* at 1193.
118. *Id.* at 1198.
119. *Id.* at 1195-96.
120. *Id.* at 1196.
121. *Id.*

exclude those factors as possible causes in this case.[122] Accordingly, the court held that his opinions were nothing more than subjective belief and unsupported speculation.[123]

In addition, the podiatrist's opinion did not "fit" the case, as required by *Daubert*.[124] The podiatrist opined that the Air Jordan shoes were defective by putting excessive pressure on the tendon during jumping.[125] However, the record evidence—including from plaintiff's own deposition—established that plaintiff was *not* jumping when he was injured.[126] The court thus concluded that the "expert's opinion, no matter how scientific or unscientific, does not fit the factual situation which this case presents."[127]

2. *Slip and Fall.*—Similarly, in *Buckner v. Sam's Club, Inc.*,[128] 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 or found.[129] In resisting summary judgment, Plaintiff offered an affidavit from a safety management expert.[130] The expert opined that Plaintiff had fallen "as a direct result of stepping on a watch that had been dropped or knocked off the display."[131] 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."[132] Both cases correctly applied *Daubert* and properly excluded inadmissible expert testimony. Counsel offering expert testimony must ensure that the rigors of *Daubert* are satisfied.

VIII. SUMMARY JUDGMENT

A. Introduction

In *Bohac v. West*,[133] the Seventh Circuit held that ordinary notice and an opportunity to present evidence generally must be given to a nonmovant on a motion to dismiss that is converted to a motion for summary judgment. But, when such notice would be futile due to the inability to present a factual issue, summary judgment is appropriate.[134]

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122. *Id.*
123. *Id.* at 1197.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 1198.
128. 75 F.3d 290 (7th Cir. 1996).
129. *Id.* at 291-92.
130. *Id.* at 292.
131. *Id.*
132. *Id.* at 293.
133. 85 F.3d 306 (7th Cir. 1996).
134. *Id.* at 312.

In *Owen v. Kroger Co.*,[135] Chief Judge Barker held that a nonmovant had complied with the requirement of Local Rule 56.1 that it provide a "statement of genuine issues." The nonmovant had met the rule's requirement by incorporating a brief statement of genuine issues with record citations in its opposition brief.[136]

B. Summary Judgment Deadlines

In a recent opinion that begins by quoting a 1959 song, "What a diff'rence a day makes . . . twenty-four little hours," the Seventh Circuit affirmed summary judgment for the City of Indianapolis in a civil-rights action.[137] The case is a reminder that, although federal judges are often very patient, they can be pushed too far on missing deadlines, and the consequences of 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."[138] Then, on January 3, 1994, the City filed a properly supported motion for summary judgment.[139] Plaintiff's response was due fifteen days later pursuant to Southern District of Indiana Local Rule 56.1.[140] Plaintiff sought an extension, and, over the City's objection, Judge Tinder gave plaintiff until February 22, 1994, to respond.[141]

Plaintiff did not meet the deadline. This time he sought an extension due to an intervening federal holiday and the number of exhibits he desired to file. Over the City's objection, Judge Tinder granted the extension until March 1, 1994.[142]

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. Some supporting documentation was filed the next day, but the filings did not end. A week later, an amended/response brief, an amended designation of materials and an amended statement of genuine issues were filed. The City objected and moved to strike the materials.[143]

In a comprehensive decision, Judge Tinder granted summary judgment, and in so doing addressed the belated filings.[144] First, the court denied the "emergency" motion for more time.[145] Second, he granted the motion to strike the new supporting materials, but denied the motion to strike the amended brief.[146]

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135. Owen v. Kroger, Co., 936 F. Supp. 579, 581 n.1 (S.D. Ind. 1996).
136. *Id.*
137. Spears v. City of Indianapolis, 74 F.3d 153 (7th Cir.1996).
138. *Id.* at 156.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

The court thus did not consider evidence filed after the March 1 due date, and accordingly accepted the City's facts as true.[147]

On appeal, the Seventh Circuit approved of Judge Tinder's rulings, finding no abuse of discretion.[148] The panel noted that we "live in a world of deadlines," and that the "practice of law is no exception."[149] 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.'"[150] The Seventh Circuit added that "[d]eadlines, in the law business, serve a useful purpose and reasonable adherence to them is to be encouraged."[151]

The lessons of *Spears* are obvious, but are worth repeating. Deadlines in federal court should not be taken lightly. When it appears that an extension is necessary, it should be sought well prior to the deadline if possible, and the request 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 the hearing.

IX. Motions to Reconsider

In *Atchley v. Heritage Cable Vision Associates*,[152] Judge Miller denied a motion to reconsider. In so doing, he noted the general standards for a motion to reconsider, which is denied unless "it clearly demonstrates manifest error of law or fact or presents newly discovered evidence."[153] A motion that simply recasts and clarifies prior arguments ordinarily will not be granted.[154]

X. Trial

Federal Rule of Civil Procedure 43(a) was amended in 1996 to allow for testimony at trial from a remote location. Specifically, Rule 43(a) provides in part, "The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location."[155]

The comments to the amendment reflect a continuing preference for live testimony or for a prior deposition to be used at trial.[156] Nonetheless, the comments recognize that in some situations "remote" testimony, by audio and

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147. *Id.*
148. *Id.* at 157.
149. *Id.*
150. *Id.*
151. *Id.*
152. 926 F. Supp. 1381 (N.D. Ind. 1996), *aff'd*, 101 F.3d 495 (7th Cir. 1996).
153. *Id.* at 1383.
154. *Id.* at 1383-84.
155. Fed. R. Civ. P. 43(a).
156. Fed. R. Civ. P. 43(a) advisory committee's notes.

video or by audio alone, might be justified. The best example, the comments note, would be where a witness is unexpectedly ill during trial and unable to travel. Prisoner litigation was also cited as a possible use for remote testimony.

XI. COSTS

Chief Judge Barker's recent decision in *Endress & Hauser*, provides an excellent overview of recoverable costs under Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920.[157] Among the court's holdings are the following:

1) costs were recoverable for three copies of all papers because those copies were filed with the court and served on opposing counsel;[158]
2) introduction of a deposition at trial is not a prerequisite for recovering transcript costs;[159]
3) costs for a second copy of the trial transcript were denied where there was no showing that the second copy was for anything other than counsel's convenience;[160]
4) costs for enlarging and mounting exhibits for trial were recoverable;[161]
5) copies for five sets of exhibits used by the court and the parties were recoverable;[162] and
6) Westlaw and Lexis costs were denied consistent with Seventh Circuit authority holding that such expenses are more in the nature of attorneys' fees than costs.[163]

XII. SANCTIONS

A. Sanctions for Over-Sized Brief

Upon seeing this headline, all federal litigators no doubt take pause. All should, but there is more to Magistrate Judge Rodovich's order in *Boatright*[164] than just an oversized brief.

Plaintiff brought an employment discrimination claim.[165] The employer moved for summary judgment. In response, plaintiff's counsel filed a brief that, upon first review, would appear to comply with the twenty-five-page limit of

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157. Endress & Hauser, Inc. v. Hawk Measurement Sys., Ltd., 922 F. Supp. 158 (S.D. Ind. 1996).

158. *Id.* at 160.

159. *Id.* at 161.

160. *Id.* at 162.

161. *Id.* at 162-63.

162. *Id.* at 163.

163. *Id.* at 163-64.

164. Boatright v. D & M Mfg., Inc., No. 2:95-cv-125 (N.D. Ind. Apr. 16, 1996) (order denying defendant's motion to strike plaintiff's 31-page brief).

165. *Id.* at 2.

Northern District of Indiana Local Rule 7.1. Indeed, the last page of the brief containing counsel's signature was numbered "25."[166]

The first five pages of the brief, however, were not numbered. The sixth page contained the number "2," with the remaining pages numbered consecutively to and including the last page, which was designated "25." The brief actually contained thirty-one pages.[167]

The employer moved to strike plaintiff's opposition brief, based on a violation of the twenty-five-page limit.[168] In a seven-page order, Judge Rodovich denied the motion to strike, but reprimanded plaintiff's counsel and ordered him to show cause why sanctions should not be imposed.[169]

His order began by noting that the pending motion "deals with an affront to the integrity of the judicial system."[170] After reciting the basic "numbering" facts and procedural history, Judge Rodovich criticized plaintiff counsel's response to the motion to strike which accused defense counsel of "sidetrack[ing]" and "dup[ing]" the court.[171] The court wrote:

> This is a classic example of the guerilla tactics which are appearing with increasing regularity in the practice of law. Rules, both substantive and procedural, are designed to be followed by the parties and their attorneys. Attorneys should not be criticized for complying with the Federal Rules . . . or the Local Rules. Nor should they be criticized for expecting other attorneys to do likewise.[172]

Things got worse from here for plaintiff's counsel. Rather then acknowledge that the thirty-one-page brief was, in fact, thirty-one pages, plaintiff's counsel accused defense counsel of a "hyper-technical and crabbed interpretation" of N.D. Local Rule 7.1.[173] Judge Rodovich succinctly dismissed this charge, writing,

> How could the brief be in compliance with Local Rule 7.1? Even a first grader can count the number of pages and determine that the brief is in excess of the 25 page limit. Misnumbering pages is an inexcusable act of deception. Denying that the brief is in excess of the page limitation multiplies the problem tenfold.[174]

Judge Rodovich nonetheless allowed plaintiff's counsel belated leave to file the oversized brief, but held that the "conduct of [plaintiff's counsel] cannot go unpunished."[175] Finding counsel's arguments frivolous, the court ordered

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166. *Id.* at 3.
167. *Id.*
168. *Id.*
169. *Id.* at 6-7.
170. *Id.* at 2.
171. *Id.* at 3-4.
172. *Id.* at 4.
173. *Id.*
174. *Id.* at 4-5.
175. *Id.* at 5.

plaintiff's counsel to show cause why sanctions should not be imposed under Federal Rule of Civil Procedure 11.[176]

B. More Sanctions

In *Shrock v. United States*,[177] Judge Lee assessed a $2500 sanction against a pro se litigant for filing a third frivolous claim. Judge Lee further ordered the Clerk to reject any future filings tendered by the litigant until the $2500 was paid.[178]

XIII. ATTORNEYS' FEES: SECTION 1988 FEE AWARD

In *Meyer v. Robinson*,[179] Magistrate Judge Foster issued a lengthy opinion determining fees under 42 U.S.C. § 1988[180] for prevailing plaintiff's counsel in a civil-rights action. The opinion contains a good summary of leading principles in this area. In awarding fees to plaintiff's counsel, Judge Foster made the following key rulings:

> There is a strong presumption that the "lodestar" (the number of hours reasonably expended multiplied by a reasonable hourly rate) is the reasonable fee under section 1988 and other fee-shifting statutes.[181]
>
> Market rates are presumed to be the reasonable hourly rate for an attorney's services, and the law presumes that the market rate for a prevailing party's legal services is the rate the attorney actually charged.[182]

The relevant rate, however, is not what the plaintiff was charged, but the opportunity cost to plaintiff's attorney—that is, the rate the attorney could have earned if the services were sold to someone else.[183]

1) Prevailing market rates are used only if it is impossible or impracticable for counsel to show actual rates charged to other clients (e.g., because all work is on a contingency fee basis).[184]

2) The hourly rate cannot be enhanced to account for contingency

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176. *Id.* at 6-7.

177. No.1:95-cv-205, 1995 WL 810029 (N.D. Ind. Nov. 14, 1995) (order granting motion to dismiss), *aff'd*, 92 F.3d 1187 (7th Cir.) (unpublished table decision), *cert. denied*, 117 S. Ct. 485 (1996).

178. *Id.* at *1 (citing Support Sys. Int'l, Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995)).

179. No. IP 90-1351-C, 1995 WL 265035 (S.D. Ind. Mar. 20, 1995).

180. (1994).

181. *Meyer*, 1995 WL 265035, at *1.

182. *Id.* at *2.

183. *Id.*

184. *Id.* at *1-2.

fees.[185]

3) Courts must employ the rate an attorney charges and receives from paying, noncontingent clients.[186]

4) Prejudgment interest should be awarded presumptively on attorneys' fees to make counsel whole, but courts ordinarily should not apply current hourly rates to earlier work.[187]

5) Prejudgment interest on fees should be calculated using the prime interest rate with compound interest.[188]

6) Judge Foster held that one of plaintiff's attorneys failed to support his claimed $245 hourly rate, and instead assigned an hourly rate of $175 for the first three years of the case and $200 for the second three years.[189]

7) For another, more junior attorney, Judge Foster assigned rates of $70 for the first three years of litigation and $120 for the last three years.[190]

8) For law clerks, Judge Foster assigned an hourly rate of $50.[191]

XIV. POST-JUDGMENT: RULE 60(B)

In *Helm v. Resolution Trust Corp.*,[192] the Seventh Circuit reaffirmed that attorney neglect does not justify opening a judgment under Federal Rule of Civil Procedure 60(b). As the court explained, "This is a simple case of attorney negligence, and as we have held more than once, inexcusable attorney negligence is not an exceptional circumstance justifying relief under Rule 60(b)(6)."[193]

XV. APPEALS

A. Appellate Jurisdiction

In *Central States, Southeast & Southwest Pension Fund, v. Central Cartage*

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185. *Id.* at *2.
186. *Id.*
187. *Id.* at *4.
188. *Id.* at *6.
189. *Id.* at *10-11.
190. *Id.* at *11.
191. *Id.* at *14.
192. 84 F.3d 874 (7th Cir. 1996).
193. *Id.* at 879.

Co.,[194] the Seventh Circuit held that an interlocutory order denying a motion to compel arbitration was not immediately appealable as an order denying an injunction under 28 U.S.C. § 1291. Although the Arbitration Act,[195] does allow for appeal from an order denying arbitration, this provision does not apply to transportation cases.[196] Thus, the Seventh Circuit held that the Act did not provide for immediate appeal in this case.[197]

B. New Seventh Circuit Handbook

The Seventh Circuit has updated and republished its invaluable guide to Seventh Circuit appellate practice. The *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit* is available from the Seventh Circuit Clerk at no charge. Call the clerk at (312) 435-5850 for more information. The Handbook is a must for anyone venturing into the Seventh Circuit.

C. Circuit Rule 30

Pursuant to Federal Rule of Appellate Procedure 30(a)(3), the appellant must provide the "judgment, order or decision in question."[198] The Seventh Circuit expounded on this by passing Circuit Rule 30 years ago. Circuit Rule 30 requires appellants to include certain materials with the opening brief, including any order at issue.[199] Circuit Rule 30(c) requires appellant's counsel to certify, as part of the opening brief, that Circuit Rule 30(a) and (b) have been satisfied.[200]

Unfortunately Circuit Rule 30(c) is commonly violated. A recent decision from Chief Judge Posner, Judge Easterbrook, and Judge Flaum deals exclusively with this problem, and warns the bar that future violations will result in sanctions.[201]

In *Galvan*, the court observed that the appellants in four of the six oral arguments set for July 10 had violated Circuit Rule 30(c).[202] The panel chastised counsel at oral argument, with Judge Easterbrook bluntly stating to one attorney that his certificate was false and constituted a direct misrepresentation to a court.[203]

In the court's recent opinion in *Galvan*, the court publicly admonished the

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194. 84 F.3d 988 (7th Cir.), *cert. denied*, 117 S. Ct. 276 (1996).
195. 9 U.S.C. § 16(a) (1994).
196. *Central States*, 84 F.3d at 993.
197. *Id.*
198. FED. R. APP. P. 30(a)(3).
199. 7TH CIR. R. 30.
200. 7TH CIR. R. 30(c).
201. *In re* Galvan, 92 F.3d 582 (7th Cir. 1996).
202. *Id.* at 584.
203. *Id.* at 584-85 (The undersigned was present that day for argument in another case and witnessed first-hand the court's frustration with those who had violated Rule 30(c). Suffice it to say that it was not a pleasant day for some in Chicago).

four counsel in its published opinion.[204] The court went on to hold that, in the future, even in criminal cases, fines would be assessed for noncompliance with Rule 30(c).[205] The court is obviously very serious about this issue; indeed it called Rule 30 "the most important rule this court has issued."[206] Appellate counsel are well advised to read Circuit Rule 30, as well as all other Circuit Rules and Federal Rules of Appellate Procedure, well in advance of commencing work on a Seventh Circuit brief.

204. *Id.*
205. *Id.*
206. *Id.* at 584.