1999 Developments In Federal Civil Practice For Seventh-Circuit Practitioners

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Introduction

Local federal practitioners encountered significant changes in federal civil practice during the survey period. New opinions from the Seventh Circuit and the local district courts refined procedural precedent and local rule changes in the Southern District of Indiana effective January 1, 2000, significantly impact local summary judgment practice. This Article outlines these important developments.

I. Jurisdiction

A. Removal

Under 28 U.S.C. § 1446(b), a removal notice of a state court action must be filed in federal court "within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the [complaint]."[1] Historically, most federal courts have held that the removal clock began to run—as suggested by the "or otherwise" language of § 1446(b)—upon receipt of the complaint from any source, even if not formally served in compliance with Rule 4. The Seventh Circuit, for instance, has sided with other circuits adopting this interpretation.[2]

The Supreme Court stepped into the fray recently and adopted a removal-friendly interpretation of §1446(b). Specifically, in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*,[3] the Court held that the removal clock does not commence until formal service (or waiver of service). In a six to three opinion authored by Justice Ginsburg, the Court relied on legislative history to conclude that § 1446(b) was not intended to trigger the removal clock prior to formal service.[4] In dissent, Chief Justice Rehnquist and Justices Scalia and Thomas criticized the majority for not following the plain language of the statute.[5]

Nonetheless, after *Murphy Bros.*, the removal clock starts upon formal service of the complaint. The result was positive in that it lends more predictability and certainty to this aspect of federal practice.

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1. 28 U.S.C. § 1446(b) (1994).

2. *See, e.g.*, Roe v. O'Donohue, 38 F.3d 298, 303 (7th Cir. 1994) ("Once the defendant possesses a copy of the complaint, it must decide promptly in which court it wants to proceed.").

3. 526 U.S. 344 (1999).

4. *See id.* at 352.

5. *See id.* at 357 (Rehnquist, C.J., dissenting).

B. Diversity of Citizenship

In *Mader v. Motorola, Inc.*,[6] the plaintiff sued in state court alleging state-law claims, and the defendants removed the action to federal court asserting diversity of jurisdiction. The plaintiff moved to remand, asserting that he was an Illinois resident (which would have defeated diversity).[7] The district court denied the motion without deciding the plaintiff's citizenship, but allowed leave to renew the motion after discovery regarding the plaintiff's citizenship.[8] Four years later, and without the diversity issue arising in the meantime, the district court reached the merits of the case by granting defendants' motion for summary judgment.[9] In the plaintiff's appeal of the summary judgment ruling, the plaintiff raised the diversity issue again in his docketing statement.

Without reaching the merits of the summary judgment ruling, the Seventh Circuit remanded the matter to the district court to resolve the diversity issue.[10] Because the district court had not in the first instance entered a finding on the plaintiff's citizenship, the Seventh Circuit found itself "unable to ascertain whether subject-matter jurisdiction is proper."[11] In remanding the action, the Seventh Circuit provided guidance on the issue, outlining the following principles for determining diversity of citizenship:

- for diversity purposes, an individual is a citizen of her domicile;
- in general, one's domicile is one's permanent home, or the place to which one intends to return;
- domicile must be determined from the totality of the circumstances, with courts focusing on factors such as residence, voting practices, location of real and personal property, bank and brokerage accounts, memberships, employment, driver's license and car registration, and payment of state taxes;
- no single factor is determinative;
- nor can a party's claim of domicile resolve the matter, for self-serving statements are subject to skepticism when in conflict with the facts; and
- the decision on citizenship is a jurisdictional fact that is reviewed for

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6. No. 98-3040, 1999 WL 220108 (7th Cir. Apr. 9, 1999).
7. *See id.* at *1.
8. *See id.*
9. *See id.*
10. *See id.* at *2.
11. *Id.*

clear error.[12]

II. DISCOVERY

A. Third-Party Discovery

Defendants often seek expansive third-party discovery of the plaintiffs, including prior employment records, medical records, and educational records. In *Perry v. Best Lock Corp.*,[13] defendant served nineteen non-party subpoenas upon past, present, and prospective employers of the plaintiff in an employment discrimination action. The plaintiff moved to quash the subpoenas. Judge Hamilton granted the motion, reasoning that under Fed. R. Civ. P. 26(b)(2) the defendant had not identified any specific concerns or targets for its "sweeping and intrusive discovery requests."[14]

In an unrelated case, Judge McKinney denied a plaintiff's motion to quash a defendant's subpoenas seeking certain records from third parties in an action under the Americans With Disabilities Act. Specifically, in *Burkhart v. Heritage Products*,[15] the court denied the plaintiff's motion to quash and ordered the plaintiff's prior employers to produce the following information: (a) any personnel files maintained on the plaintiff; (b) any documents relating to any complaint or charge made by the plaintiff with any local, state, or federal governmental agency; (c) the plaintiff's medical records; and (d) job descriptions for positions held by the plaintiff.[16]

In a similar situation, Magistrate Judge Hussman denied a plaintiff's motion to quash third-party subpoenas served upon prior employers in a discrimination case. Judge Hussman also denied a motion to quash a subpoena served on the Indiana Department of Employment and Training Services related to unemployment records.[17]

Similarly, in *Brady v. CIRBC*,[18] the plaintiff sued for sexual harassment, sex discrimination, and retaliation resulting in termination. Defendant served a third-party document request and subpoena upon the plaintiff's new employer and to the employer she worked for immediately prior to defendant, seeking the plaintiff's personnel and medical files from each. The plaintiff moved to quash, arguing that the subpoenas were part of a harassing "fishing expedition."

Judge Cosbey denied the motion to quash in a four-page opinion, reasoning that the information sought "is both relevant and likely admissible under [Fed.

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12. *Id.*

13. No. IP98-0936-C-H/G, slip op. (S.D. Ind. Jan. 21, 1999).

14. *Id.*

15. No. IP98-1691-C-M/S (S.D. Ind. Apr. 26, 1999).

16. *See id.*

17. *See* Meyer v. Mead Johnson Nutritional, No. EV98-244-C-Y/H (S.D. Ind. Apr. 14, 1999).

18. No. 1:99-MC-19 (N.D. Ind. Oct. 5, 1999).

R. Civ. P.] 26(b)(1)."[19] He noted that the records will show plaintiff's compensation, which is relevant to damages.[20] Further, the documents could identify other employers not disclosed to defendant, thus allowing defendant to investigate disciplinary and performance issues to formulate a possible defense. Moreover, because the plaintiff sought damages for emotional injuries, "medical records are relevant as to the Plaintiff's emotional status."[21]

Finally, Judge Cosbey distinguished the unpublished decision from Judge Hamilton in *Perry v. Best Lock Corp.*,[22] in which third-party subpoenas were quashed, on the basis that unlike in *Perry* when the defendant served such requests on nineteen former employers, in *Brady* the defendant "has limited its request to the Plaintiff's current and immediate past employers."[23] Judge Cosbey concluded, "Clearly these requests for personnel, employment and medical records are reasonably calculated to lead to relevant, and potentially admissible evidence in response to Plaintiff's Title VII claim, and therefore, the motion to quash must be denied."[24]

On the other hand, in *Henderson v. The Anthem Companies, Inc.*,[25] Magistrate Judge Shields quashed subpoenas issued to third parties in an employment case, reasoning that such requests are invasive of the plaintiff's privacy and must have a factual basis.

B. Seventh Circuit Puts the Squeeze on Protective Orders

Rule 26(c) of the Federal Rules of Civil Procedure provides for protective orders to be issued by federal courts "for good cause shown" if there is "a trade secret or other confidential research, development, or commercial information . . . ."[26] In recent years, the Seventh Circuit has scrutinized protective orders and has voiced a preference for public access to materials and information discovered in federal litigation. In 1999 the Seventh Circuit issued its most profound opinion yet on this subject.

In *Citizens First National Bank of Princeton v. Cincinnati Insurance Co.*,[27] an appeal was taken from the Northern District of Illinois in a commercial case. At the trial court level, the district judge had issued a standard protective order stipulated to by the parties allowing the parties to designate as confidential any document "believed to contain trade secrets or other confidential or governmental

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19. *Id.* at *3.
20. *See id.* at *3-4.
21. *Id.* at *4.
22. No. IP98-936-C H/G (S.D. Ind. Jan. 21, 1999).
23. No. 1:99-MC-19, at *4 (N.D. Ind. Oct. 5, 1999).
24. *Id.*
25. IP99-1454-C-Y/S, slip op. (S.D. Ind. Dec. 21, 1999).
26. FED. R. CIV. PROC. 26(c).
27. 178 F.3d 943 (7th Cir. 1999).

information."[28] On appeal, one of the parties asked the Seventh Circuit to file an appendix under seal, and in so doing submitted the stipulated protective order from the district court.

Writing for a panel that included fellow Judges Easterbrook and Bauer, Chief Judge Posner remanded the matter to the district court for purposes of advising whether good cause exists for the appendix to be filed under seal.[29] In so doing, Judge Posner expounded on the limits and requirements of Rule 26(c) and the Seventh Circuit's concerns in this area.

He began by noting that the stipulated protective order had been issued nearly two years ago in March of 1997, and that "we do not know enough about the case to be able to assess the order's current validity without the advice of the district judge . . . ."[30] He then added that "[t]here is a deeper issue of confidentiality than the currency of the protective order, and we must address it in order to make clear the judge's duty on remand."[31] That issue, he explained, is the "judge's failure to make a determination, as the law requires [under] Fed. R. Civ. P. 26(c) . . . , of good cause to seal any part of the record of a case."[32] He explained:

> Instead of doing that [finding good cause] he granted a virtual carte blanche to either party to seal whatever portions of the record the party wanted to seal. This delegation was improper. The parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding. It is true that pretrial discovery, unlike the trial itself, is usually conducted in private. But in the first place the protective order that was entered in this case is not limited to the pretrial stage of the litigation, and in the second place the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding.[33]

Judge Posner then addressed the balance of the public's interest versus the litigants interests in privacy, writing, "[t]hat [public] interest does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case."[34] There are, he added, limits on the parties' ability to dictate what is sealed. He elaborated as follows:

> The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will

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28. *Id.* at 944.
29. *See id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 945.

> go unprotected unless the media are interested in the case and move to unseal. The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record . . . . He may not rubber stamp a stipulation to seal the record.[35]

Judge Posner then critiqued the protective order at issue, noting that it was "far too broad to demarcate a set of documents clearly entitled without further inquiry to confidential status."[36] After noting that both the First and Third Circuits formerly endorsed broad umbrella orders but have moved away from that position, Judge Posner noted that not all determinations of good cause must be made on a document-by-document basis. He concluded:

> In a case with thousands of documents, such a [document-by-document] requirement might impose an excessive burden on the district judge or magistrate judge. There is no objection to an order that allows the parties to keep their trade secrets (or some other properly demarcated category of legitimately confidential information) out of the public record, provided the judge (1) satisfies himself that the parties know what a trade secret is and are acting in good faith in deciding which parts of the record are trade secrets and (2) makes explicit that either party and any interested member of the public can challenge the secreting of particular documents. Such an order would be a far cry from the standardless, stipulated, permanent, frozen, overbroad blanket order that we have here.[37]

What then are practitioners and the federal trial bench to do with protective orders? The best that can be discerned from Judge Posner's order is the following: (1) there should be a specific explanation of the reasons for any document or category of documents to be deemed confidential; (2) merely saying "good cause" exists is not enough, but an explicit good cause finding is required; (3) the order should recite that either party and any interested member of the public can challenge the secreting of particular documents; and (4) parties should limit the number and type of documents that they designate as confidential.

The last advice, of course, is that appellate counsel should think carefully before proceeding with motions to file materials under seal in the Seventh Circuit itself. The Seventh Circuit has a great interest in the "public's right to know," and Chief Judge Posner himself seems to be the champion of the public's interest in this regard.

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35. *Id.*
36. *Id.*
37. *Id.* at 946.

III. EXPERTS

In *Kumho Tire Co. v. Carmichael*,[38] the Supreme Court held that the *Daubert* standards for screening expert testimony apply to all types of experts, not merely scientists. The decision resolves a split in the circuits on this front, but does not change things in the Seventh Circuit where the broad application of *Daubert* had previously been recognized.

IV. SUMMARY JUDGMENT

A. Motions to Strike at Summary Judgment

In *Worlds v. Flashfold Carton, Inc.*,[39] Magistrate Judge Cosbey granted summary judgment for the employer in a discrimination case. In so doing, Judge Cosbey granted a motion to strike numerous aspects of the plaintiff's evidence submitted in opposition to summary judgment. For instance, one witness asserted in an affidavit that discrimination was "routine" and "very common," but did not provide any foundation or detail.[40] The court struck such conclusions as unsupported by specific factual support.

B. Local Rules Decision

In *Pike v. Caldera*,[41] the defendant moved for summary judgment. Thereafter, the parties filed a series of collateral motions and briefs related to the motion for summary judgment, including five motions to strike, responses thereto, replies, and even some surreplies. Judge Tinder observed at the outset that "the parties have engaged in extensive and time-consuming satellite litigation over various portions of the amended rule."[42]

In a thorough, comprehensive opinion spanning fifty-three pages, Judge Tinder went to great lengths to educate the bar on the mechanics of amended Local Rule 56.1. He granted and denied the various motions to strike, but more noteworthy than the results of the order are the lessons from the opinion. Any practitioner filing or opposing summary judgment in the Southern District *must* read the entire opinion; it is the earliest, best, and most thorough discussion of the amended summary judgment rule. This Article cannot do justice to the lengthy opinion, but simply notes the following:

- Pursuant to Local Rule 56.1(f)(1), the factual submissions should consist of concise, numbered sentences with the contents of each sentenced limited as far as practicable to a single factual proposition. Judge Tinder elaborated on this requirement, writing: "If a party seeks to prevent a narrative version of the facts, that should be done

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38. 526 U.S. 137 (1999).
39. No.1:98-CV-142, 1999 U.S. Dist. LEXIS 7048 (N.D. Ind. Apr. 2, 1999).
40. *Id.* at *5.
41. 188 F.R.D. 519 (S.D. Ind. 1999).
42. *Id.* at 522.

in the brief. But it is improper to do so in a L.R. 56.1(f) submission. Submissions consisting of numbered *paragraphs*, rather than *sentences*, provide an immediate indication that the litigant has, in all likelihood, incorrectly applied the rule."[43]

- Regarding arguments, Judge Tinder noted that all factual submissions filed under L.R. 56.1(f), "should contain concise statements of fact, not extended statements of argument." Further, he observed that "Local Rule 56.1 was not revised for purposes of extending the page limits in which a litigant may argue the merits of a summary judgment motion."[44]

- "As a general matter," Judge Tinder observed, "shorter submissions are better."[45]

- "Submissions required to comply with L.R. 56.1(f) should contain only material facts. If a party wishes to include facts that are not material, such as background facts, they should be placed in a brief."[46]

- "Material" for purposes of summary judgment means a fact that is "potentially outcome determinative."[47]

- Local Rule 56.1 does not state how a party should present objections to the opposing party's evidence and L.R. 56.1(f) submissions. Judge Tinder expressed no preference between objections/argument in a brief or by a motion to strike. He reads the amended rule, though, as not calling for such objections in the factual submissions and responses themselves. He concludes: "The most efficient way for a court to consider and rule upon objections is to have them grouped in a single location, such as either a section of the party's summary judgment brief or a motion to strike. If may be helpful (though not required) for a practitioner to make a very brief notation in the L.R. 56.1(f) response/reply submission that the party is lodging an objection, and specifying the location of the discussion of the objection. Such a brief notation would alert the court to the presence of the objection, without cluttering the L.R. 56.1(f) submission with argument."[48]

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43. *Id.* at 525.
44. *Id.* at 524.
45. *Id.* at 525 n.8.
46. *Id.* at 526.
47. *Id.* at 523.
48. *Id.* at 529.

Again, this is a mere sampling of the important lessons from the decision. Practitioners are well advised to study the entire decision and the text of Local Rule 56.1 before their next summary judgment filing. Indeed, as a result of *Pike*, the court amended Local Rule 56.1.

C. New Summary Judgment Local Rule

On December 19, 1999 the judges of the U.S. District Court, Southern District of Indiana, passed amendments to Local Rule 56.1 governing summary judgment practice. The amendments are relatively modest and are designed to clean up certain ambiguities that existed under the Court's new rule that took effect January 1, 1999.

L.R. 56.1—SUMMARY JUDGMENT PROCEDURE

(a) Requirements for Moving Party. A party filing a motion for summary judgment pursuant to Fed. R. Civ. P. 56 must also serve and file the following:

(1) a Statement of Material Facts (either as a section of the brief or as a separate document), in compliance with L.R. 56.1(f), as to which the moving party contends there is no genuine issue and that entitles the moving party to a judgment as a matter of law;
(2) to the extent not previously filed, any affidavits and other admissible evidence the moving party relies upon to support the facts material to the motion, including, but not limited to, portions of depositions and discovery responses; and
(3) a supporting brief.

(b) Requirements for Non-Movant. A party opposing a motion filed pursuant to Fed. R. Civ. P. 56 must, on or before the 30th day after service of the motion, serve and file the following:

(1) a Response to Statement of Material Facts (either as a section of the brief or as a separate document) in compliance with L.R. 56.1(f) that contains a response to each material factual assertion in the moving party's Statement of Material Facts, and if applicable, a separate Statement of Additional Material Facts that warrant denial of summary judgment;
(2) to the extent not previously filed, any additional affidavits and other admissible evidence to support material facts the opposing party relies upon under L.R. 56.1(b)(1), including, but not limited to, portions of depositions and discovery responses; and
(3) an answer brief.

(c) Reply Brief. On or before the 15th day after service of an opposing party's answer brief, the moving party may serve and file a reply brief.

If the opposing party has submitted a Response to Statement of Material Facts and/or a Statement of Additional Material Facts, and if the moving party objects to the cited evidence, the moving party may submit a Reply to Response to Statement of Material Facts and/or a Reply to Statement of Additional Material Facts (either as a section of the brief or as a separate document) containing the objections on or before the due date for filing a reply brief that complies with L.R. 56.1(f)(1) and 56.1(f)(3)-(4).

(d) New Evidence on Reply or Surreply.

(1) At the time of filing its reply brief, the moving party may supplement its filing of admissible evidence under L.R. 56.1(a)(2) only to the extent such additional evidence responds to the opposing party's Response to Statement of Material Facts and/or Statement of Additional Material Facts, and in compliance with L.R. 56.1(f). Such evidence shall be specifically labeled Statement of Additional Evidence on Reply (either as a section of the brief or as a separate document).
(2) In the event the moving party submits any additional evidence with its reply brief or objects to the admissibility of evidence cited in opposition to the motion, the non-movant may file a Surreply to Additional Material Facts and/or a surreply brief responding only to the moving party's new evidence and/or objections no later than 7 days after service of the moving party's reply brief. A Surreply to Additional Material Facts shall comply with L.R. 56.1(f) and may be accompanied by additional evidence to the extent it is responsive to the moving party's new evidence and/or objections.
(3) Other than as specifically set forth above, evidence may not be filed on reply or following reply by either party without leave of Court.

(e) Time for Submission. Any motion for summary judgment shall be filed at such a time as to be fully briefed 120 days before the trial date unless an earlier or later deadline is provided by order (see L.R. 16.1) or the case management plan. Because of the potential impact on the trial date, motions for extension of time to file summary judgment or to serve and file supporting or opposing submissions under L.R. 56.1(b), (c) and (d) must specify the trial date and any other subsequent schedule or date that the extension might affect and must recite any previous extensions of time obtained. Extensions of time shall only be granted for good cause shown. The briefing schedule in this rule applies to any motion for summary judgment, notwithstanding the provisions of Local Rule 7.1.

(f) Requirements for Factual Statements and Responses Thereto.

(1) Format and Numbering. The Statement of Material Facts shall consist of numbered sentences. The Response to Statement of

Material Facts must be numbered to correspond with the sentence numbers of the Statement of Material Facts, preferably with each respective factual statement repeated therein. Any Statement of Additional Material Facts must consist of numbered sentences and start with the next number after the last numbered sentence in the Statement of Material Facts. The Reply to Response to Statement of Material Facts, Reply to Statement of Additional Material Facts, Statement of Additional Evidence on Reply, and Surreply to Additional Material Facts must be numbered in a similar fashion, to correspond to the specific material fact to which they are responsive and with any additional facts numbered consecutively therefrom.

(2) Format of Factual Assertions. Each material fact set forth in a Statement of Material Facts, Response to Statement of Material Facts, Statement of Additional Material Facts, Statement of Additional Evidence on Reply, or Surreply to Additional Material Facts must consist of concise, numbered sentences with the contents of each sentence limited as far as practicable to a single factual proposition. Each stated material fact shall be substantiated by specific citation to record evidence. Such citation shall be by page number and paragraph or line number, if possible.

(3) Format of Objections to Asserted Material Facts or Cited Evidence. Objections to material facts and/or cited evidence shall (to the extent practicable) set forth the grounds for the objection in a concise, single sentence, with citation to appropriate authorities.

(4) In addition to filing and exchange of all required documents in hard copy format, whenever possible, the parties should exchange their factual Statements in electronic format on 3.5" computer disk. In certain cases the Court may ask the parties to submit copies of all summary judgment filings in electronic format.

(g) Effect of Factual Assertions. In determining the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are specifically controverted or objected to in compliance with L.R. 56.1(f). The Court will also assume for purposes of deciding the motion that any facts asserted by an opposing party are true to the extent they are supported by the depositions, discovery responses, affidavits or other admissible evidence.

(h) Definition of Material Fact. For purposes of summary judgment, a material fact is a potentially outcome determinative fact.

(i) Oral Argument or Hearing. All motions for summary judgment will be considered as submitted for ruling without oral argument or hearing unless a request for such is granted under L.R. 7.5 or the Court otherwise directs.

(j) Notice to Pro Se Litigants. If a party is proceeding pro se and an opposing party files a motion for summary judgment, counsel for the moving party must submit a notice to the unrepresented opposing party that:

(1) briefly and plainly states that a fact stated in the moving party's Statement of Material Facts and supported by admissible evidence will be accepted by the Court as true unless the opposing party cites specific admissible evidence contradicting that statement of a material fact; and
(2) sets forth the full text of Fed. R. Civ. P. 56 and S.D. Ind. L.R. 56.1; and
(3) otherwise complies with applicable case law regarding required notice to pro se litigants opposing summary judgment motions.

(k) Compliance. The Court may, in the interests of justice or for good cause, excuse failure to comply strictly with the terms of this rule.[49]

Practitioners are well advised to carefully study this new rule, and to review it with each summary judgment filing.

D. Effect of Local Summary Judgment Rules

In *Huey v. United Parcel Services, Inc.*,[50] the Seventh Circuit affirmed summary judgment for defendant, based in part upon the plaintiff's failure to comply with the district court's local rule on summary judgment. The Seventh Circuit reaffirmed that district courts may add operational details to summary judgment practice, and that "judges need not paw over the files without assistance from the parties."[51]

V. COSTS

In *Odom v. American Art Clay Co.*,[52] the employer obtained summary judgment against the employee in her employment discrimination claim. The employer filed a bill of costs pursuant to 28 U.S.C. § 1920, seeking recovery of $1447.11 in costs. The plaintiff objected, asking the court to exercise its discretion not to order payment of costs because she would suffer "severe economic harm" and her lawsuit was neither frivolous nor malicious.[53]

Judge Hamilton denied the objection and granted the full costs award. After

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49. The new rule, effective January 1, 2000, can be viewed on the court's website (visited Feb. 25, 2000) <www.insd.uscourts.gov>.

50. 165 F.3d 1084, 1085 (7th Cir. 1999).

51. *Id.*

52. No. IP97-1089-C-H/G, slip op. (S.D. Ind. Feb. 11, 1999) *available in* <http://www.insd.uscourts.gov/search_htm> (visited July 27, 2000).

53. *Id.*

noting that costs are recoverable by prevailing parties as a matter "of course" under Rule 54(d)(1), he noted that there is a "strong presumption" in the Seventh Circuit that the prevailing party will recover costs.[54] Judge Hamilton added, "Generally, only misconduct by a prevailing party worthy of a penalty or the losing party's inability to pay will suffice to justify denying costs."[55] Here, though, there was no indication of misconduct on the part of the employer, and the plaintiff failed to show that "the costs sought are beyond her ability to pay within a reasonable period of time."[56] The court concluded, "The costs awarded here, it should be noted, are a minor fraction of the overall resources (including attorneys' time and the court's time) devoted to the plaintiff's lawsuit, which was without merit. If the case had been frivolous or malicious, of course, the consequences would have been quite different."[57]

Similarly, in *Miller v. Town of Speedway*,[58] defendant obtained summary judgment against the plaintiff in an employment discrimination case and sought to recover $1880 in costs under 28 U.S.C. § 1920. The plaintiff objected, asserting that the case was "close and difficult."[59] Judge McKinney overruled the objection and awarded full costs, noting the strong presumption that a prevailing party should recover costs. Quoting Seventh Circuit precedent, Judge McKinney wrote, "Generally, only misconduct by the prevailing party worthy of a penalty or the losing party's inability to pay will suffice to justify denying costs."[60]

VI. APPEALS

A. Be Careful in the Seventh Circuit

For those who take appeals to the Seventh Circuit, there are many traps for the unwary. When counsel fails to strictly comply with applicable rules of procedure, the Seventh Circuit can be a harsh place. One of the most frequent errors in Seventh Circuit practice—and thus one of the most common bases for sanctions on appeal—is Seventh Circuit Rule 30(c). Although simple on its face, this rule is frequently violated. During 1999, several appellate counsel found themselves in violation of this important rule, and faced the consequences as a result.

First, in *Normand v. Orkin Exterminating Co.*,[61] in an opinion authored by Chief Judge Posner, the Seventh Circuit ordered appellate counsel to show cause within fourteen days why he should not be fined $1000 for his violation of

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54. *Id.* at 1 (citing Contreras v. City of Chicago, 119 F.3d 1286, 1295 (7th Cir. 1997)).
55. *Id.* at 1.
56. *Id.* at 2.
57. *Id.*
58. No. IP97-1707-C-M/S, slip op. (S.D. Ind. Aug. 30, 1999).
59. *Id.*
60. *Id.*
61. 193 F.3d 908, 912 (7th Cir. 1999).

Circuit Rule 30(c). Then, in *Cullen v. Olin Corp.*,[62] the court issued a similar order to show cause why sanctions should not be levied against another appellate lawyer for violating Circuit Rule 30(c). The *Normand* opinion is brief on the Rule 30(c) issue, but the *Cullen* opinion offers an excellent summary of the Rule 30(c) problem that confronts Seventh Circuit practitioners. The court wrote:

> Under Circuit Rule 30(b)(1). . . the appellant has the unambiguous duty to include in the Appendix "all opinions, orders, or oral rulings in the case that address the issues sought to be raised." In this case appellant's counsel failed to comply with Circuit Rule 30 when he failed to attach the district court's ruling concerning motions in limine as well as the trial judge's final evidentiary ruling. To add insult to injury, counsel falsely certified that he complied with Circuit Rule 30. We have repeatedly warned appellants and their counsel that failure to follow the clear requirements of Rule 30 is subject to appropriate sanctions. Failure to attach the necessary documents impairs the ability of the court to thoroughly consider all issues raised, for we "cannot consider arguments that the lower court was incorrect and should be reversed if the written orders and transcript pages containing the appealed decisions are not before us." Accordingly, we are issuing an order to show cause why appellant's counsel should not be sanctioned for his disregard of this circuit's rules.[63]

These decisions are the most recent examples of the high expectations the Seventh Circuit has for its bar. Before venturing into the Seventh Circuit, counsel must read, re-read, and fully understand the Federal Rules of Appellate Procedure and the Seventh Circuit Rules. Further, peer review of Seventh Circuit filings by someone with Seventh Circuit experience is highly recommended. Unlike some courts, the Seventh Circuit demands exacting compliance with its rules and procedures. The penalty for non-compliance range from forfeiture of a party's rights, to public reprimand, to monetary sanctions.

B. Is a Discovery Order Requiring Payment of Fees a Final Decision?

In *Cunningham v. Hamilton County*,[64] the Supreme Court held unanimously that an order imposing sanctions on an attorney pursuant to Fed. R. Civ. P. 37(a)(4) is not a "final decision" immediately appealable under 28 U.S.C. § 1291. To pursue such an appeal prior to final judgment, certification of the order for interlocutory appeal under 28 U.S.C. § 1292 is necessary, and such certification decisions are discretionary.

C. Length of Briefs in Multi-Party Appeals

Under Seventh Circuit Rule 33, when multiple parties with identical interests

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62. 195 F.3d 317, 322 (7th Cir. 1999).
63. *Id.* (citations omitted).
64. 527 U.S. 198 (1999).

appear on the same side of an appeal, the Seventh Circuit generally enters an order requiring a single joint brief within the standard 14,000 word limit (approximately fifty pages). In multi-defendant criminal appeals with simple issues, the Seventh Circuit will allow each defendant to go his own way and file a separate brief. In complex multi-defendant criminal appeals, however, the court usually requires a joint brief on common issues, and then allows individual briefs on truly individual issues.

In *United States v. Torres*,[65] four defendants appealed their criminal convictions. Each filed their own brief, and the government then asked for leave to file an over-sized appellee's brief. The Seventh Circuit responded by ordering the four defendants to file a new single joint brief not to exceed 20,000 words, and ordered that no individual briefs would be accepted. The court allowed the government an additional 2000 words beyond the standard 14,000 limit, and also ordered defendants to file a joint reply brief of no more than 8000 words.[66]

The *Torres* decision serves as a reminder that in multi-party appeals, counsel should resolve these briefing issues prior to filing individual briefs, and that counsel should otherwise anticipate and plan for the filing of a joint brief on common issues.

D. Frivolous Appeals

In *Day v. Northern Indiana Public Service Corp.*,[67] the plaintiff appealed from Judge Lozano's grant of summary judgment, which had been granted in part based on the plaintiff's failure to follow the local rule on summary judgment. On appeal, the Seventh Circuit affirmed, and imposed sanctions of $500 and a public reprimand of appellant's counsel.[68] The Seventh Circuit found such sanctions necessary because counsel had violated Circuit Rule 28(c) in his brief (requiring non-argumentative statement of facts supported by citations), and because the appeal otherwise was frivolous.[69]

E. Error Preservation

In *Wilson v. Williams*,[70] the Seventh Circuit considered the issue whether an objection at trial is required to preserve error on appeal where the trial court ruled on the evidence issue in response to a motion in limine before trial. Judge Easterbrook summarized the ruling of the majority:

> We conclude that a definitive ruling in limine preserves an issue for appellate review, without the need for later objection—but this is just a presumption, subject to variation by the trial judge, who may indicate

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65. 170 F.3d 749 (7th Cir. 1999).
66. *See id.* at 751.
67. 164 F.3d 382 (7th Cir. 1999).
68. *See id.* at 385.
69. *See id.*
70. 182 F.3d 562 (7th Cir. 1999) (en banc).

> that further consideration is in order. Moreover, issues about how the evidence is used, as opposed to yes-or-no questions about admissibility frequently require attention at trial, so that failure to object means forfeiture.[71]

The court also noted that: "Conclusive pretrial rulings on evidence serve another useful end: they permit the parties to adjust their trial strategy in light of the court's decisions."[72] Thus, the court stated, if the court made a definitive ruling in limine that certain evidence was admissible, the party resisting admission of the evidence could present that evidence at trial ("if only to draw its sting," as the court put it) without waiving the objection to admissibility.[73]

VI. MISCELLANEOUS

In *Pettis v. Alexander*,[74] defense counsel moved to withdraw their appearance five weeks prior to trial due to non-payment of fees stemming from financial difficulties. The court denied the motion, relying on Rule 1.16(b)(4) of the Indiana Rules of Professional Conduct. The rule governs withdrawals from representation, but gives courts the power to order counsel to continue their representation.

Judge Hamilton followed existing precedent on the issue and reasoned: (1) the client did not consent to withdraw; (2) no substitute counsel had appeared; (3) the plaintiff's right to a trial would be impeded if withdrawal were allowed because a continuance would be necessary.[75] He concluded:

> If the court must choose between imposing financial burdens on defendant and/or its lawyers, on the one hand, or imposing delays and disruption on the opposing party and the court on the other hand, the choice is clear. Any hardships should be imposed on those directly involved in the contractual relationship that has broken down, rather than on the court and the plaintiff.[76]

VII. RULE AMENDMENTS

The Southern District of Indiana passed amendments to sixteen of its Local Rules, effective January 1, 2000.[77] The amendments are the result of a year-long audit of all the Local Rules by the Court's Local Rules Advisory Committee. Most of the amendments are in the nature of "housekeeping" changes that will

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71. *Id.* at 563.
72. *Id.* at 566.
73. *Id.*
74. No. IP97-1969-C-H/G, slip op. (S.D. Ind. May 5, 1999).
75. *See id.*
76. *Id.*
77. The full text of all changes is available at the court's website (visited Feb. 25, 2000) <http:\\www.insd.uscourts.gov>.

not significantly impact practitioners. Several rule changes, however, will have immediate impact on local federal practice. The most important changes are outlined below.

A. Format of Filings

Local Rule 5.1 is substantially revised, with the key amended language set forth as follows:

> In order that the files of the Clerk's office may be kept under the system commonly known as "flat filing," all papers presented to the Clerk or Judge for filing shall be flat and unfolded. All filings shall be on white paper of good quality, 8 ½½" x 11" in size, and shall be plainly typewritten, printed, or prepared by a clearly legible duplication process, and double spaced, except for quoted material. The filings shall be either stapled in the top left corner or bound in a manner which permits the document to lie reasonably flat when open (*e.g.*, spiral bound), and shall be two-hole punched at the top (but not fastened) (the punches shall be 2 ¾¾" apart and appropriately centered). Should the nature of the filing be so unusual as to make these methods of fastening infeasible, a party may seek leave of the Court to use a different method. Such leave shall be sought prior to the submission of any filing fastened in any way not conforming to this Rule. The title of each filing must be set out on the first page. Each page shall be numbered consecutively. Any filing containing four or more exhibits shall include a separate index identifying and briefly describing each exhibit.[78]

As amended, the rule requires filings to be two-hole punched at the top center of the page. This system will facilitate filing at the Clerk's office, which uses two-hole files. Compliance with the amended rule should be easy. In addition to manual two-hole punches, practitioners can purchase pre-punched paper from office supply stores or distributors.

B. Extensions of Time

Local Rule 6.1 is amended to clarify that notices of extensions (as opposed to motions) are only appropriate for deadlines relating to responsive pleadings and written discovery requests. All other extensions must be by motion. In addition, all notices and motions for extensions must recite whether opposing counsel consents or objects to the extension, and must state the original due date and the new due date. The full text of amended Local Rule 6.1 follows:

> (a) In every civil action pending in this Court in which a party wishes to obtain an initial extension of time not exceeding thirty (30) days within which to file a responsive pleading or a response to a written request for discovery or request for admission, the party shall contact counsel for

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78. S.D. IND. LOCAL Rule. 5.1.

> the opposing party and solicit opposing counsel's agreement to the extension. In the event opposing counsel does not object to the extension or cannot with due diligence be reached, the party requesting the extension shall file a notice with the Court reciting the lack of objection to the extension by opposing counsel or the fact that opposing counsel could not with due diligence be reached. No further filings with the Court nor action by the Court shall be required for the extension.
>
> (b) Any other request for an extension of time, unless made in open court or at a conference, shall be made by written motion. In the event the opposing counsel objects to the request for extension, the party seeking the same shall recite in the motion the effort to obtain agreement.
>
> (c) Any motion or notice filed pursuant to this rule shall state the original due date and the date to which time is extended.[79]

C. Core Elements

Under the Pilot Program administered by Magistrate Judge Shields, core jury instructions were required with the case management plan. As the Pilot Program winds down, a modification of that concept is now part of Local Rule 16.3(d)(2), and requires in each case management plan the following: "The plan shall set forth the contentions of the parties, including a brief description of the parties' claims and defenses. The plan shall include the essential legal elements of each claim or defense upon which a party bears the burden of proof."[80]

D. Deadline for Bill of Costs Shortened to Fourteen Days

Under prior Local Rule 54.1, a bill of costs was due thirty days after judgment. This time period was longer than the fourteen-day attorneys fee period of Fed. R. Civ. P. 54, and was inconsistent with the Northern District's fourteen-day period for costs under its Local Rule 54.1. To make the deadline for costs consistent with the deadline for fees, and to harmonize this local rule with the Northern District, the Southern District's amended Local Rule 54.1 requires bills of costs to be filed fourteen days after judgment, as follows:

> Except as otherwise provided by statute, rule, or Court order, the parties shall have 14 days from the entry of final judgment to file and serve a Bill of Costs and a motion for the assessment of attorney fees. The Court prefers that any Bill of Costs be filed on AO form 133, which is available from the Clerk. This time may be extended by the Court for good cause shown. Failure to file such bill or motion or to obtain leave of Court for extensions of time within which to file shall be deemed a

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79. S.D. IND. L.R. 6.1.

80. S.D. IND. L.R. 16.3.

waiver of the right to recover taxable costs or attorney fees.[81]

E. Preliminary Injunctions/TROs

Local Rule 65.2 was amended to remove the obligation of filing a supporting brief with a motion for preliminary injunction. The change recognizes that in many preliminary injunction settings, as the time the motion is filed the matter is often premature for briefing until certain discovery has taken place. Under the amended rule, supporting briefs remain mandatory for TROs, but are implicitly optional and/or left to the Court's discretion and scheduling in a given case in the preliminary injunction context. The full text of the amended Local Rule 65.2 follows:

> The Court will consider a request for preliminary injunction or for a temporary restraining order only when the moving party files a separate motion for such relief. If the motion is for a temporary restraining order, in addition to fully complying with all the requirements of *Federal Rule of Civil Procedure* 65(b), the moving party shall also file with its motion a supporting brief.[82]

CONCLUSION

During 2000, additional developments in federal civil practice are anticipated. In particular, a package of amendments to the Federal Rules of Civil Procedure is working its way through to approval, and would take effect December 1, 2000. The most significant changes would be to mandatory disclosure under Fed. R. Civ. P. 26(a)(1) and to discovery. Practitioners should watch for these changes, which will be reported in next year's Article.

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81. S.D. IND. L.R. 54.1.
82. S.D. IND. L.R. 65.2.