ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

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Federal Litigation

The Judge Advocate General's Legal Center and School

United States Army

Federal Litigation

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CHAPTER A

CASE MANAGEMENT AND RESPONSIBILITIES FOR LITIGATION

I. RESPONSIBILITIES FOR LITIGATION

A. United States Department of Justice (DOJ)

1. Mission: To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.

2. Statutory Authority: "Except as otherwise authorized by law, the conduct of litigation in which the United States, any agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to the officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516

3. Organization of the DOJ: There are 42 separate components of the Department. These include the U.S. Attorneys, who prosecute offenders and represent the U.S. Government in court; the National Security Division, which coordinates the Department's highest priority of combating terrorism and protecting national security the major investigative agencies – the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco, Firearms and Explosives – which prevent and deter crime and arrest criminal suspects; the U.S. Marshals Service, which protects the federal judiciary, apprehends fugitives, and detains persons in federal custody; and the Federal Bureau of Prisons, which confines convicted offenders. The litigating divisions enforce federal criminal and civil laws, including civil rights, tax, antitrust, environmental, and civil justice statutes. The Office of Justice Programs and the Office of Community Oriented Policing Services provide assistance to state, tribal, and local governments. Other departmental components include the National Drug Intelligence Center, the Executive Office for U.S. Trustees, the Justice Management Division, the Executive Office for Immigration Review, the Community Relations Service, and the Office of the Inspector General. Although headquartered in Washington, D.C., the Department conducts much of its work in offices located throughout the country and overseas.

B. Civil Division

1. Mission: The Civil Division represents the United States in any civil or criminal matter within its scope of responsibility – protecting the U.S. Treasury, ensuring that the federal government speaks with one voice in its view of the law,

preserving the intent of Congress, and advancing the credibility of the government before the courts.

2. Major functions:

   a. Defend or assert the laws, programs, and policies of the United States, including defending new laws implementing the President's domestic and foreign agenda against constitutional challenges.

   b. Recover monies owed to the United States and victims as the result of fraud, loan default, bankruptcy, injury, damage to federal property, violation of consumer laws, or unsatisfied judgments.

   c. Defend the interests of the U.S. Treasury, prevailing against unwarranted monetary claims, while resolving fairly those claims with merit.

   d. Fight terrorism through litigation to detain and remove alien terrorists; defend immigration laws and policies, including determinations to expel criminal aliens.

   e. Enforce consumer protection laws and defend agency policies affecting public health and safety.

   f. Defend the federal government and its officers and employees in lawsuits seeking damages from the U.S. Treasury or from individuals personally.

   g. Implement compensation programs, such as the Childhood Vaccine and Radiation Exposure programs; support viable alternatives to litigation when appropriate.

   h. Represent the United States in foreign courts through foreign counsel supervised and instructed by attorney staff in Washington, D.C. and London.

   i. Represent the interests of the United States in civil and criminal litigation in foreign courts.

3. Components

   a. Appellate Staff: Litigating (for the entire Civil Division) cases appealed directly from administrative agencies to the courts of appeal. Appellate attorneys draft briefs and argue cases in the courts of appeals and draft documents for the U.S. Supreme Court, including petitions for certiorari and briefs on the merits. Typical cases include defending the federal government against constitutional challenges to Acts of Congress, Executive decisions, and national security programs; administrative

challenges to agency rules and adjudications; tort claims against the United States; employment discrimination claims against the government; and claims against federal officers in their individual capacities for the alleged violation of a person's constitutional rights (Bivens claims).

b. Commercial Litigation Branch: Covers six major areas - Corporate and Financial Litigation, Office of Foreign Litigation, Fraud, Intellectual Property, and the National Courts.

c. Federal Programs Branch: Litigates on behalf of approximately 100 federal agencies, the President, Cabinet officers, and other government officials. Activities include the defense against constitutional challenges to federal statutes, suits to overturn government policies and programs, and attacks on the legality of government decisions. The Branch also initiates litigation to enforce regulatory statutes and to remedy statutory and regulatory violations.

d. Torts Branch: Represents the interests of the United States in suits where monetary judgments are sought for damages resulting from negligent or wrongful acts. The Branch also handles actions involving injury or damage to government property. The Branch is comprised of four major practice areas: Aviation and Admiralty, Environmental Tort Litigation, Federal Tort Claims Act Litigation, and the Constitutional and Specialized Torts Litigation.

e. Consumer Protection Branch: Enforces and defends the consumer protection programs of four client agencies: the Food and Drug Administration, the Federal Trade Commission, the Consumer Product Safety Commission, and the Department of Transportation's National Highway Traffic Safety Administration. The Branch is also responsible for litigation under the principal federal consumer protection laws these agencies enforce, including the Federal Food, Drug, and Cosmetic Act; the odometer tampering prohibitions of the Motor Vehicle Information and Cost Savings Act; the Consumer Product Safety Act, and the Fair Debt Collection Practices Act.

f. Office of Immigration Litigation: The office is divided into two functional sections, the Appellate Section and a District Court Section. The office oversees all civil immigration litigation, both affirmative and defensive, is responsible for coordinating national immigration matters with U.S. Attorneys' offices on matters before the federal district courts and circuit courts of appeals, and provides support and counsel to all federal agencies involved in alien admission, regulation, and removal under U.S. immigration and nationality statutes.

4. Mission: The U.S. Attorneys serve as the nation's principal litigators under the direction of the Attorney General.

5. Statutory Authority

   a. Each U.S. Attorney is appointed by the President for each judicial district to a term of four years. Upon expiration of his term, a U.S. Attorney shall continue to perform the duties of his office until his successor is appointed and qualified. 28 U.S.C. § 541.

   b. "Each U.S. Attorney within his district shall prosecute for all offenses against the United States; prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned …" 28 U.S.C. § 547.

   c. Assistant U.S. Attorneys (AUSA) are appointed by the Attorney General. 28 U.S.C. § 542.

6. Organization of the U.S. Attorney's Office: There are 93 U.S. Attorneys stationed throughout the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. One U.S. Attorney is assigned to each of the judicial districts, with the exception of Guam and the Northern Mariana Islands where a single U.S. Attorney serves in both districts. Each U.S. Attorney is the chief federal law enforcement officer of the United States within his or her particular jurisdiction.

C. Attorneys at Army Activities or Commands: Staff Judge Advocates or legal advisers, or attorneys assigned to them, will represent the United States in litigation only if authorized by this regulation or delegated authority in individual cases by the Chief, Litigation Division, U.S. Army Legal Services Agency (USALSA). AR 27-40, para. 1-4.

II. CASE MANAGEMENT

A. Federal Rules of Civil Procedure (2019 edition)

1. Scope and Purpose: "These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

2. Overview of the Federal Rules of Civil Procedure:

   a. Commencing an Action: Fed. R. Civ. P. 3-6.

b. Pleadings and Motions: Fed. R. Civ. P. 7-16.

c. Parties: Fed. R. Civ. P. 27-38.

d. Disclosures and Discovery: Fed. R. Civ. P. 26-37.

e. Trials: Fed. R. Civ. P. 38-53.

f. Judgment: Fed. R. Civ. P. 54-63.

g. Provisional and Final Remedies: Fed. R. Civ. P. 64-71.

B. Overview of Agency Counsel Responsibilities:

1. Read Complaint/Summons

2. Determine Filing Date

3. Check Service Date (120 days from filing)

4. Check Proper Service (Fed. R. Civ. P. 4(i); AR 27-40, Ch. 2)

5. Determine Answer Due Date (usually 60 days from Service, if waived)

6. Determine whether the case should be delegated or removed

7. Prepare a litigation report (AR 27-40, para. 3-9)

   a. Look for bases for motion(s) to dismiss and affirmative defenses

   b. Identify background issues and possible delays

8. Forward litigation report to Litigation Division, USALSA

9. Contact Litigation Division, USALSA to discuss:

   a. Coordination with AUSA or DOJ

   b. Discovery (e.g. litigation holds, e-discovery issues)

   c. Draft an answer or motion to dismiss

LITIGATION TIMELINE

Days	Litigation Event
0	COMPLAINT (Fed. R. Civ. P. 3)
90	SERVICE: no later than 90 days after complaint is filed (Fed. R. Civ. P. 4(m))
150	DEFENDANT RESPONSE (ANSWER or MOTIONS TO DISMISS): within 60 days after service on the U.S. Attorney if the United States, a U.S. agency, U.S. officer or employee is sued in an official capacity (Fed. R. Civ. P. 12(a)(2))
219	DISCOVERY CONFERENCE: as soon as practicable but at least 21 days before a scheduling conference is held or a scheduling order is due (Fed. R. Civ. P. 26(f))
233	INITIAL MANDATORY DISCLOSURES: no later than 14 days after Rule 26(f) conference (Fed. R. Civ. P. 26(a)(1))
240	SCHEDULING CONFERENCE AND ORDER: as soon as practicable but, unless the judge finds good cause for a delay, within the earlier of 90 days after service or 60 days after appearance (Fed. R. Civ. P. 16(b))
	Time Line assumes Court sets Trial in six months
Varies	DISCOVERY: Fed. R. Civ. P. 26-37
330	DISCLOSURE OF EXPERTS: at least 90 days before trial (Fed. R. Civ. P. 26(a)(2)(D))
Varies	DISPOSITIVE MOTION: Fed. R. Civ. P. 56
390	PRETRIAL DISCLOSURES OF WITNESSES AND EXHIBITS: at least 30 days before trial (Fed. R. Cil. P. 26(a)(3))
406	OBJECTIONS TO ADMISSABILITY OF WITNESSES AND EXHIBITS: at least 30 days before trial or waiver without showing of "good cause" (Fed. R. Civ. P. 26(a)(3))
420	TRIAL

CHAPTER B

SYSTEMATIC ANALYSIS OF CASES IN FEDERAL LITIGATION

I. INTRODUCTION

A. Military decisions, programs, and policies are subject to review by the federal courts.

B. Themes common to litigation against the military departments:

1. Suits almost exclusively in the federal courts.

2. Suits are generally filed against a federal agency.

3. The military and its officials are involved.

II. METHOD OF ANALYSIS

A. Does the federal court have jurisdiction?

1. General: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." U.S. Const. art. III, § 2.

a. Limited jurisdiction. *See generally*, *Turner v. Bank of North America*, 4 U.S. 8, 4 Dall. 8 (1799).

b. Subjects and Parties. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821). Superceded by statute as stated in *Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231 (10th Cir.(Wyo.) Feb 13, 2003), rehearing in banc granted (Apr 22, 2003).

c. Cases and Controversies: *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968) (discussing who has standing to file suit).

2. Congressional Grant of Jurisdiction

a. General: Except for the U.S. Supreme Court's original jurisdiction derived directly from the Constitution, federal judicial power is dependent upon a statutory grant of jurisdiction.

Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922) (upholding "where an action is one *in rem* that court whether state or federal which first acquires jurisdiction draws itself the exclusive authority to control and dispose of the *res*, involves the conclusion that rights of the litigants to invoke the jurisdiction of the respective courts are of equal rank.").

b. Jurisdictional statute may be more restrictive than the Constitution. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). However, jurisdictional statute may not exceed constitutional limits of jurisdiction. *Hodgson & Thompson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809).

c. The burden of pleading and proving the subject-matter jurisdiction of the court rests with the plaintiff. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182, 189 (1936).

d. The United States cannot be sued without its consent. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

3. Federal Question Jurisdiction: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

a. An action is "arising under federal law":

(1) ". . . if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law -- whether that proposition is independently applicable or becomes so only by reference from state law." P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System, p. 889 (3d ed. 1988).

(2) if "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677 (2006).

b. Vindication of right under state law necessarily turns on some construction of federal law. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). *Cf. Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (federal preemption). The mere presence of a federal issue in a state cause of action does not

automatically confer federal question jurisdiction. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986). The federal question must be substantial and form an essential part of the cause of action. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

c. Well-pleaded complaint rule: In determining whether a case arises under federal law, a court generally is confined to the well-pleaded allegations of the plaintiff's complaint. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1987). *See also Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (holding "Under the longstanding well-pleaded complaint rule …a suit arises under federal law only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law]." *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, (1908).

d. Federal jurisdiction cannot be predicated on an actual or anticipated defense: "It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of [federal law]. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, (1908).

e. Complete preemption provides a limited exception to the well-pleaded complaint rule. "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). *See also Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S.308 (2005) (the meaning of a federal tax provision is an important federal law issue that supports federal question jurisdiction in this state quiet title action).

B. What constitutes federal law?

1. The U.S. Constitution.

2. Statute.

3. Federal common law. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

4. Executive regulations. *Compare Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 7-8 (3d Cir. 1964) (validly issued administrative regulations or orders may be treated as "laws of the United States") with *Chaase v. Chasen*, 595 F.2d 59 (1st Cir. 1979) (customs circular concerning employee overtime does not constitute one of the "laws of the United States") and *Federal Land Bank v. Federal Intermediate Credit Bank*,

727 F. Supp. 1055 (S.D. Miss. 1989) (financial directive by Farm Credit Administration not a "law of the United States").

5. Treaties. *Compare Int'l Ins. Co. v. Caja Nacional De Ahorro Y Seguro*, 293 F.3d 392 (7th Cir. 2002) (holding that Panama Convention provided independent federal question jurisdiction) with *Chubb & Son, Inc. v. Asiana Airlines*, 214 F. 3d 301 (2d Cir. 2000) (holding that court lacks subject matter jurisdiction in absence of treaty relationship between the United States and South Korea).

C. Is it justiciable? Justiciability is the term of art employed to give expression to the dual limitation imposed upon federal courts by the "case and controversy" doctrine. *Flast v. Cohen*, 392 U.S. 83 (1968); U.S. Const. art. III, § 2. Analysis of the question involves application of both constitutional limitations and prudential concens – a two-pronged doctrine:

1. Constitutional limitations prong.

a. Advisory opinions: an answer to a hypothetical question of law unconnected to any particular case.

b. Ripeness: "[T]he conclusion that an issue is not ripe for adjudication ordinarily emphasizes a prospective examination of the controversy which indicates that future events may affect its structure in ways that determine its present justiciability, either by making a later decision more apt or by demonstrating directly that the matter is not yet appropriate for adjudication by an article III court." L. Tribe, American Constitutional Law 61 (2d Ed. 1988) (emphasis in the original).

(1) Rule: In determining whether a case is ripe for adjudication, a court must:

(a) Evalute the fitness of the issues for adjudication:

(i) Is the agency action final?

(ii) Are the issues legal or factual?

(iii) Have administrative remedies been exhausted?

(iv) What is the nature of the record created?

(b) Determine the hardship to the parties by withholding court decision:

(i) What is the likelihood the challenged action will affect the plaintiff?

(ii) What is the nature of consequences risked by the plaintiff if affected by the action?

(iii) Will the plaintiff be forced to alter conduct as a result of the action?

(2) Rationale: Avoid premature adjudication of suits and protect agencies from unnecessary judicial interference. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99 (1977). Also, to avoid abstract disagreements over administrative policies and to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *Id*. at 148-149 (1967); *Nat'l Park Hospitality Ass'n. v. Dept. of Interior*, 538 U.S. 803 (2003).

(3) Examples:

(a) Pre-enforcement attacks on statutes or regulations. *Cf. Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967) with *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (overruled other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977).

(b) Challenges to pending administrative or judicial proceedings. *Hastings v. Judicial Conference*, 770 F.2d 1093 (D.C. Cir. 1985).

(c) Threat to commit military forces without congressional authorization. *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990).

c. Mootness: "…looks primarily to the relationship between past events and the present challenge in order to determine whether there remains a case or controversy that meets the article III test of justiciability." L. Tribe, American Constitutional Law 62 (1988).

(1) General rule: There is no case or controversy once the issues in a lawsuit have been resolved. However, a case becomes moot when "[i]t can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur," and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 635 (1979). *See also McFarlin v. Newport Special School District*, 980 F.2d 1208 (8th Cir. 1992).

(2) Exceptions:

(a) Capable of repetition, yet evading review. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Test: The challenged action is too short in its duration to be fully litigated prior to its cessation or expiration and there is no reasonable expectation the same complaining party will be subject to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

(b) Voluntary cessation: a case is not made moot merely because a defendant voluntarily ceases his allegedly unlawful conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

(c) Collateral consequences: a case is not moot where, even though stopped, the government's allegedly unlawful conduct leaves lasting adverse consequences. *Sibron v. New York*, 392 U.S. 40 (1968).

(d) Class actions.

(i) Mootness of the class representative's claim before class certification: the case may be moot. *Indianapolis School Comm'rs v. Jacobs*, 420 U.S. 128 (1975).

(ii) Mootness of the class representative's claim after the class has been certified: the case is not moot. *Sosna v. Iowa*, 419 U.S. 393 (1975).

(iii) Mootness of the class representative's claim after motion for class certification has been made and denied, but before appeal from the denial: the case is not moot. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

(iv) The U.S. Supreme Court has proscribed the interlocutory appeal of denials of class certification. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

(v) The U.S. Supreme Court has allowed class members to intervene to appeal the denial of class certification after the named

plaintiff's claim has been fully satisfied. *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

(vi) Mootness of the claims of the members of the class: the case may be moot or the class may be realigned. *Kremens v. Bartley*, 431 U.S. 119 (1977).

d. Standing. The primary focus is on the party seeking to get his complaint before the federal court, and only secondarily on the issues raised. The question subsumes both constitutional and prudential considerations.

(1) Constitutional considerations: To establish standing, a plaintiff must demonstrate:

(a) That he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. [Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable?] *Meese v. Keene*, 481 U.S. 465 (1987); *George v. State of Texas*, 788 F.2d 1099 (5th Cir.), cert. denied, 479 U.S. 866 (1986).

(b) An asserted right to have the government act in accordance with law does not confer standing. *Allen v. Wright*, 468 U.S. 737 (1984); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1978). Mere interest of plaintiff in an issue does not confer standing. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

(c) That the injury is traceable to the acts or omissions of the defendant (causation requirement). [Is the line of causation between the illegal conduct and injury too attenuated?] *Warth v. Seldin*, 422 U.S. 490 (1975).

(d) That the plaintiff's stake in the controversy is sufficient to ensure that the injuries claimed will be effectively redressed by a favorable court decision. [Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?] *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

(2) Prudential considerations.

(a) A plaintiff may not claim standing to vindicate the constitutional rights of third parties. *Tileston v. Ullman*, 318 U.S. 44 (1943).

(b) A plaintiff may only challenge a statute or regulation in the terms in which it is applied to him. *Parker v. Levy*, 417 U.S. 733 (1974).

(c) "Generalized grievances" shared in substantially equal measure by all or a large class of citizens. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *Pietsch v. Bush*, 755 F. Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

(d) Interest within the "zone of interests" arguably protected or regulated by the law in question. *Lujan v. National Wildlife Foundation*, 504 U.S. 555 (1992); *Hadley v. Secretary of the Army*, 479 F. Supp. 189 (D.D.C. 1979).

(e) Rationale: Courts should not make unnecessary constitutional adjudications and the holders of constitutional rights are the best parties to assert the rights. *Singleton v. Wulff*, 428 U.S. 106 (1976).

(f) Exceptions:

(i) Countervailing policies. *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977).

(ii) Statute confers third-party standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

(3) Taxpayer Standing. To establish standing as a taxpayer, a plaintiff must demonstrate:

(a) A nexus between his taxpayer status and the type of legislation being challenged. Taxpayer standing is only proper where the plaintiff challenges an exercise of congressional power under the taxing and spending clause of the Constitution. U.S. Const. art. I, § 8.

(b) A nexus between the taxpayer status and the precise nature of the constitutional infringement

alleged. The plaintiff must show a specific constitutional limitation on the taxing and spending power of Congress. *Flast v. Cohen*, 392 U.S. 83, 102-103 (1968).

(c) Variations in approach:

(i) Challenge to congressional exercise under the property clause. U.S. Const. art. I, § 3, cl. 2; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

(ii) Challenge under the incompatibility clause. U.S. Const. art. I, § 9, cl. 7; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

(iii) Challenge under the accounting clause. U.S. Const. art. I, § 9, cl. 7; *United States v. Richardson*, 418 U.S. 166 (1974).

(iv) Challenge under foreign affairs powers. U.S. Const. art. I, § 10, cl. 1; *Americans United for Separation of Church & State v. Reagan*, 786 F.2d 194 (3d Cir. 1986).

(v) Challenge under war powers and Commander-in-Chief clauses. U.S. Const. art. I, § 8, cl. 11 and art. II, § 2; *Pietsch v. Bush*, 755 F.Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

(4) Citizen Standing. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *Pietsch v. Bush*, 755 F. Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

(5) Associational Standing. For an association to have standing to sue on behalf of its members, it must show: the conduct challenged is injurious to its members; the claim is germane to the association's purpose; and the cause can proceed without the participation of the individual members affected by the challenged conduct.

(a) Suits for injuries suffered by the association. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *NAACP v. Alabama*, 357 U.S. 449 (1958).

(b) Suits for injuries suffered by members. *International Union, UAW v. Brock*, 477 U.S. 274 (1986); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1976).

2. Prudential (political question) prong.

a. "Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable or manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

b. "[T]he doctrine incorporates three inquiries under *Goldwater v. Carter*, 444 U.S. 996, 998 (1980) (Powell, J., concurring):

(1) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate political branch of Government?

(2) Would resolution of the question demand that a court move beyond areas of judicial expertise?

(3) Do prudential considerations counsel against judicial intervention?

c. Examples:

(1) Organization, training, and weaponry of the armed forces. *Gilligan v. Morgan*, 413 U.S. 1 (1973).

(2) Commitment and use of military forces. *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990.

(3) Establishment of diplomatic relations. *Phelps v. Reagan*, 812 F.2d 1293 (10th Cir. 1987); *Americans United for Separation of Church & State v. Reagan*, 786 F.2d 194 (3d Cir.), cert. denied, 479 U.S. 1012 (1986).

(4) Repatriation of POW's. *Smith v. Reagan*, 637 F. Supp. 964 (E.D.N.C. 1986).

(5) Relief from or placement in command. *Wood v. United States*, 968 F.2d 738 (8th Cir. 1992).

(6) Setting standards at service academies. *Green v. Lehman*, 544 F. Supp. 260 (D. Md. 1982), aff'd, 744 F.2d 1049 (4th Cir. 1984).

(7) Establishing promotion quotas. *Blevins v. Orr*, 553 F. Supp. 750 (D.D.C. 1982), aff'd, 721 F.2d 1419 (D.C. Cir. 1983).

(8) Conduct of military intelligence activities. *Laird v. Tatum*, 408 U.S. 1 (1972); *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984).

(9) Making political appointments. *National Treasury Employees Union v. Bush*, 715 F. Supp. 405 (D.D.C. 1989).

(10) Enforcement of accession standards. *Whittle v. United States*, 7 F.3d 1259 (6th Cir. 1993).

D. Sovereign immunity: Has there been a waiver?

1. Federal Question: No. 28 U.S.C. § 1331.

2. Tucker Act: Limited.

a. "The U.S. Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages not sounding in tort…" 28 U.S.C. § 1491(a)(1) ("Tucker Act").

b. "The district courts shall have original jurisdiction, concurrent with the U.S. Court of Federal Claims, of . . . [a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ." 28 U.S.C. § 1346(a)(2) ("Little Tucker Act").

c. General Requirements.

(1) Must be brought within 6 years of accrual of claim. 28 U.S.C. § 2501.

(2) Monetary damages only allowed in U.S. Court of Federal Claims (COFC) with exception of bid protests.

(3) Jurisdictional statute only; confers no substantive rights for plaintiff. In order to state a claim upon which relief may be granted, the plaintiff must demonstrate an independent "money-mandating" basis for relief sought:

(a) Contract (must demonstrate all elements of enforceable contract),

(b) Statute or regulation with mandatory provisions establishing entitlement to money (military/ civilian personnel claims),

(c) Constitution (Fifth Amendment takings claims heard by COFC), and

(d) Not sounding in tort.

d. Concurrent jurisdiction of the district courts and the COFC.

(1) Claims not exceeding $10,000: district courts and COFC have concurrent jurisdiction.

(2) Claims exceeding $10,000: COFC has exclusive jurisdiction.

(3) The amount of a claim is the total amount of money the plaintiff ultimately stands to recover in the case. *Smith v. Orr*, 855 F.2d 1544 (Fed. Cir. 1988); *Chabal v. Reagen*, 822 F.2d 349 (3d Cir. 1987). The amount is determined by the good-faith allegations of the plaintiff's complaint. *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985).

(4) Transfer to COFC under 28 U.S.C. § 1631. *State of New Mexico v. Regan*, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985).

(5) Waiver of claims in excess of $10,000. *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985).

e. Demands for monetary and nonmonetary relief: finding a Tucker Act Claim.

(1) The federal courts will look beyond the facial allegations of the complaint to determine what the plaintiff hopes to acquire from the lawsuit. *Mitchell v. United States*, 930 F.2d 893 (Fed. Cir. 1991); *Amoco Prod. Co. v. Hodel*, 815 F.2d 352 (5th Cir. 1987).

(2) The plaintiff cannot hide a claim for money damages by couching the claim in equitable terms. *Denton v. Schlesinger*, 605 F.2d 484 (9th Cir. 1979); *Polos v. United States*, 556 F.2d 903 (8th Cir. 1977).

(3) Where equitable or declaratory claim serves a significant purpose independent of recovering money damages, it does not necessarily fall under the Tucker Act because it may later become the basis for a money judgment. *Duke Power Co. v. Carolina Envt'l Study Group*, 438 U.S. 59, 71 n.15 (1978); *Hahn v. United States*, 757 F.2d 581 (3d Cir. 1985); *Giordano v. Roudebush*, 617 F.2d 511 (8th Cir. 1980).

(4) A claim falls under the Tucker Act when the prime objective of the plaintiff's suit is non-tort money damages from the United States. *Fairview Township v. United States Envt'l Prot'n Agency*, 773 F.2d 517 (3d Cir. 1985); *United States v. City of Kansas City*, 761 F.2d 605 (8th Cir. 1985).

f. Distinguishing damages from specific relief or equitable relief. *Bowen v. Massachusetts*, 487 U.S. 905 (1988) (monetary relief, other than damages, may be an incident to specific relief granted).

g. Bifurcating the Tucker Act and nonmoney claims. *Cf. Shaw v. Gwatney*, 795 F.2d 1351 (8th Cir. 1986); *Hahn v. United States*, 757 F.2d 581 (3d Cir. 1985), with *Matthews v. United States*, 810 F.2d 109 (6th Cir. 1987); *Keller v. Merit Systems Prot'n Bd.*, 679 F.2d 220 (11th Cir. 1982).

h. The Tucker Act and substantive rights to relief. *United States v. Testan*, 424 U.S. 392 (1976).

i. Appeal of Tucker Act cases. The Court of Appeals for the Federal Circuit has exclusive jurisdiction over all appeals where the district court's jurisdiction is based, in whole or in part, on the Tucker Act. 28 U.S.C. § 1295; *United States v. Hohri*, 482 U.S. 64 (1987). Exceptions:

(1) Tucker Act claim frivolous or exceeds the jurisdiction of the district court. *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907 (3d Cir. 1987).

(2) Another statute independently confers jurisdiction. *Van Drasek v. Lehman*, 762 F.2d 1065 (D.C. Cir. 1985). But *cf. Wronke v. Marsh*, 767 F.2d 354 (7th Cir. 1985); *Maier v. Orr*, 754 F.2d 973 (Fed. Cir. 1985).

3. Federal Tort Claims Act: Limited. "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injuries or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §§ 1346(b), 2671-2680.

   a. Jurisdictional prerequisites:

      (1) Administrative claim requirement. 28 U.S.C. § 2675.

      (2) Statute of limitations. 28 U.S.C. § 2401.

      (3) Strictly construed. *Lee v. United States*, 980 F.2d 1337 (10th Cir. 1992) (administrative claim requirement).

   b. Limitations: Limited to the amount of the administrative claim (28 U.S.C. § 2675(b)) except for specific torts (28 U.S.C. § 2680):

      (1) Discretionary function.

      (2) Intentional torts.

      (3) Arising out of combatant activities.

      (4) Arising in a foreign country.

   c. State statutory limitations on amount.

4. Mandamus: No. "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

5. Habeas Corpus: Limited. "…Writs of habeas corpus may be granted by the U.S. Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions … The writ of habeas corpus shall not extend to a prisoner unless – he is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or he is in custody for an act done or omitted in pursuance of an Act of Congress, or any order, process, judgment or decree of a court or judge of the United States; or he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241. Jurisdictional prerequisites include:

a. Custody: The petitioner must be in custody. 28 U.S.C. § 2241. Types of custody include:

(1) Confinement. *Ex Parte Reed*, 100 U.S. 13 (1879).

(2) Involuntary military service. *Parisi v. Davidson*, 405 U.S. 34 (1972); *Wiggins v. Secretary of the Army*, 946 F.2d 892 (5th Cir. 1991).

b. Jurisdiction is not lost if the petitioner is subsequently released. *Carafas v. La Vallee*, 391 U.S. 234 (1968); *cf. Hensley v. Municipal Court*, 411 U.S. 345 (1973) (bail); *Jones v. Cunningham*, 371 U.S. 236 (1963) (parole).

c. Venue: Petitioner's presence within the territorial jurisdiction of the district court jurisdiction is not an invariable prerequisite. Rather, because the writ of habeas corpus does not act upon the person who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody, a district court acts within its respective jurisdiction as long as the custodian can be reached by service of process. *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Rooney v. Secretary of the Army*, 405 F.3d 1029 (D.C. Cir. 2005).

6. Civil Rights Statutes: No. "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person (1) to recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of a conspiracy mentioned in section 1985 of Title 42; (2) to redress the deprivation, under color of State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; or (3) to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U.S.C. § 1343.

7. Administrative Procedure Act: Limited. 5 U.S.C. §§ 701-06.

8. Declaratory Judgment Act: No. 28 U.S.C. §§ 2201-02.

E. Federal Remedies: Can the court award the relief demanded?

1. Mandamus: Yes. 28 U.S.C. § 1361.

2. Habeas corpus: Yes. 28 U.S.C. § 2241.

3. Declaratory judgment: Yes. 28 U.S.C. §§ 2201-02.

CHAPTER C

PLEADINGS AND MOTIONS

I. PAPER MANAGEMENT IN THE FEDERAL COURTS

A. Pleadings, Motions, and Other Papers.

1. Pleadings. Pleadings are limited to the complaint, answer, answer to a counterclaim designated as a counterclaim, answer to a crossclaim, third-party complaint, and answer to a third-party complaint. Fed. R. Civ. P. 7(a). No other pleadings are allowed, except the court can order a reply to an answer. How a pleading is defined becomes important when taken in context of other rules. Note: Courts may liberally construe the pleadings of *pro se* litigants.

a. Caption. "Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation." Fed. R. Civ. P. 10(a).

b. Claim for Relief. Under Fed. R. Civ. P. 8(a), a pleading that states a claim for relief must contain the following:

(1) A short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) A short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) A demand for the relief sought, which may include relief in the alterative or different types of relief.

c. Defenses. Under Fed. R. Civ. P. 8(b), a party must state in short and plain terms its defenses to each claim asserted against it, and admit or deny the allegations asserted against it by an opposing party.

(a) Affirmative Defenses. Fed. R. Civ. P. 8(c) sets forth defenses that must be pled affirmatively. Each affirmative defense should be set forth in a separate numbered paragraph. Fed. R. Civ. P. 10(b). If you fail to plead an affirmative defense, it may be waived. But the "technical" failure to plead an affirmative defense may not be fatal. Fed. R. Civ. P. 12(h).

(b) Admissions and Denials. Must admit or deny each allegation of the complaint. May deny specific allegations of specific paragraphs and admit the remainder, or may make general denial with specific admissions. Fed R. Civ. P. 8(b).

(i) Failure to deny constitutes an admission. If pleader is without knowledge or information sufficient to form a belief as to the truth of an allegation, he can so state in his answer and it will have the effect of a denial.

(ii) General Denial. A party that intends in good faith to deny all allegations--including jurisdictional grounds—may do so by a general denial. Fed. R. Civ. P. 8(b)(3)

d. Time to Answer.

(1) Generally, government and official capacity defendants have 60 days to answer; private defendants have 21 days. Fed. R. Civ. P. 12(a)(2). Government employee sued for acts or omissions occurring in connection with the performance of duties on behalf of the United States have 60 days to answer, counting from later of service on officer or employee, or service on the U.S. Attorney. Fed. R. Civ. P. 12(a)(3). If service of summons is waived under Rule 4(d), then 60 days after request for waiver. *Id*.

(2) A motion served under Rule 12 enlarges the time to answer until 14 days after notice of the court's action on the motion (unless a different time is fixed by court order), Fed. R. Civ. P. 12(a)(4), or 14 days after a more definite statement is filed if a motion for more definite statement is filed pursuant to Rule 12(e).

2. Motions and Other Papers. A motion is an application to the court for an order that must be in writing, unless made during a hearing or trial; must state with particularity the grounds, and must set forth the relief or order sought. Fed. R. Civ. P. 7(b). Local court rules may substantially impact motions practice by limiting number of pages, setting time requirements for notice, response, etc.

3. Signing Pleadings, Motions, and Other Papers. Fed. R. Civ. P. 11.

a. Background. Prior to 1 August 1983, the signature of an attorney on a pleading or motion certified that to the best of the signer's belief "there is good ground to support it." Whether a particular document was signed in violation of Fed. R. Civ. P. 11 required the court to conduct a subjective inquiry into the lawyer's knowledge and motivation for signing. "Good faith" was a defense and sanctions were imposed only upon a determination that the lawyer acted willfully or in bad faith. Sanctions were seldom imposed, and frivolous pleadings that caused delay and increased the cost of litigation were becoming more numerous. The 1993 amendments were intended to remedy problems that arose in interpretation of the rule but retained the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1 to "secure the just, speedy, and inexpensive determination of every action."

b. Requirements of Fed. R. Civ. P. 11:

(1) Every pleading, motion, or other paper shall be signed by an attorney of record. If the party is not represented by an attorney, the party must sign. The paper must state the signer's address, e-mail address, and phone number; there need not be an affidavit attached.

(2) Signature certifies that:

(a) the person signing has read the document [While not expressly stated in the rule, the obligations imposed by the rule obviously require that a signer first read the document];

(b) to the best of the person's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact (has or is likely to have evidentiary support) and is warranted by existing law or a good faith (non-frivolous) argument for the extension, modification, or reversal of existing law or the establishment of new law; and

(c) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(d) Current rule imposes an objective standard by which to measure the actions of the litigants. "Simply put, subjective good faith no longer provides the safe harbor it once did." *Eastway Construction Corp. v. City of New York*, 762 F.2d

243 (2d Cir. 1985) (Decided before Rule 11 was revised in 1993 to include crucial language that "the court may impose an appropriate sanction.") Fed.R.Civ.P. 11(c)(1); *Ipcon Collections LLC v. Costco Wholesale Corp.*, 698 F.3d 58 (N.Y. 2012); *Paganucci v. New York*, 993 F.2d 310 (2d Cir. 1993) (The standard is whether a reasonably competent attorney would have acted similarly).

(e) Whether the inquiry into the law and facts of a case is "reasonable" will depend upon the facts and circumstances of the particular case. The following factors have been considered by courts to determine the appropriateness of the pre-signature inquiry:

(i) As to the facts:

a. time available for investigation;

b. extent of the attorney's reliance upon the client for the factual basis of the document;

c. feasibility of a pre-filing investigation;

d. whether the attorney accepted the case on referral from another attorney;

e. complexity of the issues; and

f. extent to which development of the facts underlying the claim requires discovery. *Childs v. State Farm Mutual Automobile Insurance Co.*, 29 F.3d 1018, 1026 (5th Cir. 1994).

(ii) Practice Point: Relying on labor counselor filings to respond to the complaint could be a violation of duty under Fed. R. Civ. P. 11. *In re Connetics Corp. Secs. Litig.*, 2008 U.S. Dist. LEXIS 9634 (N.D. Cal. Jan. 28, 2008) (Rule 11 violation if attorney relies on previously filed complaint without conducting his own inquiry into propriety of

allegations/defenses; duty to inquire is non-delegable).

(iii) As to the law:

a. time available to prepare the document before filing;

b. plausibility of the legal view contained in the document;

c. whether litigant is pro se; and

d. complexity of the legal issues involved. *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866, 875-76 (5th Cir. 1988) (en banc).

(iv) Courts are split on whether compliance is measured at the time the document is signed and filed or if there is a continuing duty to amend when additional information reveals that the claim is frivolous or the allegations are unsupported. *Compare Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) (no continuing duty) with *Kale v. Combined Ins. Co. of America*, 861 F.2d 746 (1st Cir. 1988) (continuing duty). The 1993 amendments make clear that although a formal amendment to pleadings may not be required, Fed. R. Civ. P. 11 is violated by continuing to assert ("later advocating") claim or defense after learning that it has no merit.

(3) Sanctions for Violations of Fed. R. Civ. P. 11. "If, after notice and a reasonable opportunity to respond, the court determines that [Rule 11] has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c). "Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." *Id.* Sanctions may be imposed upon pro se litigants who violate the rule, although the court should consider the pro se status in determining whether the filing in question was

reasonable. *Patterson v. Aiken,* 841 F.2d 386 (11th Cir. 1988).

(a) Sanctions are "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). A motion for sanctions should not be made or threatened for minor, inconsequential violations of the standards prescribed by the rule.

(b) Sanctions may include: striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other education programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head). The Court may award reasonable expenses and attorney's fees to the prevailing party. *Blue v. U.S. Dept. of Army*, 914 F.2d 525 (4th Cir. 1990) (government awarded costs and attorneys' fees for plaintiff's bad-faith pursuit of employment discrimination action), cert. denied 499 U.S. 959 (1991).

(c) Compensatory awards should be limited to unusual circumstances. Non-monetary sanctions are proper and suggested.

(d) Safe harbor provision: Motion for sanctions shall be made and served separately and may be filed with the court only if the challenged paper, claim, or defense is not withdrawn or corrected within 21 days after service. Fed. R. Civ. P. 11(c)(2). Ordinarily, a motion for sanctions should be served promptly after the inappropriate paper is filed, and if delayed too long, may be viewed as untimely. *Retail Flooring Dealers of America, Inc. v. Beaulieu of America, LLC*, 339 F.3d 1146 (9th Cir. 2003) (sanctions award precluded because motion was served after complaint had been dismissed and the period within which an amended complaint could be filed had expired).

(4) Rule 11 does not apply to discovery. Fed. R. Civ. P. 11(d). However, Fed. R. Civ. P. 26(g) and 37 establish similar certification standards and sanctions that apply to

discovery disclosures, requests, responses, objections, and motions.

4. Commencing the Action. "A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. Filing is accomplished by complying with local rules as to delivery of the requisite number of copies of the complaint to the clerk of court's office and having the complaint logged into the court's docket file. A pleading, motion, or other paper is not filed until received by the clerk; "depositing a document in the mail is not filing." *Cooper v. Ashland*, 871 F.2d 104 (9th Cir. 1989). See Fed. R. Civ. P. 5(d)(3) regarding electronic filing and signing procedures.

   a. Under federal question jurisdiction, the statute of limitations is tolled by the filing of the complaint with the court. *West v. Conrail*, 481 U.S. 35 (1987).

   b. If jurisdiction is based upon diversity of citizenship and the state statute specifies that the period of limitations is tolled only upon service of process, the state rule will apply. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

5. Service of Process. "On or after the filing of the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant." Fed. R. Civ. P. 4(b).

   a. The summons should state the name of the parties, the name of the court, and the name and address of the plaintiff or his attorney, if represented. It must state the time within which the defendant must appear and defend, and warn that failure to appear and defend will result in default. Fed. R. Civ. P. 4(a). Practice Point: Clerks of Court routinely err in applying the 21-day response time as opposed to the 60-day response time for U.S. and federal agencies as stated in Fed. R. Civ. P. 12(a)(1)&(2).

   b. If defendant is not served within 90 days after the complaint is filed, the court must (upon motion or on its own accord) dismiss the action *without prejudice* or order service within a specified time unless plaintiff can show good cause for the failure to do so. Fed. R. Civ. P. 4(m). Ignorance of Fed. R. Civ. P. 4(m) by pro se litigants does not excuse their failure to serve within 120 days. *Lowe v. Hart*, 157 F.R.D. 550 (M.D. Fla. 1994).

   c. Serving the United States. Pursuant to Fed. R. Civ. P. 4(i)(1), service is effected by delivering a copy of the summons and complaint to the U.S. Attorney for the district in which the action is brought or to an AUSA or designated clerical employee who

has been designated by the U.S. Attorney in writing to the court to receive service of process, or by sending a copy of the summons and complaint by registered or certified mail addressed to the civil process clerk at the office of the U.S. Attorney; and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General in Washington, D.C. Note: Waiver of service provisions of Fed. R. Civ. P. 4(d), discussed below, do not apply to the United States as a defendant.

(1) Practice Point: Is Fed Ex registered or certified mail? *Coulter v. DHS*, 2008 U.S. Dist. LEXIS 73014 (D.N.J. 2008) (No) but see *Tracphone Wireless, Inc. v. Washington*, 2013 WL 3974709 (court granted plaintiff's unopposed motion for alternative service of process).

(2) Practice Point - Is service proper if hand delivered to any AUSA? *Constien v. U.S.*, 2010 WL 2618536 (W.D. Okla. 2010) (No).

d. Serving a U.S. agency, officer, or employee in his or her *official capacity*. Pursuant to Fed. R. Civ. P. 4(i)(2), service is effected by serving the U.S. Attorney and the Attorney General and by sending a copy of the summons and complaint by registered or certified mail to the named officer or agency. Service beyond the territorial limits of the forum state may be authorized by 28 U.S.C. § 1391(e). Note: waiver of service provisions of Fed. R. Civ. P. 4(d), discussed below, do not apply to U.S. officers of agencies sued in their official capacity. The court must allow a plaintiff who fails to effect service properly on a U.S. agency or officer served in his/her official capacity a "reasonable time" to cure defects in service, provided plaintiff has effected service on either the U.S. Attorney or the Attorney General. Fed. R. Civ. P. 4(i)(4).

e. Serving a U.S. agency, officer, or employee, including former employees, in his or her *individual capacity* (whether or not also sued in ther official capacity). Pursuant to Fed. R. Civ. P. 4(i)(3), states that for an act or omission occurring in connection with duties performed on the United States' behalf, service shall be effected by serving the U.S. Attorney and the Attorney General and by serving the officer or employee in the manner prescribed by Fed. R. Civ. P. 4(d-g). Note: waiver of service provisions of Fed. R. Civ. P. 4(d), discussed below, do apply. The court must allow a plaintiff who fails to effect service properly on a U.S. agency or officer served in his/her individual capacity a "reasonable time" to cure defects in service, provided plaintiff has effected service on either the U.S. Attorney or the Attorney General. Fed. R. Civ. P. 4(i)(4).

f. Serving an individual defendant. Pursuant to Fed. R. Civ. P. 4(e), service is effected by delivering a copy of the summons and complaint to him/her personally or by leaving copies at his/her house or usual place of abode with some person of suitable age and discretion who also resides at the house or by delivering copies to an agent authorized by appointment or by law to receive service of process; or by serving the defendant in accordance with the law of the state wherein the district court sits; or by obtaining the defendant's waiver of service as specified in Fed. R. Civ. P. 4(d).

g. Serving an individuals in a foreign country. Pursuant to Fed. R. Civ. P. 4(f), service is effected by an internationally agreed upon means reasonably calculated to give notice, or if there is no internationally agreed upon means of service, or the international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice in the manner prescribed by the law of the foreign country in its courts of general jurisdiction, as directed by a foreign authority in response to a letter rogatory or letter of request, or unless prohibited by law of the foreign country, by delivery to the individual personally, or using any form of mail that the clerk addresses and send to the individual and that requires a signed receipt, or by other means not prohibited by international agreement, as the court directs.Service of process on the installation. Commanders and officials will not evade service of process in actions brought against the United States or themselves concerning official duties. If acceptance of service would interfere with duty, appoint an agent or representative to accept service. Reasonable restrictions on the service of process on the installation may be imposed. Check with local installation policies and guidance. See generally, AR 27-40, Ch. 2.

6. Waiver of Service. A party subject to service under Fed. R. Civ. P. 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. Fed. R. Civ. P. 4(d)(1). Plaintiff must allow defendant a reasonable time, at least 30 days after the request for waiver was sent or 60 days if the defendant is outside the United States).

II. MOTION PRACTICE

A. Motion to Dismiss. Fed. R. Civ. P. 12(b). Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

1. Lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A facial attack on the court's jurisdiction goes to whether the plaintiff has properly alleged a basis of subject matter jurisdiction. A "factual attack"

challenges the existence of subject matter jurisdiction in fact, regardless of the allegations in the complaint.

a. Matters outside the complaint may be considered by the court in resolving the issue. Considering matters outside the pleadings does not convert a motion to dismiss for lack of subject matter jurisdiction into a motion for summary judgment and the dismissal is not an adjudication on the merits. *Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987).

b. Except for Supreme Court's original jurisdiction, federal judicial power is dependent upon a statutory grant of jurisdiction. *Stevenson v. Fain*, 195 U.S. 165, 167 (1904).

c. The right to file this motion cannot be waived, and can be raised for the first time on appeal. In fact, any court considering a case has a duty to raise the issue sua sponte if it appears that subject matter jurisdiction is lacking. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988) (but see *Pauly v. Eagle Point Software Co., Inc.*, 958 F.Supp. 437 (N.D.Iowa 1997) (declined to follow *Emrich*)).

d. The burden of pleading and proving the subject-matter jurisdiction of the court is on the plaintiff. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182, 189 (1936).

e. Federal court jurisdiction cannot be presumed, but must be affirmatively and positively pled. *Norton v. Larney*, 266 U.S. 511 (1925).

f. Sovereign immunity may be asseted as failure to state a claim. The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit. *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

   (1) With regard to sovereign immunity of U.S. officials and agencies, as opposed to the United States itself, the suit is, in effect, a suit against the United States when the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting, or compel it to act. *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

   (2) In suits against federal officials for money damages directly under the Constitution (Bivens suits), the principle of sovereign immunity does not apply, since the suit is against the federal official personally (i.e., in his

individual capacity as opposed to his official capacity.) *Kenner v. Holder*, WL 6617331 (S.D.Ca. 2012) (Dugan exception to the doctrine of sovereign immunity does not apply when plaintiffs sue federal officials in their official capacity, not as individuals.).

(3) Commonly asserted provisions that waive sovereign immunity:

(a) Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

(b) Federal Tort Claims Act, 28 U.S.C. § 1346(b).

(c) Freedom of Information Act, 5 U.S.C. §552.

(d) The Privacy Act, 5 U.S.C. § 552a.

(e) The Unjust Conviction Act, 28 U.S.C. §§ 2513, 1495.

(f) The Equal Access to Justice Act, 28 U.S.C. § 2412(b) & (d); 5 U.S.C. § 504.

(g) The Civil Rights Act of 1991.

(h) The Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq. However, the APA does not contain a specific jurisdictional grant. 28 U.S.C. § 1331 (federal question jurisdiction) can furnish the basis for a suit under the APA.

(4) Commonly asserted provisions that do not waive sovereign immunity for monetary relief:

(a) The federal question jurisdiction statute, 28 U.S.C. § 1331.

(b) The Commerce and Trade Regulation statute, 28 U.S.C. § 1337.

(c) The Civil Rights Jurisdiction Statute, 28 U.S.C. § 1343.

(d) The Mandamus Statute, 28 U.S.C. § 1361.

(e) The Declaratory Judgment Act, 28 U.S.C. § 2201-02.

(f) The Constitution.

(5) Waiver of Sovereign Immunity. Any waiver of sovereign immunity must be strictly construed in favor of the United States. A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980). It must be contained in statutory language that is "specific and express." United States v. King, 395 U.S. 1, 4 (1969) (superseded by Contract Disputes Act of 1978, 41 U.S.C. §§ 601-13, and before the Tucker Act 28 U.S.C. § 1491, which provide for Claims Court jurisdiction over naked default termination claims). For this reason, the waiver cannot be enlarged beyond the boundaries that the statutory language plainly requires. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). Congressional conditions on waivers of sovereign immunity are jurisdictional prerequisites to suit. *United States v. Dalm*, 494 U.S. 596 (1990).

(6) Failure to Exhaust Administrative Remedies may be asseted as failure to state a claim.

(a) Statutory Exhaustion Remedy. Exhaustion is mandatory when the statute itself specifically requires exhaustion prior to bringing a judicial action. *McCarthy v. Madigan*, 503 U.S. 140 (1992).

(b) Judicially Mandated Exhaustion. If no statute establishes an administrative remedy or if the statute does not clearly mandate exhaustion, the court may balance the various factors set out in *McCarthy* to determine whether exhaustion required.

(i) Exhaustion will not be required when the interests of the individual in retaining prompt access outweighs the institutional interests favoring exhaustion or when undue prejudice exists to the subsequent assertion of court action, such as when there is an unreasonable or indefinite time frame for administrative action, or the administrative remedy is inadequate, or the administrative body is shown to be biased or to have predetermined the issue.

(ii) When judicial review of an agency decision is sought under the APA, and the statute or agency rules do not require

exhaustion, no judicially- created exhaustion requirement can be imposed. *Darby v. Cisneros*, 509 U.S. 137 (1993); 5 U.S.C. § 704. *Cf. Saad v. Dalton*, 846 F. Supp. 889 (S.D. Cal. 1994) (holding "review of military personnel actions . . . is a unique context with specialized rules limiting judicial review,") citing *Chappell v. Wallace*, 462 U.S. 486 (1983)). In some circuits, military services may continue to assert the exhaustion doctrine as a defense, seeking to distinguish *Darby*--which was not a military case. See E. Roy Hawkens, The Exhaustion Component of the Mindes Justiciability Test Is Not Laid to Rest by Darby v. Cisneros, 166 Mil. L. Rev. 67 (2000) (arguing that Darby is inapplicable to military claims).

(c) What remedies must be exhausted?

(i) Boards for Correction of Military Records. 10 U.S.C. § 1552.

(ii) Discharge Review Boards. 10 U.S.C. § 1553.

(iii) Article 138, UCMJ. 10 U.S.C. § 938.

(iv) Clemency Boards. 10 U.S.C. §§ 874, 951-954.

(v) Inspector General. 10 U.S.C. § 3039.

(d) Exceptions to the exhaustion doctrine:

(i) Inadequacy. *Von Hoffburg v. United States*, 615 F.2d 633 (5th Cir. 1980).

(ii) Futility. Cf. *Watkins v. United States Army*, 541 F.Supp. 249 (W.D. Wash. 1982),

(iii) Irreparable injury. *Hickey v. Commandant*, 461 F.Supp. 1085 (E.D. Pa. 1978).

(iv) Purely legal issues. *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975).

(v) Avoiding piecemeal relief. *Walters v. Secretary of the Navy*, 533 F.Supp. 1068 (D.D.C. 1982), rev'd on other grounds, 725 F.2d 107 (D.C. Cir. 1983).

(7) Standing. Sometimes asserted as failure to state a claim under Rule 12(b)(6), but more properly brought as a Rule 12(b)(1) motion. The standing inquiry has constitutional, statutory, and judicially formulated components. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In the constitutional sense, Article III requires that a plaintiff have suffered an injury which is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

(a) An asserted right to have the government act in accordance with the law does not confer standing. *Allen v. Wright*, 468 U.S. 737 (1984).

(b) To establish standing, the plaintiff must show that the challenged action has caused him injury in fact (that he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant), and that the interest sought to be protected by him is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). A plaintiff may not claim standing to vindicate constitutional rights of third parties, *Tileston v. Ullman*, 318 U.S. 44 (1943), unless a statute confers third–party standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

(8) Lack of Ripeness (no justiciable case or controversy) may be asseted as failure to state a claim. In determining whether a case is ripe for adjudication, a court must evaluate the fitness of the issues for judicial decision and determine the hardship to the parties of withholding court decision. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

(9) Mootness (no justiciable case or controversy) may be asserted as failure to state a claim. A case becomes moot when "it can be said with assurance that there is no reasonable expectation … that the alleged violation will recur" and "interim relief or events have completely and

irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 635 (1979). General rule: there is no case or controversy once the issues in a lawsuit have been resolved. Exceptions:

(a) Capable of repetition, yet evading review. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

(b) Voluntary cessation. *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

(c) Collateral consequences. *Sibron v. New York*, 392 U.S. 40 (1968).

(10) No remedy; exclusive remedy may be asserted as failure to state a claim. Judicial review may be foreclosed when the statute which creates the right does not authorize judicial review. *Califano v. Sanders*, 430 U.S. 99 (1977). When Congress has specially crafted a comprehensive statutory scheme, it is generally the only avenue for judicial action. *Brown v. General Services Administration*, 425 U.S. 820 (1976) (Title VII is the exclusive remedy for discrimination in federal employment).

(11) Incorrect Defendant may be asserted as failure to state a claim.

(a) The only proper defendant in a suit under the Federal Torts Claim Act (FTCA) is the United States.

(b) Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, federal employees cannot be held responsible for common law torts. Exclusive remedy is against the United States under the FTCA. 28 U.S.C. § 2679(b).

(c) The head of the agency is the only appropriate defendant in a Title VII case.

2. Lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2). Personal jurisdiction, unlike subject matter jurisdiction, is waivable and must be asserted by the defendant. *Petrowski v. Hawkeye-Sec. Ins. Co.*, 350 U.S. 495 (1956). Whether personal jurisdiction over a non-resident defendant is present will depend upon the state's long-arm statute and whether the defendant has sufficient "minimal contacts" with the forum to satisfy

due process. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Furthermore, maintaining the action must not offend "traditional notions of fair play and substantial justice." *Id.*

a. For suits against the United States, its agencies and officers, the issue arises in the context of whether there has been sufficient process or service of process upon the government such that the court has jurisdiction over the "person" of the United States.

b. For suits against United States officers in their personal or individual capacities (Bivens suits), this defense is important to consider. May be asserted when an individual is sued in a forum other than where he or she resides or is otherwise amenable to personal jurisdiction.

3. Improper venue. Fed. R. Civ. P. 12(b)(3). Like personal jurisdiction, the defense of improper venue may be waived if not raised in a pre-answer motion or in the answer itself. Fed. R. Civ. P. 12(h)(1). Generally, actions against the United States, its officers and agencies, can be brought where the defendant resides, where the cause of action arose, where any real property involved is located, or, if no real property is involved, where the plaintiff resides. 28 U.S.C. § 1391(e).

a. In Bivens cases, section 1391(e) does not apply, and venue is a very important consideration.

b. Actions under the FTCA can be brought only where the plaintiff resides or where the act or omission occurred. 28 U.S.C. § 1402(b).

c. Tucker Act claims brought in the district court can only be brought in the district where the plaintiff resides. 28 U.S.C. § 1402(a)(1).

4. Insufficient process. Fed. R. Civ. P. 12(b)(4). The complaint and summons together constitute "process." If process is defective, plaintiff has failed to perfect personal jurisdiction over the defendant. Rather than dismiss the action, courts will often quash the service and allow plaintiff to re-serve the defendant. *Bolton v. Guiffrida*, 569 F. Supp. 30 (N.D. Cal. 1983).

5. Insufficient service of process. Fed. R. Civ. P. 12(b)(5) is a challenge to the manner in which process is served. This motion addresses the question - has the plaintiff complied with Rule 4? *Bryant v. Rohr Ind., Inc.*, 116 F.R.D. 530 (W.D. Wash. 1987) (case dismissed without prejudice because of pro se plaintiff's failure to show good cause for his failure to comply with requirements of Rule 4). Like Rule 12(b)(4), courts generally will quash the service and retain the case and provide plaintiff with another opportunity to perfect service. *Daley v. ALIA*, 105

F.R.D. 87 (E.D.N.Y. 1985). In litigation against the United States, its agencies and officers, consider:

a. Has the U.S. Attorney been served with a copy of the summons and complaint by hand delivery or by registered or certified mail directed to the appropriate person in accordance with Rule 4(i)?

b. Has the Attorney General been served by registered or certified mail in accordance with Rule 4(i)?

c. Are individual defendants being sued in their official or individual capacities?

(1) Official capacity service can be accomplished by certified mail under 28 U.S.C. § 1391(e), or pursuant to Rule 4(i)(2)(A).

(2) Individual capacity service must be perfected as required for any other private party. If the complaint arguably implicates official activities of the individually-named federal officer defendant, service on the United States is also be required. Fed. R. Civ. P. 4(i)(2)(B).

d. Has service been made within 120 days of filing? *Lambert v. United States*, 44 F.3d 296 (5th Cir.1995).

6. Failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). This is the modern equivalent to the demurrer. A complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

a. "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action' will not do." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice").

b. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (quoting *Twombly* at 556).

c. A complaint also must contain allegations giving defendants "fair notice of what the ... claim is and the grounds upon which it rests." *Id*. at 1961 (quoting *Twombly* at 555).

d. Factual allegations of the complaint are assumed to be true and all reasonable inferences are made in favor of the nonmoving

party. *United States v. Gaubert*, 499 U.S. 315, 327 (1991). Legal conclusion masquerading as factual allegations are not deemed to be true. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly* at 555).

e. The court's inquiry is limited to the four corners of the complaint; if the court considers matters outside the pleadings, the motion is treated as one for summary judgment under Fed. R. Civ. P. 56. *California v. American Stores Co.*, 872 F.2d 837 (9th Cir.).

f. In the context of Bivens claims and claims alleging fraud, conspiracy, and other civil rights violations, a heightened pleading standard applies, and the operative facts upon which the claim is based must be pled. Mere conclusory allegations are insufficient. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

g. In a Bivens action, the plaintiff must plead the personal involvement of each defendant and vicarious liability is not allowed. *Bivens v. Six Unknown, Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 390 n.2 (1971).

h. Examples of common Rule 12(b)(6) motions in federal litigation:

(1) Absolute official immunity: If allegations of the complaint contain all of the facts upon which the defense of absolute immunity is based, dismissal under Rule 12(b)(6) is appropriate. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

(2) Nonjusticiable "political questions": Subject matter jurisdiction is present because the matter is a "case or controversy" under Article III, but is otherwise unsuited for judicial resolution because of a constitutional commitment to another branch of government. *Gilligan v. Morgan*, 413 U.S. 1 (1973).

(3) Feres-based immunity of military officers from Bivens actions brought by their subordinates. Cf. *Chappell v. Wallace*, 462 U.S. 296 (1983). *But see Wright v. Park*, 5 F.3d 586 (C.A.1 (Me.) 1993). "To call the Feres doctrine an exception is an oversimplification. Feres is a judge-made exception to the [FTCA], itself a statutory waiver of sovereign immunity from tort liability. Thus, if tort liability is the rule, Feres created an exception to an exception to an exception." *Id.* at 591 n.5.

(4) Nonreviewable military activities: *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) (overruled on other grounds).

(5) FTCA cases that fail to allege a cause of action under state law. *Davis v. Dep't of Army*, 602 F. Supp. 355 (D. Md. 1985).

7. Failure to join a party under Rule 19. Fed. R. Civ. P. 12(b)(7).

8. Timing and waiver of Rule 12(b) motions. Fed. R. Civ. P. 12(h). Rule 12(b) defenses "may at the option of the pleader be made by motion." However, a motion raising any of the defenses enumerated in that section "shall be made before pleading if a further pleading is permitted." If a motion is filed under Rule 12 and the movant omits therefrom the defense of lack of personal jurisdiction, improper venue, insufficiency of process, or insufficiency of service of process, the defense is waived. Fed. R. Civ. P. 12(g) & (h)(1).

B. Motion for Judgment on the Pleadings. Fed. R. Civ. P. 12(c). This asserts a challenge of the legal sufficiency of the opposing party's pleadings. On motion for judgment on the pleadings, court must accept all factual allegations of the complaint as true and motion is granted when movant is entitled to judgment as a matter of law. *Westlands Water District v. U.S. Dep't of Interior*, 805 F.Supp. 1503, 1506 (E.D. Cal. 1992), aff'd 10 F.3d 667 (9th Cir. 1993). If matters outside the pleading are presented to and not excluded by the court, motion is treated as one for summary judgment and disposed of as provided in Rule 56. Fed. R. Civ. P. 12(c).

C. Other Rule 12 Motions.

1. Motion for more definite statement. Proper when pleading to which a responsive pleading is permitted is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Fed. R. Civ. P. 12(e).

2. Motion to strike. Before responding to a pleading or, if no response is permitted, within 20 days of service. This addresses any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

3. Motion for Summary Judgment. Summary judgment disposes of cases where there is no dispute as to any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. When the primary issue is one of intent or state of mind, summary judgment is generally inappropriate. *Suydam v. Reed-Stenhouse of Wash., Inc.*, 820 F.2d 1506 (9th Cir. 1987). Since summary judgment precludes trial of the case and thus denies litigants their "day in court," it is sometimes referred to as a drastic or extreme remedy. *Jones v.*

Nelson, 484 F.2d 1165 (10th Cir. 1973). *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), the Supreme Court instructed that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action." *Id.*

a. Moving party's burden is to show that there is no dispute as to a genuine issue of material fact and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The responding party need only show a dispute as to a genuine issue of material fact to defeat the motion.

b. Substantive law will identify which facts are material, and only disputes over facts that might affect the outcome of the case will properly prevail on summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

c. Burden is met by the pleadings, depositions, answers to interrogatories, admissions, and any affidavits submitted by the movant in support of the motion. *Bell v. Dillard Dep't Stores, Inc.*, 85 F.3d 1451 (10th Cir. 1996). When the non-moving party has the burden of proof at trial, the moving party may carry its burden at summary judgment either by presenting evidence negating an essential element of the non-moving party's claim or by pointing to specific portions of the record which demonstrate that the non-moving party cannot meet its burden of proof at trial. Anderson v. Radisson Hotel Corp., 834 F.Supp. 1364 (S.D.Ga. Jun 21 1993).

d. Moving party is entitled to summary judgment if after adequate time for discovery the party who will have the burden of proof at trial on an essential element cannot make a showing sufficient to establish the existence of that element. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

e. Materials submitted in support of the motion should be viewed in light most favorable to the non-moving party and all reasonable inferences should be drawn in his favor. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

f. Once a motion has been made and supported by depositions, admissions, affidavits, etc., the opposing party cannot rest upon the allegations in the pleadings; he must respond with affidavits and evidence of his own to create a material issue of fact. Fed. R. Civ. P. 56(e).

CHAPTER D

DISCOVERY THEORY & PRACTICE

I. DISCOVERY: SCOPE, LIMITATIONS, SANCTIONS AND SUPPLEMENTATION

A. Scope: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible at the trial to be discoverable." Fed. R. Civ. P. 26(b)(1); *Henry v. Morgan's Hotel Group*, 2016 WL 303114 (S.D.N.Y. Jan. 25, 2016); *Gilead Sciences, Inc. v. Merck & Co.*, No. 2016 WL 146574, at 1 (N.D. Cal. Jan. 13, 2016).

1. Note: The December 2015 amendments to the Federal Rules of Civil Procedure were substantially different, and previously allowed discover of information "reasonably calculated to lead to the discovery of admissible evidence."

2. "Relevancy" in the context of Fed. R. Civ. P. 26(b)(1) is broadly construed. "[A]ny matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case . . . [is relevant] . . . [D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues . . . Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits." *Oppenheimer Fund, Inc., v. Sanders*, 437 U.S. 340, 351 (1978) (citations omitted).

3. Scope of discovery for expert witnesses. Fed. R. Civ. P. 26(b)(4).

   a. Discovery from experts expected to testify. Parties may depose expert witnesses retained by their adversaries. If the court requires Rule 26(a)(2) expert reports to be exchanged, the deposition cannot be conducted until the report is provided. *Freeland v. Amigo*, 103 F.3d 1271 (6th Cir. 1997). The party seeking discovery must ordinarily pay the reasonable expenses of the expert in responding to discovery. *Mathis v. NYNEX*, 165 F.R.D. 23 (E.D.N.Y. 1996); but see *Reed v. Binder*, 165 F.R.D. 424 (D.N.J. 1996) (would be manifestly unjust to force indigent plaintiff to pay defendant's excessive number of experts).

Under Fed. R. Civ. P. 26(a)(2)(B), parties must disclose the identity of any expert witness and a report signed by the expert that includes:

(1) "a complete statement of all of the opinions the witness will express and the basis and reasons for them;"

(2) "the facts or data considered by the witness in forming [their opinions];"

(3) "any exhibits that will be used to summarize or support [the expert's opinions];"

(4) the witness' qualifications including "a list of all publications authored [by the witness] in the previous 10 years;"

(5) "a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition; and

(6) "a statement of the compensation to be paid for the study and testimony in the case." *Nguyen v. IBG, Inc.*, 162 F.R.D. 675 (D. Kan. 1995).

b. Discovery from retained experts who are not expected to testify is ordinarily prohibited. *Coates v. A.C. & S., Inc.*, 133 F.R.D. 109 (E.D. La. 1990). Fed. R. Civ. P. 26(b)(4)(B) states "A party may . . . discover facts known or opinions held by an expert who has been retained or specially employed . . . in anticipation of litigation or preparation for trial and who is not expected . . . [to testify at trial], only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable . . . to obtain facts or opinions on the same subject by other means."

c. In-house experts can be "specially employed" but their pre- retention knowledge and opinions are subject to full discovery. *In re Shell Oil Refinery*, 134 F.R.D. 148 (E.D. La. 1990).

d. Providing work-product of a non-testifying expert to a testifying expert may make it discoverable. *Douglas v. University Hosp.*, 150 F.R.D. 165, 168 (E.D. Mo. 1993), aff'd 34 F.3d 1070.

B. Limitations on Discovery.

1. Limits on Electronically Stored Information (ESI). A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. Fed. R. Civ. P. 26(b)(2)(B).

2. Privileged material is generally not discoverable. Privileges in the discovery context refer to those privileges found in the law of evidence. Fed. R. Evid. 1101(c) ("The rules on privilege apply to all stages of a case or proceeding."); *U.S. v. Reynolds*, 345 U.S. 1, 6 (1953).

   a. Claims of privilege must be made in writing and with specificity. The party claiming the privilege must "describe the nature of the documents, communications, or things not produced or disclosed—and do so in a manner that . . . will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5).

   b. The privileges which may properly be invoked depend on the nature of action. Fed. R. Evid. 501.

   c. If federal law governs the action, (e.g., federal question cases) the privileges recognized by federal common law apply. *Heilman v. Waldron*, 287 F.R.D. 467, 473-74 (D. Minn. 2012). However, if state law provides the rule of decision, either as to an element of the claim or a defense, (e.g., cases brought under diversity jurisdiction), then the privileges recognized under state law apply. *Id.* When a federal court applies state law in a non-diversity case, (e.g., in an FTCA action), it does so by adopting the state rule as federal law, thus "state law" does not provide the rule of decision within the meaning of Fed. R. Evid. 501 and federal law governs the privilege issue. *Whitman v. United States*, 108 F.R.D. 5, 6 (D.N.H. 1985); *see generally* Wright & Graham, Federal Practice and Procedure, Evidence § 5433. Exception: Work product immunity is governed by federal law, even in diversity (state law) cases. *EDO Corp. v. Newark Ins. Co*., 145 F.R.D. 18 (D. Conn. 1992).

   d. Privileges which typically arise in government litigation include:

      (1) Military and State Secrets Privilege. Privilege belongs to the government and must be asserted by it. To assert the privilege, it must be (1) a formal claim of privilege, (2) lodged by the head of the department that has control over the matter, and (3) after actual personal consideration. *United States v. Reynolds*, 345 U.S. 1 (1953).

      (2) Intra-agency advisory opinions, or the so-called "deliberative process privilege." Asserted in the same manner as state secrets privilege. It is designed to protect internal decision-making process and thus encourage full and free discussions of the various issues and policies by the participants. To assert the privilege, it must be (1) deliberative information, and (2) the information must be pre-decisional. *Olmsted v. McNutt*, 188

F.R.D. 386 (D. Colo. 1999). This type of privilege is commonly used to protect aircraft accident safety investigations from disclosure. *United States v. Weber Aircraft*, 465 U.S. 792 (1984). Caveat: If deliberations are in issue, they may be discoverable. *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 139 F.R.D. 295 (S.D.N.Y. 1991).

(3) Work Product Privilege. This protects documents and tangible things prepared by a party, his attorney, agent, or representative, when done in anticipation of litigation or for trial. Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947). It may be overcome if the party seeking discovery has a substantial need for the materials sought and is unable, without undue hardship, to obtain the substantial equivalent by other means. *Raso v. CMC Equip. Rental Inc.*, 154 F.R.D. 126 (E.D. Pa. 1994). Contemporaneous statements are typically so unique as to allow for no "substantial equivalent." Wright & Miller, Federal Practice & Procedure, Civil § 2025. Even where a showing of need compels production, the impressions, conclusions and opinions of counsel are protected (absent fraud). *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691 (D. Nev. 1994). A disclosure by the client or even by counsel to someone other than an adversary does not waive protection. *Westinghouse Elec. Corp. v. Rep. of Philippines*, 951 F.2d 1414 (3rd Cir. 1991).

(4) Attorney-Client Privilege. This protects communications between an attorney and the client when made in connection with securing a legal opinion or obtaining legal services. *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981). The privilege is applicable in the government setting. *Green v. IRS*, 556 F. Supp. 79 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984). Disclosure to any third party waives the privilege. *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (Partial disclosure of otherwise privileged information waives privilege with respect to all communications regarding related subject matter).

(5) Medical Quality Assurance Records Privilege. Records created in a medical quality assurance program are confidential and privileged; they may be disclosed only as provided by statute. 10 U.S.C. § 1102; W. Woodruff, The Confidentiality of Medical Quality Assurance Records, The Army Lawyer, May 1987, at 5; *In re United States of America*, 864 F.2d 1153 (5th Cir. 1989).

3. Mandatory disclosures under Fed. R. Civ. P. 26(a). Certain material must be disclosed to other parties, even absent a request for it.

a. Initial disclosures. Within 14 days after the parties' Rule 26(f) conference to plan for discovery, each party must provide:

(1) "the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;"

(2) "a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;"

(3) A computation of damages – by damage category, and non-privileged factual material related to the nature and extent of injuries suffered;

(4) A copy of any insurance agreement under which an insurance business may be liable to satisfy any potential judgment.

(5) Certain categories of cases are excluded from the initial disclosure requirement. These include:

(a) actions based on an administrative record;

(b) a forfeiture action in rem arising from a federal statute;

(c) petitions for habeas corpus;

(d) actions brought pro se by persons in custody of the United States;

(e) actions to enforce or quash a subpoena or an administrative summons;

(f) actions, by the United States, to recover benefits;

(g) an action by the United States to collect on a student loan guaranteed by the United States;

(h) proceedings ancillary to proceedings in other courts; and

(i) actions to enforce arbitration awards.

(6) A party may not withhold its own initial disclosure because its adversary has failed to comply with this requirement or made an inadequate disclosure. Fed. R. Civ. P. 26(a)(1)(E).

b. Expert disclosures. The identity of all experts who may be used at trial must be disclosed to the other parties at the time specified by the court, and in no event, less than 90 days before trial. Fed. R. Civ. P. 26(a)(2)(D)(i). The disclosure requirement applies to all testifying experts, not just those specially retained or employed. The scope of the disclosure required for a specially retained expert is substantially greater than for expert witnesses who were not specially retained. Experts who will present testimony solely to rebut the evidence presented by specially retained witnesses of an adversary may be designated 30 days after the initial expert disclosure, unless the court orders otherwise. Fed. R. Civ. P. 26(a)(2)(D)(ii).

c. Pretrial disclosures. Under Fed. R. Civ. P. 26(a)(3), no later than 30 days prior to trial, unless the court orders otherwise, the parties must disclose:

(1) the identification of all "will call" and "may call" witnesses;

(2) a designation of any witness whose testimony is expected to be presented by deposition, and if the deposition was not stenographically transcribed, a transcript of the pertinent parts of the deposition;

(3) the identification of all documents or other exhibits expected to be offered or which may be offered at the trial.

(4) Within 14 days after these disclosures are made, the opposing parties may serve objections to the deposition designations and objections to the admissibility of documents and exhibits. Objections to admissibility, other than on the basis of relevancy, not raised are waived.

4. Discovery limitations imposed by the rules.

a. Timing. Discovery may not be initiated until initial disclosures are made and the parties have conferred to plan for discovery. Fed. R. Civ. P. 26(d).

b. Interrogatories. A party may serve on another party no more than 25 written interrogatories, including sub-parts. Fed. R. Civ. P. 33(a). An

interrogatory composed of subsections may be counted as a single interrogatory or as multiple interrogatories. The relevant determination is whether the interrogatory requests information about discrete separate subjects. Note of Advisory Committee on Rules, 1993 Amendment. The number of permissible interrogatories can be increased by leave of court or by written stipulation between the parties. The court may impose different limitations on interrogatories by a case management order.

c. Depositions. Plaintiffs, defendants, and third-party defendants are limited to ten depositions in total. Fed. R. Civ. P. 30(a)(2)(A) & 31(a)(2)(A). Leave of court, or a written stipulation between the parties, is required in order to take:

(1) Depositions in excess of ten;

(2) The deposition of any person in confinement;

(3) The deposition of anyone who has previously been deposed in the case;

(4) A deposition prior to the Rule 26(f) discovery planning conference.

5. Discovery limitations imposed by the forum.

a. The court, by a case management order, may alter the limitations on depositions and interrogatories, or may impose restrictions on the length of depositions and the number of requests for admission. Local rules can impose limitations on the number of requests for admission which may be served.

b. The court may also limit discovery, by order or either sua sponte or in response to a motion for a protective order under Fed. R. Civ. P. 26(c), if it determines that:

(1) "[T]he discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C)(i).

(2) "[T]he party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought." Fed. R. Civ. P. 26(b)(2)(C)(ii).

(3) The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery sought to the questions at issue. Fed. R. Civ. P. 26(b)(2)(C)(iii).

c. The discovery of electronic evidence, particularly "inaccessible electronic evidence," has caused courts to formulate new tests for the determination of whether discovery is "unduly burdensome or expensive," and has encouraged courts to enter orders shifting the cost of discovery to the party seeking the production. *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). In determining whether to shift the costs, courts may consider:

(1) The extent to which the request is narrowed to the discovery of relevant information;

(2) Whether the evidence produced is or was available from other, less costly, sources;

(3) The cost of producing the evidence in relation to the amount in controversy;

(4) The cost of producing the evidence in relation to the resources of each party;

(5) The relative ability of each party to control costs and its incentive to do so;

(6) The significance of the issues at stake;

(7) The relative benefit – to the various parties – of the evidence produced. *Id.*

6. Protective orders limiting discovery may also be sought under Fed. R. Civ. P. 26(c), but the party seeking protection bears substantial burden of showing entitlement. *In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559 (E.D.N.Y. 1985). Note: Seeking a protective order does not absolve movant of the duty to respond. *Williams v. AT&T*, 134 F.R.D. 302 (M.D. Fla. 1991). A motion seeking a protective order must be accompanied by a certification that the moving party conferred with the affected parties in an attempt to resolve the dispute. The court has broad discretion in fashioning protective orders. *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992).

C. Signing Discovery Requests and Responses.

1. "Every disclosure [under Fed. R. Civ. P. 26(a)(1) or (a)(3)] shall be signed by at least one attorney of record . . . The signature . . . constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a *reasonable inquiry*, the disclosure is complete and correct as of the time it is made." Fed. R. Civ. P. 26(g)(1).

2. Every discovery request, response, or objection shall be signed by at least one attorney of record. Fed. R. Civ. P. 26(g)(1). The signature "certifies that to the best of the person's knowledge, information and belief formed after a reasonable inquiry" the request, response or objection is:

    a. consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

    b. not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

    c. not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. Fed. R. Civ. P. 26(g).

3. "Reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions arrived at are reasonable under the circumstances. The standard is objective, not a subjective "bad faith" test. While the attorney's signature does not certify the truthfulness of the client's factual responses, it does certify that the lawyer has made reasonable efforts to assure that the client has provided all the information and documents available to him that are responsive to the discovery request. *Bernal v. All American Investment Realty, Inc.*, 479 F.Supp.2d 1291 (S.D. Fla. 2007).

4. If a certification is made in violation of the rule, the court shall impose an appropriate sanction upon the person who made the certification. The court may also sanction the party, or the person signing and the party. Sanctions may include an order to pay the reasonable expenses incurred because of the violation, including a reasonable attorney's fee. Fed. R. Civ. P. 26(g)(3).

5. The provisions of Fed. R. Civ. P. 11 do not apply to discovery matters. Fed. R. Civ. P. 11(d).

6. Agency counsel are generally expected to prepare and sign the answers to interrogatories directed to the agency or the United States when the interrogatories seek information within the knowledge of the agency. U.S. Attorneys Manual § 4-1.440.

D. Supplementing Responses to Discovery.

1. A party has a duty to supplement any disclosures made under Rule 26(a), at appropriate intervals, whenever the party determines that "in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A).

2. Generally, there is no obligation to supplement deposition testimony. However, where an expert's deposition is used in whole or in part to satisfy the disclosure requirement of Fed. R. 26(a)(2), a duty to supplement may arise. *Bradley v. United States*, 866 F.2d 120 (5th Cir. 1989) (failure to supplement response with identity of expert or substance of his/her facts and opinions may bar use of expert at trial.)

3. Supplementation must be timely ("seasonable"). *Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993) (providing a videotape related to expert testimony on liability one month before trial not seasonable); *Davis v. Marathon Oil Co.*, 528 F.2d 395 (6th Cir. 1975) (supplementation of witness list three days before trial warrants excluding them as witnesses).

4. Counsel who fails to take immediate remedial measures when additional or corrective information is discovered risks running afoul of the duty of candor to the tribunal. *United States v. Shaffer Equipment Co.*, 796 F.Supp. 938 (S.D. W.Va. 1992) (Government CERCLA cost recovery action dismissed because government counsel violated duty of candor to the tribunal), aff'd in part and rev'd in part, 11 F.3d 454 (4th Cir. 1993).

5. Court can order further supplementation of disclosures or discovery responses. Fed. R. Civ. P. 26(e)(1)(B).

E. Sanctions for Discovery Abuses.

1. Automatic Sanctions. "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to suppy evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). No motion is required. However, upon motion and after an opportunity to be heard, the court may impose additional sanctions, including: reasonable expenses, including attorney's fees, and; advising the jury of the party's failure to disclose the evidence.

2. Sanctions available upon application to the court. Fed. R. Civ. P. 37.

   a. Compelling Discovery. Fed. R. Civ. P. 37(a). The court wherein the action is pending or the court for the district where a deposition is being

taken, may, upon application, enter an order requiring the discovery to take place as requested. A motion is appropriate when:

(1) The deponent refuses to answer a question posed during a deposition. In such a case, the questioner may adjourn or complete the deposition before seeking the court's intervention.

(2) A party fails to answer an interrogatory.

(3) A party refuses to produce documents or allow inspection as requested.

(4) A party fails to designate an individual pursuant to Fed. R. Civ. P. 30(b)(6). Fed. R. Civ. P. 37(a)(3)(B). An evasive or incomplete answer is treated as a failure to respond. Fed. R. Civ. P. 37(a)(4).

(5) Any motion to compel must include a certification that the moving party attempted, by conference with the person or party resisting discovery, to resolve the matter before seeking court intervention. Fed. R. Civ. P. 37(a)(1).

(6) In addition to ordering the discovery to take place, the court shall order the party or deponent whose conduct necessitated the motion, or the attorney, to pay the moving party the expenses incurred, including reasonable attorney's fees unless the court finds the opposition was substantially justified or other circumstances make an award unjust. Fed. R. Civ. P. 37(a)(5). An award of costs shall also be awarded when the discovery is provided after the motion is filed. Fed. R. Civ. P. 37(a)(5).

(7) If the motion to compel is denied, the moving party must pay the costs unless the court finds that the making of the motion was justified or other circumstances makes an award unjust. Fed. R. Civ. P. 37(a)(5)(B).

b. Failure to Preserve Electronically Stored Information (ESI). If ESI is lost or destroyed because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced, upon a finding of prejudice, the court may order remedial measures. Alternatively, if the court finds that the party acted with intent to deprive the other party of use of the information, the court may:

(1) Presume that the lost information was unfavorable to the party;

(2) Instruct the jury that it may or must presume the information was unfavorable to the party; or

(3) Dismiss the action or enter a default judgment.

c. Sanctions for failure to obey the motion to compel, includes:

(1) A deponent who refuses to be sworn or to answer questions after being directed to do so may be held in contempt of court. Fed. R. Civ. P. 37(b)(1).

(2) Oral discovery orders must be complied with and disobedience can give rise to Rule 37 sanctions. *Avionc Co. v. General Dynamics Corp*., 957 F.2d 555 (8th Cir. 1992).

d. Fed. R. Civ. P. 37(b)(2) provides for a wide range of possible sanctions for disobedient parties:

(1) An order establishing facts. *Chilcutt v. U.S.*, 4 F.3rd 1313 (5th Cir. 1993), reh'g den'd, and cert. den'd 513 U.S. 979.

(2) An order precluding a party from supporting or opposing a claim or defense or prohibiting him from introducing certain evidence. *Parker v. Freightliner Corp.*, 940 F.2d 1019 (7th Cir. 1991).

(3) An order striking pleadings. *Green v. District of Columbia*, 134 F.R.D. 1 (D.D.C. 1991).

(4) An order staying the proceedings until compliance.

(5) An order dismissing the action or rendering judgment by default against the disobedient party. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), but see Fed. R. Civ. P. 55(e) ("No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court."). The drastic remedy of dismissal is reserved for the most flagrant violations. *In re Exxon Valdez,* 102 F.3d 429 (9th Cir. 1996).

(6) An adverse jury instruction. *Residential Funding Corp. v. DeGeorge Home Alliance, Inc.*, 306 F.3d 99 (2nd Cir. 2002).

(7) An order holding the disobedient party in contempt of court.

(8) Monetary sanctions may be imposed on the party, its attorney(s), including government counsel, or both. *U.S. v. Sumitomo Marine & Fire Ins. Co*., 617 F.2d 1365 (9th Cir. 1980).

e. Sanctions imposed on party need only be just and related to the infraction in question. *Boardman v. National Medical Enterprises*, 106 F.3d 840 (8th Cir. 1997).

f. A party's failure to attend its own deposition, to answer interrogatories, or to respond to requests for production is immediately sanctionable (i.e., the movant need not first secure an order compelling disclosure). Any of the various sanctions, save contempt, may be imposed. *Blue Grass Steel, Inc. v. Miller Bldg. Corp.*, 162 F.R.D. 493 (E.D. Pa. 1995); Fed. R. Civ. P. 37(d).

g. Expenses upon failure to admit. If a party refuses to admit the genuineness of a document or the truth of a fact as requested under Fed. R. Civ. P. 36, and the requesting party subsequently proves the genuineness of the document or the truth of the fact, the party refusing to admit may be ordered to pay his opponent's expenses. Fed. R. Civ. P. 37(c)(2). The court shall order payment of the reasonable expenses, including attorney's fees, unless it finds that:

(1) The request was objectionable.

(2) The admission sought was of no substantial importance.

(3) The party refusing to admit had reasonable ground to believe he might prevail.

(4) There were other good reasons for the failure to admit. Fed. R. Civ. P. 37(c)(2).

h. The court may require a party or an attorney to pay the reasonable expenses incurred by reason of that party or attorney's failure to confer and assist in the development of a discovery plan. Fed. R. Civ. P. 37(f).

i. The court may impose a sanction upon any person who has "frustrated the fair examination of [a] deponent." The sanction may include reasonable attorney fees and costs incurred by other parties as a result of the offensive conduct. Fed. R. Civ. P. 30(d)(2).

II. DISCOVERY: STRATEGY, PRACTICE AND PROCEDURE

A. Planning for discovery. The discovery strategy should address the following questions:

1. What information do I have an affirmative obligation to disclose?

2. What information do I need to obtain?

3. Who has the information I need?

4. When, if at all, should I begin the discovery process?

5. What information do I have which my adversary will try to obtain and how can I best marshal and present it or prevent its disclosure?

B. Consider the following when preparing the discovery strategy:

1. The nature and complexity of the legal issues involved;

2. The amount in controversy;

3. The importance of the principles and positions being attacked by the adversary;

4. The strategy for the defense of the case;

5. The number and nature of the parties in the litigation; and

6. The issues likely to be contested and to be conceded.

C. Check local rules. The December 2000 amendments to the Rules was intended to standardize discovery practice in the U.S. District Courts. Nevertheless, the implementation of the federal rules governing discovery has always varied widely between districts and sometimes within each division of a district. *The importance of securing an up-to-date copy of the local rules of court cannot be overstated.*

1. Local rules may impose additional or different limits on the frequency and amount of discovery than those imposed by the federal rules.

2. The particular format for discovery papers, as well as other pleadings and motions, may be set out in the local rules.

3. Local rules may memorialize customary discovery time limits, alter the time for objecting to discovery, establish procedures for requesting a discovery conference, and delineate the steps that a party must take to resolve a discovery dispute. They may also require a party to set forth certain information with regard to documents for which a privilege is asserted.

4. Local rules may provide for "uniform discovery definitions" or uniform discovery that must be answered.

5. Local rules versus "local practice". Local practices may vary considerably from local rules. Consult with a local practitioner if possible.

D. Rule 26(f) pre-discovery conference and discovery plan.

1. The discovery strategy must be formulated prior to the Rule 26(f) pre-discovery conference of the parties. Except in excepted cases or where a court order provides otherwise, all parties are required to confer before beginning discovery in any action.

2. The conference should be held "as soon as practicable" but not later than 21 days before a scheduling conference is held or a scheduling order is due.

   a. Rule 26(f) permits the court, by order or local rule, to require the conference be held less than 21 days prior to the scheduling conference and to require an oral, rather than written, report concerning the discovery plan.

   b. Fed. R. Civ. P. 16(b). Rule 16(b) orders are required within 90 days of the appearance of the defendant, making a 26(f) conference necessary within the first 69 days after an appearance.

3. Topics to be covered at the conference include: the nature of the claims and defenses, the likelihood of settlement or other resolution of the case, the conditions for the exchange of mandatory disclosures, and an appropriate discovery plan for the case.

4. All parties are jointly responsible for providing the court with a report within 14 days of the conference outlining the discovery plan. The plan must include:

   a. any agreements regarding initial disclosures, including a statement of when these were or will be made;

   b. the subjects of future discovery, when discovery will be completed, and whether discovery will be phased or limited to certain subject areas;

   c. whether amendments to the limitations on discovery imposed by the federal rules or by the rules of court are necessary;

   d. whether any protective orders regarding discovery or any scheduling or other Rule 16 order should be entered.

E. Implement the discovery strategy by outlining the tasks to be performed in sequence. NOTE: Complex cases may require a formal discovery planning document assigning tasks and suspense dates to various attorneys involved in the case. In simpler cases, counsel's hand-written notes may suffice as a discovery outline. In any case, the

outline should be continuously reviewed and modified as tasks are completed and information is generated.

1. A complete outline includes provisions for providing mandatory disclosures and for responding to opposing discovery, including marshalling any documents or tangible things expected to be requested by the opposing party, and identifying and interviewing any witnesses who will be identified by opposing counsel.

2. The discovery outline and its implementation in a given case should serve several purposes:

    a. It should provide useful information in a timely manner.

    b. Facts and testimony should be gathered in time to make effective use of it in subsequent discovery (e.g., expert depositions).

    c. All of the evidence gathered should be consistent with the theories to be advanced at trial.

    d. It should use your available resources, including time, efficiently.

    e. It should place you in the best negotiating position possible.

    f. It should preserve and advance your defenses.

    g. It should avoid unnecessary appearances before the judge.

F. Filing discovery pleadings. Rule 5(d) provides that Rule 26(a) disclosures and discovery pleadings (i.e., all requests and responses, including interrogatories, requests for documents or to permit entry onto land, requests for admissions and depositions) are not filed until they are used in proceeding or filing is ordered by the court.

G. Using the Right Tool for the Right Job (at the right time)

1. Interrogatories (Fed. R. Civ. P. 33).

    a. General procedure. Written questions covering the entire gamut of material and information within the general scope of discovery propounded to a party. Interrogatories directed to a specific agent or employee who is not a named party are improper. Waider v. Chicago, R.I., & P. Ry. Co., 10 F.R.D. 263 (D.C. Iowa 1950).

    b. No more than 25 interrogatories, including all discrete subparts, may be served without leave of the court or agreement of the parties. Check local rules for additional or different requirements.

c. Unless an objection is made, interrogatories must be answered separately and fully under oath. However, an unsworn declaration made under penalty of perjury may be used to satisfy the requirement that the interrogatories be executed under oath. (28 U.S.C. § 1746.)

(1) Answers must include all information known by the party or his attorney. When the party is a corporation or a governmental agency, the party can designate an individual (ie. attorney) to answer the interrogatories and will be bound by the responses. *Mangual v. Prudential Lines, Inc.*, 53 F.R.D. 301 (D.C. Pa. 1971).

(2) Fed. R. Civ. P. 26(g) requires the signature of the attorney of record on the answers as well.

(3) Interrogatories that are objectionable in part, must be answered to the extent not objectionable. Fed. R. Civ. P. 33(b)(1). Thus, the rule codifies the common practice of: stating an objection to the interrogatory; re-stating the interrogatory in a non-objectionable way, and; answering the re-stated interrogatory.

(4) Responding party can produce business records or files in lieu of answering if the answers can be found therein and, as between the responder and the inquirer, the burden of finding the answers would be equal. Fed. R. Civ. P. 33(d).

(5) Answers must be served within 30 days unless the court orders a shorter or longer time for response, or the parties agree to same. Failure to timely object constitutes a waiver of any objection including that the information sought is privileged. See, e.g., United States v. 58.16 Acres of Land, 66 F.R.D. 570, 572 (D. Ill. 1975).

d. Can be used at trial to extent permitted by the rules of evidence.

e. Drafting Considerations. Unlike questions asked at a deposition, the answers to interrogatories will be "word-smithed" by opposing counsel. Careful drafting is important. Any excuse to avoid answering an interrogatory will be offered. The following areas are appropriate for interrogatories in most cases:

(1) Background information on the plaintiff that will usually take some research to produce, such as the dates of past medical treatment, former residences, names and addresses of employers, etc. These items can be acquired through interrogatories rather than wasting deposition time.

(2) Non-controversial factual details that not are not included in the Complaint or Answer.

(3) The application of law to fact or the party's contentions concerning certain facts ("contention interrogatories"). But cannot ask for pure conclusions of law. *Bynum v. United States*, 36 F.R.D. 14, 15 (D.C. La. 1965).

f. Miscellaneous considerations.

(1) Form interrogatories may be a useful starting place in drafting, but should be used with care.

(2) Definition sections are frequently used in conjunction with interrogatories. By defining terms interrogatories can be shortened and unnecessary objections concerning ambiguity can be avoided. However, the requirements imposed by these sections are often ignored.

g. Timing.

(1) The first set of interrogatories should be propounded as early as possible in order to secure necessary background information for the litigation. At a minimum, interrogatories should be propounded before depositions unless unusual circumstances dictate otherwise.

(2) A second set of interrogatories propounded late in the case, (i.e. a number of contention interrogatories) used in conjunction with requests for admission can be used to narrow the issues to be tried.

2. Request for Production of Documents and Things (Fed. R. Civ. P. 34).

a. General procedure. Applies only to parties. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir. 1985), *cert. den'd* 474 U.S. 1021.

(1) Must set forth with "reasonable particularity" the documents or things to be produced for inspection, copying, or testing. What is an adequate description is a relative matter. Designate documents by category.

(2) The documents or things must be in the possession, custody, or control of the party. Fed. R. Civ. P. 34(a)(1). "Control" generally means the ability to obtain. *Comeau v. Rupp*, 810

F.Supp. 1127, 1166 (D.Kan. 1992) *recon. Den'd* 810 F.Supp. 1172.

(3) Party seeking production does not have a right, however, to an authorization permitting independent access to the documents or things.

(4) Must set forth a reasonable time, place and manner for inspecting and copying. Fed. R. Civ. P. 34(b).

(5) A response to a request for inspection must be served within 30 days, unless the court orders a shorter or longer time for it. A response is not production. The response simply agrees to permit inspection or objects. Fed. R. Civ. P. 34(b)(2).

(6) The responding party shall produce documents for inspection in the manner they are kept in the ordinary course of business or organize and label them to correspond with the categories of the request. Fed. R. Civ. P. 34(b)(2)(E).

b. Drafting considerations for requests and responses.

(1) "Reasonable particularity" requirement is one that will cause the most problems. If it can be misunderstood, it will be. Like interrogatories, the request for production must be tailored to the case at hand.

(2) In an effort to get all documents, tendency is to draft over- broad requests. May need to wait until answers to interrogatories are in before adequate production requests can be drafted.

(3) Following types of requests may be appropriate in most cases: assuming an appropriate interrogatory was asked, the documents identified in the answer to the interrogatory; and all documents referred to or consulted in preparing answers to interrogatories.

c. Electronic information. Fed. R. Civ. P. 34 applies to information stored on any electronic media. Don't overlook the possibility that material subject to production may exist on thumb drives, hard disks, CD-ROM and may include draft versions of documents, E-Mail messages, databases and other information customarily stored on electronic media. See *Zubulake v. UBS Warburg LLC*, 02 Civ. 1243, U.S.D.C. (S.D.N.Y.).

d. Timing. The request for production should be served as early as possible in the litigation. Additional requests may be required as further

discovery reveals the existence of documents that may not have been described in the initial request. The federal rules make no limitation on the number of requests which may be propounded and local rules seldom do.

e. Securing documents from non-parties.

(1) Fed. R. Civ. P. 34 applies only to parties, therefore, must subpoena documents or things from non-parties.

(2) Can serve subpoena for the individual to appear at a deposition and produce described documents, or subpoena only the documents. Fed. R. Civ. P. 45.

(3) Any objection must be raised in court that issued subpoena, not forum court. *In re Digital Equipment Corp*., 949 F.2d 228 (8th Cir. 1991).

3. Physical and Mental Examinations (Fed. R. Civ. P. 35).

a. General procedure.

(1) Absent agreement, an independent medical examination (IME) requires a court order. An IME is allowed of a party or a person under the custody or control of a party by a "suitably licensed or certified examiner." Fed. R. Civ. P. 35(a). An IME will be permitted only upon a showing of good cause. The mental or physical condition of the person to be examined must be in controversy.

(2) The mental condition of a party is not in issue simply because the intent of a party is in issue. *Taylor v. National Group of Companies, Inc.*, 145 F.R.D. 79, 80 (N.D.Ohio 1992); but see *Eckman v. University of Rhode Island*, 160 F.R.D. 431 (D.R.I. 1995).

(3) Order must specify the time, place, manner, conditions, and scope of the examination, and the person or persons who will conduct the IME. Thus, all arrangements should be made prior to filing the motion. Fed. R. Civ. P. 35(a)(2).

(4) Person examined is entitled to a copy of the examiner's report upon request. If request is made, examined party must provide opponent with copies of reports of previous or subsequent examinations. By requesting and obtaining copy of examiner's report or by taking examiner's deposition, person examined

waives any doctor-patient privilege that may apply to another person who has examined him or who may examine him in the future with respect to the mental or physical condition in issue. Fed. R. Civ. P. 35(b).

b. Practical Considerations.

(1) Fed. R. Civ. P. 35 exam can be arranged by stipulation or agreement of the parties. Same general rules concerning exchange of reports, etc., apply to examinations by stipulation unless agreement provides otherwise.

(2) An IME conducted too early in the course of the patient's illness or recovery period may not be valid at the time of trial. For example, an early IME may not provide the patient with enough time to fully improve, and thus, be of little help in minimizing damages. On the other hand, an IME too late may blow any chance of settlement for a reasonable amount or put you in a bind to locate an additional expert to address some condition the examination revealed. Thus, the timing of the IME is important, but it must depend upon the unique circumstances of each case.

(3) A thorough exam by a competent physician may reveal that the adverse party patient is severely disabled and has very little chance of recovery. Thus, you may be helping your opponent's case by seeking the IME. Don't seek an IME until you have obtained all of the plaintiff's medical records and have had them reviewed by appropriate consultants. You may find that an exam is not really needed.

4. Requests for Admissions (Fed. R. Civ. P. 36). The purpose of the rule is to eliminate issues that are not really in dispute and to facilitate the proof of those issues that cannot be eliminated. Request may go to any matter within the scope of discovery. Thus, not strictly limited to seeking admissions of facts. Furthermore, it is not grounds for objection if the request goes to central facts upon which the case will turn at trial.

a. General Procedure.

(1) Each request must be separately set forth.

(2) Responding party has 30 days within which to answer, unless the court orders a shorter or longer time.

(3) Unless answers are served within the time permitted, the requests will be deemed admitted. Fed. R. Civ. P. 36(a).

(4) Answers must fairly meet the substance of the request. Cannot evade a response due to lack of information or knowledge unless you make a reasonable inquiry in an attempt to gain the information upon which either an admission or a denial can be based. Fed. R. Civ. P. 36(a).

(5) Court has discretion to permit party to withdraw a prior admission or to relieve a party from the effect of an admission for failure to respond. Fed. R. Civ. P. 36(b). Whether the court will exercise that discretion and give the party relief will depend upon the prejudice to the other party and whether the party seeking relief has acted in good faith.

(6) If a party fails to admit in response to a request and the requesting party subsequently proves the truth of the matter embodied in the request, the party refusing to admit may be required to pay the requesting party's expenses incurred in proving the matter, including reasonable attorney's fees. Fed. R. Civ. P. 37(c).

b. Practical Considerations.

(1) Careful drafting is required. Limit the scope of each request. The narrower the better.

(2) Use of request for admissions early in the case will limit the issues and probably save considerable discovery. But, if local rules limit the number of requests it is usually better to wait until after some discovery has been conducted in order to make the best use of the requests.

(3) Requests for admission are particularly well suited for easing introduction of documentary evidence.

(4) Consider using requests for admissions and interrogatories in conjunction.

(5) U.S. Attorneys cannot admit liability in cases seeking damages in excess of their settlement authority. Thus, when the request for admission asks the U.S. to admit negligence or liability, the U.S. Attorney may not be permitted to admit, even if an admission is appropriate, without the approval of DOJ. Most cases can be handled with a denial since the request will be so broad and will cover so many issues that an unqualified admission will not be required. Furthermore, if the admission comes early in the case an inability to either admit or deny due

to the incomplete nature of the investigation may be appropriate. Difficulties arise, however, where the opponent submits well drafted admissions directed to each of the underlying facts comprising the plaintiff's case. These cannot be avoided and counsel should notify DOJ ASAP.

5. Appellate Review of Discovery Orders.

   a. Most discovery orders are interlocutory and not immediately appealable. After judgment when they may be appealed, it is often difficult to show prejudice or how the issue is not now moot.

   b. Varying ways to seek immediate review are on contempt citations, by writ of mandamus, on appeal from the quashing of a subpoena, or on interlocutory appeal under 28 U.S.C. § 1292(b).

   c. The standard of appellate review is highly deferential (abuse of discretion).

CHAPTER E

DEPOSITIONS

I. RULES AND PROCEDURES

A. Depositions Upon Written Questions (Fed. R. Civ. P. 31). "Interrogatories" to non-parties. Subpoena issued under Fed. R. Civ. P. 45 can compel the witness to attend.

1. General Procedure.

a. No more than 10 depositions under this rule and under Rule 30 may be taken by all the plaintiffs, all the defendants, or all the third-party defendants without leave of court. Further, no witness may be deposed more than once.

b. Party noticing the deposition must serve notice and his questions upon all other parties.

c. Parties then have 14 days to serve cross-examination questions. Within 7 days of service of cross-examination questions, party noticing deposition may serve re-direct questions. Opponent then has 7 days to serve re-cross.

d. After all questions have been served and re-served, party noticing the deposition delivers them to the court reporter and issues subpoena for the witness. Court reporter reads the questions to the witness and records the answers.

2. Practical Considerations.

a. Much cheaper to mail a set of questions to a court reporter than to fly to some distant location to depose the witness in person.

b. Useful for establishing evidentiary foundations to authenticate documents or to lay foundations for business records, etc.

c. If the witness knows anything about the facts of the case, the deposition upon written questions is a very cumbersome and unreliable way to get that person's testimony.

d. Will probably become even more underutilized as video- conferencing for depositions becomes cheaper and more accessible.

B. Depositions Upon Oral Examination (Fed. R. Civ. P. 30).

1. General Procedures.

   a. Must give reasonable notice in writing to all other parties. (What is "reasonable" will depend upon the circumstances.) Must include time, date, place, and name and address of witness to be examined, as well as the manner in which the deposition will be recorded. If the name of the proposed deponent is unknown, the notice must provide "a general description sufficient to identify the person or the particular class or group to which the person belongs."

   b. Notice served less than 14 days prior to the deposition is risky. If a party promptly files a motion for protective order that the deposition be taken at another time or place or not be taken, and the motion is pending when the deposition is taken, the deposition may not be used against the party. Fed. R. Civ. P. 32(a)(5)(A).

   c. Witness attendance may be compelled through the use of a subpoena. Fed. R. Civ. P. 45. Notice is sufficient to compel the attendance of a party. If the subpoena also compels production of documents, the documents to be produced must be identified in the deposition notice or an attachment to it. Fed. R. Civ. P. 30 (a)(1) and (b)(2).

   d. Generally, the plaintiff must appear for his deposition in the forum, but, the place of the deposition is within the sole discretion of the court and it may alter the location as it deems appropriate. Court will consider convenience, expense, etc.

   e. Under Fed. R. Civ. P. 30(b)(6), a party may take the deposition of a corporation, association, or governmental agency by noticing the organization and specifying the scope of the matters it wishes to inquire into. The organization must then designate the witness who will testify. Any admissions made by the designated witness are admissible against the organization.

   f. A deposition may be recorded by audio, audiovisual, or stenographic means unless the court orders otherwise. Fed. R. Civ. P. 30 (b)(3).

      (1) The party taking the deposition must state in the notice the method by which the testimony will be recorded.

      (2) With prior notice to the deponent and the other parties, a party may designate and arrange for another method of recording the testimony, at that party's expense.

      (3) Any party may arrange for a transcript to be made from a deposition recorded by other than stenographic means.

(4) If a nonstenographically recorded deposition is used at trial, those portions used must be transcribed. "On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise." Fed. R. Civ. P. 32(c).

(5) Fed. R. Civ. P. 30(b)(4) provides deposition can be taken by telephone or other remote electronic means (e.g. satellite television) upon stipulation of parties or court order. This is a cost effective means to secure evidence, but obvious limitations to implementation exist.

2. Practical Considerations.

a. If, prior to the conclusion of the deposition, any party requests to review the deposition before it is filed, they will be given 30 days after the transcript or recording is available to review and correct it. Fed. R. Civ. P. 30 (e). Purpose of review is to correct substantive or transcription errors of the court reporter, not to permit broad amendment of testimony. *Greenway v. International Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992) (Sixty- four corrections in 200 page deposition, many of them substantive, not permitted.)

b. As a general rule, "counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer." *Armstrong v. Hussman Corp.*, 163 F.R.D. 299, 303 (E.D. Mo. 1995).

c. Depositions are presumptively limited to one day of seven hours. However, the court "must allow additional time . . . if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination." Fed. R. Civ. P. 30(d)(1)

II. TAKING AND DEFENDING ORAL DEPOSITIONS – PRACTICE TIPS

A. Defending Depositions.

1. Witness preparation. Every witness should be prepared prior to the deposition, but the nature and degree of pre-deposition preparation depends on the type of witness and his prior testimonial experience. Ensure that deponent has reviewed all his prior statements before being deposed.

2. Your preparation should be designed to make all witnesses informed about and comfortable with the deposition process and capable of reciting the relevant information they possess in a fashion most favorable to your position in the litigation. It should include:

   a. A review of the relevant evidence likely to be elicited during questioning. Let the witness tell the story first, then go back over parts and explore extent of witness' knowledge, recollection, etc.

   b. A review of all documents which the witness is likely to see during the deposition.

   c. In some cases there may be documents which exist, but you decide the witness should not review prior to testifying. (e.g. a statement by another witness substantially similar to the deponent when the opposing counsel is likely to raise a claim that they collaborated on their testimony. The witness should be told of the existence of the document and what its general nature is so that he will be confident in declaring that he has not previously seen it when it is shown to him.

   d. Caveat: use of privileged documents to prepare a witness for deposition testimony may result in the waiver of the privilege. *Sprock v. Peil*, 759 F.2d 312 (3d Cir. 1985).

3. Instruction about the three primary purposes of a deposition: (1) to fix the witness' testimony so that it may be altered at trial only at the expense of the witness' credibility; (2) to find out what the witness knows; and (3) to assess how credible the witness' testimony will be at trial. NOTE: The witness will be testifying under oath and that he is required to tell the truth. If opposing counsel asks what the witness was told in preparation, the one instruction that should always be recited is that he was told to tell the truth.

4. Volunteering information: Being truthful doesn't require the witness to volunteer information that hasn't been elicited by questioning. Carefully listen to questions and ask for the question to be repeated or for clarification if the witness doesn't understand the question.

5. Questions which cannot be answered with "yes" or "no" response, even though they are phrased to elicit one of those responses, can and should be qualified with additional information. The opposing counsel is not entitled to a yes or no answer to any question.

6. A reassurance that "I don't know" and "I don't remember" are perfectly acceptable responses if they are truthful. However, the questioner may ask for estimates and best guesses and there is no rule against these, so long as the record is clear that the response is an estimate.

7. The preparation session you are conducting is perfectly appropriate and it is acceptable to relate any of it that the witness can recall if he is questioned about it. Tell your witness, "If you remember nothing else about this session, please recall that I told you to tell the truth."

8. The deposition process and opposing counsel should be taken very seriously. The questioner is not there to help the witness, nor to do him any favors. Treat opposing counsel with courtesy, but there's no reason to be overly friendly. Don't converse with anyone, the court reporter, opposing counsel, or other attendees about the subject matter of the litigation or related aspects. There is no such thing as a remark "off the record."

9. The witness should pause and think before answering. This will give you time to object and the witness time to formulate a coherent response.

10. Instruct the witness to ask for a break when one is needed.

11. The witness should not agree to do anything for counsel after the deposition. The witness has no obligation to do additional work or research, to improve his memory, or to fill in forgotten details.

12. If you object, the witness should stop talking and listen to the objection. Tell the witness that the objection is made only to preserve it for later, but that frequently, listening to the objection will point out deficiencies in the question that may not otherwise be apparent.

13. Preparing expert witnesses. Preparing an expert witness for his deposition poses special problems. Don't assume the expert knows or recalls all of the general witness instructions. Ensure your witness understands your theory of the case and how his testimony fits into it. Prepare him to resist the temptation to offer "off the cuff" opinions on matters you have not asked him to review. Help the witness anticipate where his opinion will be assaulted and prepare a credible response to good criticisms of his view. Don't deprive your expert of your knowledge about where your adversary's emphasis will be placed.

B. Intra-deposition Issues.

1. Suspending the deposition to seek relief from the court. Fed. R. Civ. P. 30(d)(3) provides that either party or a deponent can suspend the taking of the deposition for the time necessary to petition the court for a protective order when the deposition is being conducted in such a manner so as to annoy, embarrass, or oppress the deponent or party.

2. Objectionable questions. Fed. R. Civ. P. 32(d)(3)(A) and (B) note:

a. "An objection to a deponent's competence– or to the competence, relevance or materiality of testimony – is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time."

b. "An objection to an error or irregularity at an oral examination is waived if it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and it is not timely made during the deposition."

c. Improper questions include: ambiguous or unintelligible, compound, argumentative, leading (on direct), one that calls for a narrative answer, and one that misquotes the witness' testimony.

d. Counsel should raise only objections that will be waived if not made at the deposition. Fed. R. Civ. P. 30, Committee Notes.

e. Objections are to be stated "concisely in a nonargumentative and nonsuggestive manner." Fed. R. Civ. P. 30(c)(2).

f. Objections made will be entered upon the deposition, however, the testimony is taken subject to the objections. Fed. R. Civ. P. 30(c)(2). "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [to suspend the taking of the deposition because it is being conducted in bad faith, or in a manner to annoy, embarrass, or oppress the deponent or the party]." Fed. R. Civ. P. 30(c)(2). Unless the question seeks privileged information, the witness must answer subject to the objection.

3. Private conferences between deponents and their attorneys during the taking of a deposition are generally considered improper. *Langer v. Presbyterian Medical Center of Pennsylvania*, 1995 WL 79520 at 11 (E.D. Pa. Feb. 17, 1995), vacated on other grounds 1995 WL 395937 (E.D. Pa. July 3, 1995). The only exception is a conference to determine whether a privilege should be asserted. *Id.*

4. At the conclusion of opposing counsel's questions, weigh very carefully whether you will question the witness. If you question, you provide your opponent with an additional opportunity for questioning.

5. Logistical considerations. The recording requirements for depositions, Fed. R. Civ. P. 30(b)(3), make it mandatory that counsel defending a deposition consider the logistical arrangements for transcription made by others. Remember (1) A deposition notice which does not set forth the method of

recording is defective; (2) Any notary public with a cassette recorder is qualified to record a deposition; and (3) If the method of recording by which counsel intends to take a deposition is likely to capture the testimony inaccurately, it may be necessary to arrange for some other means of recording it.

C. Taking Depositions. General considerations:

1. To discover admissible evidence and develop information that will lead to evidence.

2. To obtain admissions and create weaknesses in opponent's case.

3. To learn what witness knows about the case and to fix his testimony.

4. To discover strengths and weaknesses of opponent's case.

5. To develop material for cross-examination.

6. To evaluate the witness and opposing counsel.

7. To perpetuate testimony.

8. To display your capabilities and strengths of your case.

9. To authenticate and lay the foundation for admission of documents into evidence.

10. To lay the foundation for motions to compel and dispositive motions.

11. To improve your posture in settlement negotiations.

D. Preparation. Same preparation as you would for trial testimony.

1. Review all previous discovery, organize documents to be used at deposition, and prepare outline of questioning.

2. A form outline for expert testimony is a good beginning, but must be adapted for the particular facts of your litigation.

E. Logistics.

1. Retain court reporter. Usually hire reporter in the town where the witness lives rather than taking one with you.

2. Make telephonic contact with reporter to confirm date/time of deposition.

3. If deposition deals with technical or scientific subjects, ask for reporter with experience in those areas.

4. Court reporters often have offices or conference facilities suitable for taking depositions and will make those facilities available for the deposition.

5. Check to make sure the reporter will provide the kinds of services necessary, considering technology requirements.

6. Arrange for the place to conduct the deposition if it is not at the witness' or court reporter's office.

7. Send out notice to all parties, and court reporter. Arrange for subpoena if non-party is to be deposed.

8. Double check with court reporter a day or two ahead of time.

9. Make the court reporter aware of anything out of the ordinary that is likely to disrupt the proceeding or make the court reporter uncomfortable.

F. Relationship with the deponent.

1. Make a conscious choice about the style you will display during the deposition. Consider the nature of the witness (e.g. lay or expert; fact or specially retained), the relationship of the witness to the litigation, how the witness is likely to view you, and how your performance may effect the witness' view of you in the trial.

2. Can change tone and/or style during course of deposition, but if you must "get tough" with the witness, do it after you have gotten all of the concessions you can by being cordial.

3. Establish early on that you have command of the facts of the case and you have prepared for this deposition. This is particularly true for expert witnesses who may be tempted to inflate their credentials or the strength of their opinions unless you convince them that it is dangerous to do so.

G. Relationship with counsel.

1. Establish control. Arrive early and set the room up as you want it (with deference to the needs and requests of your court reporter).

2. NEVER let opposing counsel know that your time is limited (e.g. that you need to catch a particular flight home).

3. Your attitude toward opposing counsel when first entering the room can be very significant to the deponent's perception of you. E.g., if you are courteous

and friendly and engage in some "light-hearted" banter, the witness may think that you are not as big an ogre as his lawyer told him you were.

H. Interrogating the witness.

1. Have court reporter swear witness and, if relevant, attach a copy of notice to record. Unless waived, start with the 30(b)(5)(A) litany.

2. Introduce yourself on the record and cover following points:

   a. Who you represent and purpose of deposition.

   b. You will ask questions and witness will answer under oath and court reporter will record the exchange verbatim.

   c. Not trying to trick witness, just want to know what information he has that is relevant and material to the case.

   d. Ask witness to agree to ask for clarification of any question that he/she does not understand. If question is answered you must assume that witness understood question.

   e. If need break just say so.

   f. Any reason why can't take the deposition at this time.

   g. Any plans to move or change positions in future.

3. Inquire about the witness' preparation.

   a. What documents were reviewed?

   b. Who did witness talk to about case?

   c. What was substance of any conversation with anyone (including counsel) about case/testimony?

4. Inquire about documents produced.

   a. If documents were to be produced go over each one individually and have deponent identify.

   b. If documents were not produced that were requested ask questions to determine who may have custody or control and why they weren't produced.

5. Miscellaneous.

a. Frequently use catch-all questions such as “Have you told me everything you can remember?”, “Is there anything that would refresh you memory?”, “What else do you recall?”, “Is that all you can remember?”

b. Use pregnant pauses to allow the witness to volunteer information.

c. Clarify special terms. “When I refer to ‘peer-reviewed journals’ what do you understand that to mean, if anything?”

d. Mark all documents that the witness reviews and refer to the documents by exhibit number.

e. Deal with evasive witnesses.

f. Object to non-responsive answers.

g. Break questions down.

h. Persist.

i. Alert the witness to the proposition that you will not conclude the deposition without responsive answers. (“Shall we break for supper or keep going?”)

j. Inquire about the witness’ knowledge of other discoverable information.

k. Respond appropriately to objections.

l. Listen/learn. Re-phrase if you should.

m. Get an answer nonetheless. “You may answer the question.”

n. Alert opposing counsel that you know the rules. “Are you instructing the witness not to answer?”

o. Make a complete record. “are you refusing to answer and, if so, are you doing so on advice of counsel?”

p. Take notes. Review and ask follow-up questions before concluding your examination.

CHAPTER F

TEMPORARY RESTRAINING ORDERS & PRELIMINARY INJUNCTIONS

"Plaintiffs may attempt to force Government action or restraint in important operational matters or pending personnel actions through motions for temporary restraining orders or preliminary injunctions. Because these actions can quickly impede military functions, immediate and decisive action must be taken." AR-27-40, para. 3-5.

I. TEMPORARY RESTRAINING ORDERS

A. General purpose: prevent irreparable injury to moving party until court can hear motion for preliminary injunction.

B. Governing rules: Fed. R. Civ. P. 65(b); RCFC 65(b).

C. Notice. Notice is required before entry of a temporary restraining order (TRO). Notice to successful bidder. RCFC 65(f)(2). Exception: Movant will suffer irreparable injury if adverse party afforded opportunity to be heard; and movant's attorney certifies efforts made to give notice and the reasons why notice should not be required. Fed. R. Civ. P. 65(b); RCFC 65(b).

D. Term of the order: 10 days, with a possible 10-day extension. Fed. R. Civ. P. 65(b); RCFC 65(b).

E. Security. Rule 65(c) requires applicants for restraining orders or preliminary injunctions (PI) to give as security a sum deemed proper by the court for payment of such costs and damages as may result to any party who is found to have been wrongfully restrained or enjoined. A bond is not required when the US is the petitioner.

F. Moving for hearing of a PI takes precedence over other matters. Fed. R. Civ. P. 65(b); RCFC 65(b).

G. Burden of proof. Generally, the burden of proof is on the moving party. The standard four prong test for injunctive relief, set out in *Younger v. Harris*, 401 U.S. 37 (1970) is:

1. Substantial likelihood of success on the merits.

2. Irreparable injury to movant if relief is denied.

3. Relative harm to the opposing party (balance of harms).

4. Impact on the public interest.

H. Appeal. General rule: orders granting, denying, modifying, or dissolving TROs are not appealable. *Geneva Assurance Syndicate, Inc. v. Medical Emergency Services Associates*, 964 F.2d 599 (7th Cir. 1992). Exceptions:

1. Extension of TRO substantially beyond time limits of Rule 65(b). In effect, an extension beyond 20 days converts the TRO to a PI, which is appealable under 28 U.S.C. 1292(a)(1).

2. Denial of the TRO would result in irreparable harm to national security or other important government interest under circumstances in which monetary damages would be inadequate. *United States v. Washington Post Co.*, 446 F.2d 1322 (D.C. Cir. 1971).

3. TRO denied following notice and hearing under circumstances in which such denial was tantamount to the denial of a PI. *Religious Technology Center v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989).

II. PRELIMINARY INJUNCTIONS

A. General purpose: prevent irreparable injury during pendency of lawsuit. "A [PI] is an extraordinary remedy never awarded as of right." *Munaf v. Geren*, 128 S.Ct. 2207, 2218-2219 (2008).

B. Governing rules: Fed. R. Civ. P. 65(a); RCFC 65(a).

C. Notice and hearing. Fed. R. Civ. P. 65(a)(1); RCFC 65(a)(1).

1. Type of hearing. See, e.g., Drywall Tapers and Pointers of Greater New York v. Local 530 of Plasterers and Cement Masons International Association, 954 F.2d 69 (2d Cir. 1992).

2. Consolidation of trial on the merits. Fed. R. Civ. P. 65(a)(2).

D. Security. Fed. R. Civ. P. 65(c); RCFC 65(c).

E. Appeal.

1. Orders granting, denying, modifying, or dissolving preliminary injunctions are appealable. 28 U.S.C. § 1292(a)(1).

2. Standard of appellate review: abuse of discretion. *McKeesport Hospital v. Accreditation Council for Graduate Medical Education*, 24 F.3d 519 (3d Cir. 1994).

3. Appellate forum. 28 U.S.C. §§ 1292(c); 1295(a)(2).

F. Burden of Proof is on the moving party. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers*, 415 U.S. 423 (1974). Elements are:

1. Substantial likelihood of success on the merits. *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991), rev'g, 747 F. Supp. 1160 (E.D.N.C. 1990).

2. Irreparable injury to the movant is likely if relief is denied. *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 375 (2008).

    a. Plaintiff demonstrating a "significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *RODA Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009).

    b. Discharge from government employment. *Sampson v. Murray*, 415 U.S. 61 (1974).

    c. Involuntary military service. *Patton v. Dole*, 806 F.2d 24 (2d Cir. 1986).

    d. Preserving a damages remedy. *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220 (8th Cir. 1987).

    e. Alleged constitutional deprivations. *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion).

    f. Loss of government contract; loss of ability to compete for contract. *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971).

        (1) Plaintiff can recover bid preparation costs. *Morgan Business Assoc. v. United States*, 619 F.2d 892 (Ct. Cl. 1980).

        (2) Plaintiff cannot recover anticipated profits. *Keco Indus., Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970). NOTE: Court generally will not order the award of a contract to a successful plaintiff. *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197 (D.C. Cir. 1984).

        (3) Bid protests. *Design Pak, Inc. v. Secretary of the Treasury*, 801 F.2d 525 (1st Cir. 1985).

        (4) Expiration of bids. *Sterlingwear of Boston, Inc. v. United States*, 11 Cl. Ct. 517 (1987).

3. Relative harm to the opposing party, also known as the *balancing of equities*. *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).

4. Impact on the public interest. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Yakus v. United States*, 321 U.S. 414, 441 (1944); *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 375 (2008). NOTE: There are extreme various on the general rule regarding impact on public interest.

G. Compare with elements for a permanent injunction. *Monsanto Co., et al., v. Geertson Seed Farms, et al.*, 130 S.Ct. 2743 (2010):

1. Plaintiff has suffered an irreparable injury.

2. Remedies available at law, such as monetary damages, are inadequate to compensate for that injury.

3. Considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted.

4. Public interest would not be disserved by a permanent injunction.

CHAPTER G

FEDERAL TORT CLAIMS ACT (FTCA)

I. REFERENCES

A. AR 27-20, Claims (8 February 2008).

B. AR 27-40, Litigation (19 September 1994)

C. DA Pamphlet 27-162, Claims Procedures (21 March 2008)

D. Federal Tort Claims Act Handbook (1 May 2012)

E. JA 241, Federal Tort Claims Act (May 2000)

II. OVERVIEW OF THE FTCA

A. Before passage of the FTCA in 1946, the United States was immune from suit. Redress for injuries caused by Government employees was available only through private relief bills.

B. The FTCA permits recovery for personal injury, death, or property damage caused by Government employees acting within the course and scope of employment. 28 U.S.C. § 1346(b). Plaintiffs may sue for negligence, but not, in most cases, for intentional torts. 28 U.S.C. § 2680.

C. Trial is by Federal judge without a jury. 28 U.S.C. § 2402.

D. Venue is appropriate only in the district where the plaintiff resides or where the act or omission occurred. 28 U.S.C. § 1402(b).

III. PROCEDURAL METHOD OF ANALYSIS

A. Administrative Prerequisites to Suit.

1. Has the Claimant Filed a Proper Administrative Claim?

a. Written Notice and a Sum-Certain.

(1) The claimant must make a written demand that provides sufficient notice to the agency to allow it to investigate. The plaintiff must give the agency minimal notice which includes (1) a written statement sufficiently describing the injury to enable

the agency to begin its own investigation, and (2) a sum-certain damages claim.

(2) Suit may be brought only on those facts and theories of liability raised by the administrative claim. *Bembinista v. United States*, 866 F.2d 493 (D.C. Cir. 1989).

(3) The written claim must demand a sum certain in money. Failure to specify a sum certain is a defect that deprives the court of subject matter jurisdiction over the action. NOTE: Claims asking for an approximate number of dollars have been considered sufficient, but the recovery has been limited to the stated amount. *Corte-Real v. United States*, 949 F.2d 484 (1st Cir. 1991).

(4) Suit cannot be brought for an amount greater than that submitted in the administrative claim unless the claimant provides proof of (1) newly discovered evidence not reasonably discoverable at the time of presenting the claim to the agency, or (2) intervening facts relating to the amount of the claim. 28 U.S.C. § 2675(b).

b. Signed by the Claimant.

(1) The claimant or the claimant's representative must sign the written notice demanding a sum certain.

(2) Proof of agent signatory authority may or may not be required. *Conn v. United States*, 867 F.2d 916 (6th Cir. 1989), but see Department of Justice Regulations, 28 C.F.R. Part 14.

(3) If a derivative claim is intended to be presented, a separate, signed claim must be received. *Manko v. United States*, 830 F.2d 831, 840 (8th Cir. 1987).

(4) Reference in a claim to injuries suffered by other persons does not suffice as a claim on behalf of any person other than the signatory. *Montoya v. United States*, 841 F.2d 102 (5th Cir. 1988).

c. Submitted to the Appropriate Federal Agency.

(1) An SF-95 is the standard form on which claims are usually submitted, however there is no legal requirement that the form be used.

(2) The appropriate agency is the federal agency whose activities gave rise to the claim.

(3) If a claim is submitted to the wrong agency, the Attorney General's regulations require the receiving agency to transfer the claim to the appropriate agency and to notify the claimant of the transfer. 28 C.F.R. § 14.2(b)(1). Failure of an agency to "transfer . . . [a claim] forthwith to the appropriate agency" may, in effect, extend the statute of limitations or excuse presentment to the "appropriate agency." *Bukala v. United States*, 854 F.2d 201 (7th Cir. 1988).

2. Has the Claimant Complied with the Statute of Limitations?

a. The purpose of the FTCA's statute of limitations (SOL) is to require the reasonably diligent presentation of tort claims against the government. *Ryan v. United States*, 534 F.3d 828 (8th Cir. 2008).

b. The SOL is an affirmative defense. Fed. R. Civ. P. 8(c).

c. The written claim must be presented to the appropriate Federal agency within two years of when the claim first accrued. 28 U.S.C. § 2401(b) provides: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim *accrues* or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." *Id.*

d. When does a claim "accrue"?

(1) Normally, in a tort cause of action, accrual occurs at the time of injury, loss, or damage. Federal, not state, law determines accrual. *Vega-Velez v United States*, 800 F2d 288(1st Cir. 1986).

(2) Discovery Rule: In medical malpractice cases under the FTCA, the Supreme Court has held that a claim accrues when the claimant knew or should have known of the injury and the cause of the injury. *United States v. Kubrick*, 444 U.S. 111 (1979). The Kubrick standard is an objective test. The claim accrues and the statute begins to run "when the facts would lead a reasonable person (a) to conclude that there was a causal connection between the treatment and injury, or (b) to seek professional advice, and then with that advice, to conclude that there was a causal connection between the treatment and injury." *MacMillan v. United States*, 46 F.3d 377 (5th Cir. 1995).

e. Tolling the statute of limitations. *Irwin v. Veterans' Admin.*, 498 U.S. 89 (1990) (holding in a Title VII case that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States).

(1) Equitable tolling. It applies in limited circumstances; see *Gonzalez v. United States*, 284 F.3d 281, 291, (1st Cir. 2002) (Suspends the running of the statute of limitations if a plaintiff, in the exercise of reasonable diligence, could not have discovered information essential to the suit).

(2) Neither infancy nor incompetence will postpone the accrual of a claim. *Leonhard v. United States*; *Kach v. Hose*, 589 F.3d 626, 637 (3d Cir. 2009); *Patterson v. United States*, 451 F.3d 268 (1st Cir. 2006).

(3) The Servicemembers Civil Relief Act will toll the claims of service members regardless of whether their ability to pursue the claim has been impaired by military service. *Kerstetter v. United States*, 57 F.3d 362, 369 (4th Cir. 1995).

f. After filing the administrative claim, a claimant cannot file suit until the agency has had the claim for six months. The court lacks subject matter jurisdiction if the complaint is filed within six months of the submission of the claim and before the agency makes a final denial. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9(b)

g. After six months of receipt of the claim, if the agency has not settled or denied it (or notified the claimant by certified or registered mail of its decision to deny the claim), the claimant may deem the claim denied and file suit in Federal court, otherwise the ation will be forever barred. 28 U.S.C. § 2675(a), 28 U.S.C. § 2401(b). The six-month limitation period does not begin to run until the agency has denied the claim. *Life Partners Inc. v. United States*, No. 10-50354, 2011 WL 3572003 (5th Cir. Aug. 16, 2011).

3. Is the Person Filing a Proper Claimant?

a. Proper Claimants.

(1) Claims for personal injury or for damage to or loss of property may be presented by the injured person or property owner or their authorized agent or representative. 28 C.F.R. § 14.3(a) and (b).

(2) Wrongful death claims may be presented by the executor or administrator of the decedent's estate, or by any other person legally entitled to assert a claim under applicable state law. 28 C.F.R. § 14.3(c).

(3) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the parties individually as their respective interests appear, or jointly. 28 C.F.R. § 14.3(d).

b. Improper Claimants.

(1) Federal civilian employees.

(a) The exclusive remedy for Federal civilian employees injured during their employment is the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c). "FECA's exclusive liability provision ... was designed to protect the Government from suits under statutes, such as the]FTCA], that had been enacted to waive the Government's sovereign immunity. In enacting this provision, Congress adopted the principal compromise-the "quid pro quo"-commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government." *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 193-94 (1983).

(b) If the claimant is a Federal employee and there is a substantial question whether FECA applies, the question must be resolved by the Secretary of Labor (SOL) before the FTCA claim will be adjudicated. *Figueroa v. United States*, 7 F.3d 1405 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994).

(c) The FTCA statute of limitations is not tolled while the SOL considers the FECA question.

(d) Decisions by the SOL as to whether FECA covers the alleged injury, or on the amount of compensation, if any, to be awarded, are final. Review of any kind by a court is absolutely barred. 5 U.S.C. § 8128(b).

(e) FECA coverage extends to all injuries within the work "premises." *Woodruff v. Dep't of Labor*, 954 F.2d 634, 640 (11th Cir.), *reh'g denied*, 961 F.2d 224 (1992).

(f) Employees of nonappropriated funds are covered by the Longshoreman's and Harbor Worker's Compensation Act. 33 U.S.C. §§ 901-950, 8171.

(2) Service members. Service members who are injured incident to service cannot maintain an action against the United States under the FTCA. *Feres v. United States*, 340 U.S. 135 (1950).

(a) "Incident to service" test , set forth in *Verma v. United States*, 19 F.3d 646, 648 (D.C. Cir. 1994), holds that not one factor (below) is dispositive:

(i) Nature of the plaintiff's activity at the time of the injury. If the plaintiff was performing military duties or enjoying a privilege or benefit of military service at the time of the injury, the claim will usually be barred. *United States v. Johnson*, 481 U.S. 681 (1987).

a. Claims for injuries incurred during medical treatment in a military medical treatment facility (MTF) are *Feres* barred. *Jones v. United States*, 112 F.3d 299 (7th Cir. 1997). This is currently pending review.

b. Claims for injuries incurred while using recreational equipment owned by the Government are usually barred. *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986).

c. Claims for injuries incurred during transport as space available passengers are barred. *Uptegrove v. United States*, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044 (1980).

d. Claims for injuries caused in on post housing are generally barred. *Feres*, 340 U.S. 135 (1950).

(ii) If the service member was not engaged in a military activity or enjoying a benefit of service at the time of his or her injury, courts usually consider the following factors together: plaintiff's location and duty status.

a. Location.

i. If the incident occurs off post while off duty, *Feres* generally will not bar the claim. *Brooks v. United States*, 337 U.S. 49 (1949) (on leave).

ii. If off-duty but on the installation, *Feres* will bar the claim. *Warner v. United States*, 720 F.2d 837 (5th Cir. 1983).

b. Duty status. If service member is off duty (pass) or on chargeable leave, the majority of courts will look at the plaintiff's activity and location at the time of injuries to determine if they are incident to service and therefore be *Feres* barred.

(b) The rationale underlying the *Feres* doctrine is:

(i) The relationship between the Government and members of its armed forces is "distinctively Federal in character" and should not be affected by state law;

(ii) Congress already provides a system of compensation for injuries and/or death for members of the armed services; and,

(iii) There would be an adverse impact upon discipline if Soldiers could sue for command decisions made and orders given in the course of duty.

(iv) Finally, the Supreme Court explained that "*Feres* and its progeny indicate that suits brought by service members against the Government for

injuries incurred incident to service are barred by the *Feres* doctrine because they are the 'type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Miller v. United States*, 42 F.3d 297, 303 (5th Cir. 1995) (quoting *United States v. Johnson*, 481 U.S 681, 690 (1987)) (emphasis in original)).

(c) Feres bar also extends to:

(i) Commissioned officers of the Public Health Service,

(ii) National Guardsmen when engaged in Guard activities,

(iii) Third party claims for contribution and indemnity arising out of injuries sustained by a plaintiff whose direct action against the United States is barred by *Feres*,

(iv) Foreign military members in the United States for training or service with U.S. forces,

(v) Service academy cadets,

(d) *Feres* bars not only the direct action by the service member, but also any derivative action arising out of the service member's injuries. *Stephenson v. Stone*, 21 F.3d 159 (7th Cir. 1994).

(e) Family members of active duty service members who are personally injured by Government negligence <u>are not</u> barred by *Feres* even if their injuries are sustained while using privileges or benefits available to them because of their sponsors' status. *Portis v. United States*, 483 F.2d 670 (4th Cir. 1973). The service member can also recover on derivative claims arising out of injuries to dependents. *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981).

(3) Veterans/retirees. If the tort occurs after discharge, Feres will not bar the claim. The issue is often whether the alleged tort is *separate and distinct* from any acts occurring before discharge.

United States v. Stanley, 483 U.S. 669 (1987) (no post-discharge injury).

IV. FTCA SUBSTANTIVE ANALYSIS.

A. What Law Applies?

1. The FTCA provides that the law of the state where the act or omission occurred determines the liability of the United States. 28 U.S.C. § 1346(b).

2. The "law of the state" is the whole law, including the state's choice of law rules. Richards v. United States, 369 U.S. 1 (1962).

B. Does the FTCA Provide a Remedy for the Relief Being Sought?

1. Cause of Action.

a. The substantive tort law of the state determines whether the plaintiff has a valid cause of action. *Henderson v. United States*, 846 F.2d 1233 (9th Cir. 1988). If the state law does not permit recovery under the circumstances, the United States will not be liable. There is no liability for failure to warn when there is no duty to warn under state law. *Cole v. United States*, 846 F.2d 1290 (11th Cir.), *cert. denied*, 488 U.S. 966 (1988).

b. Proximate cause limitations in state law applicable to FTCA suit. *Skipper v. United States*, 1 F.3d 349 (5th Cir. 1993), cert. denied, 510 U.S. 1178 (1994).

c. No liability under a state's *res ipsa loquitur* doctrine if plaintiff cannot prove shared responsibility. *Creekmore v. United States*, 905 F.2d 1508 (11th Cir. 1990).

d. The United States may claim the benefit of state limitations on the liability of private parties.

e. The FTCA does not waive sovereign immunity for strict liability. Even if state law would permit recovery under a strict liability theory, the United States is immune. *Laird v. Nelms*, 406 U.S. 797 (1972). However, the waiver of sovereign immunity for state negligence actions does not waive the United States' immunity for Federal constitutional torts. *Castro v. United States*, 775 F.2d 399 (1st Cir. 1985) (abrogated on other grounds).

2. Relief Sought.

a. Relief is limited to money damages. Equitable relief is not available under the FTCA. Congress has precluded the recovery of punitive damages and prejudgment interest. 28 U.S.C. § 2674.

b. Amount of recovery is limited to the amount claimed in the administrative claim unless "the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the Federal agency, or upon allegation and proof of intervening facts relating to the amount of the claim." 28 U.S.C. § 2675(b).

c. When the new evidence or intervening facts only refine or go to the precision of the plaintiff's prognosis, an increased damage award is not appropriate. *Low v. United States*, 795 F.2d 466 (5th Cir. 1986). A reasonably based change in expectation as to the severity and permanence of the injuries will support an award greater than claimed in the administrative claim. *Spivey v. United States*, 912 F.2d 80 (4th Cir. 1990).

d. Attorney fees are limited to 20% of an administrative settlement and 25% of a judgment or compromise settlement. 28 U.S.C. § 2678.

C. Who Caused the Injury or Damage?

1. The negligent actor must be a Federal employee acting within the course and scope of Federal employment. 28 U.S.C. § 2679(b)(1).

2. Federal law determines whether a given individual is a Federal employee. The general test used by the courts to determine if an individual is an employee of the Government is the "right to control the details of the day-to-day performance of duty" analysis set forth in Restatement (Second) of Agency § 220 (1958). Examples include:

a. Local Federally funded community action agency is not a Federal enterprise. *United States v. Orleans*, 425 U.S. 807 (1976).

b. Local jail contracted to temporarily house Federal prisoners; jail employees were not "Federal employees" under the FTCA. *Logue v. United States*, 412 U.S. 521 (1973).

c. Private physicians designated as Aviation Medical Examiners by the Federal Aviation Administration, are not Federal employees. *Leone v. United States*, 910 F.2d 46 (2d Cir.), cert. denied, 499 U.S. 905 (1991).

d. Independent contractors are not Federal employees. 28 U.S.C. § 2671. However, the Government may be liable if the United States has

authority "to control the detailed physical performance of the contractor" and supervise its day-to-day operations. *Bird v. United States*, 949 F.2d 1079 (10th Cir. 1991).

e. The Federal employee must be acting within the course and scope of Federal employment. The FTCA is the exclusive remedy for state law torts committed by Federal employees within the scope of employment. *Wright v. Park*, 5 F.3d 586 (1st Cir. 1993).

3. Applicable state tort law determines whether the employee was acting within the course and scope of Federal employment. *Williams v. United States*, 350 U.S. 857 (1955). Statutory Immunity for Individuals. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act) amended the FTCA and provides absolute immunity from state and common law torts for Federal employees acting within the scope of employment.

a. Before the Westfall Act applies, the U.S. Attorney must certify that the Federal employee was acting within the scope of employment. Attorney General certification/motion to substitute. U.S. Attorney's decision is subject to review. *DeMartinez v. Lamagno*, 515 U.S. 417 (1995).

b. After certification, the suit is removed to Federal court, the United States is substituted as the defendant, and the suit becomes an FTCA cause of action against the Government.

D. Is there a Statutory Bar to Liability? Even if the claimant clears all of the foregoing obstacles, the claim may still be barred by one of the 13 exceptions listed in the FTCA. 28 U.S.C. § 2680.

1. Discretionary function. 28 U.S.C. § 2680(a). The statute sets forth two separate exceptions under this section.

a. "Due care". Sovereign immunity is not waived for any claim based upon an act or omission of a Federal employee exercising due care in the execution of a statute or regulation, whether or not the statute or regulation is valid.

(1) Due care exclusion applies primarily to Government employees in the execution of statutes or regulations.

(2) If a statute or regulation mandates particular conduct, and the employee follows the mandate, the conduct is deemed in furtherance of U.S. policy and the Government will not be liable. *United States v. Gaubert*, 499 U.S. 315 (1991).

(3) Federal law determines whether the Government employee exercised due care in the execution of the Federal statute or regulation. *Hydrogen Technology Corp. v. United States*, 831 F.2d 1155 (1st Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988).

b. "Discretionary function." Sovereign immunity is not waived for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or employee, whether or not the discretion involved is abused. For this exception to apply:

(1) The act must involve an element of judgment or choice. *Berkovitz v. United States*, 486 U.S. 531 (1988).

(2) The judgment must be the kind that the discretionary function exception was designed to shield.

(3) The exception applies even when decisions are negligently made or discretion is abused.

2. Intentional torts exception. 28 U.S.C. § 2680(h).

a. The FTCA does not waive sovereign immunity for assault and battery; false arrest; libel; slander; misrepresentation; and interference with contract rights.

b. Exception to the assault and battery and false arrest exceptions: FTCA does waive sovereign immunity for assault, battery, and false arrest when committed by Federal law enforcement officers.

(1) "Federal law enforcement officer" is defined as an officer of the U.S. "who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal law."

(2) Military police are Federal law enforcement officers for FTCA purposes. *Kennedy v. United States*, 585 F. Supp. 1119 (D.S.C. 1984).

(3) Parole officers are not Federal law enforcement officers. *Wilson v. United States*, 959 F.2d 12 (2d Cir. 1992).

(4) Post Exchange security guards are not Federal law enforcement officers. *Solomon v. United States*, 559 F.2d 309 (5th Cir. 1977).

c. The intentional tort exception will apply only if the conduct relied on to establish the alleged tort is substantially the same as that required to establish one of the specifically barred torts. *Sheehan v. United States*, 896 F.2d 1168, *modified*, 917 F.2d 424 (9th Cir. 1990).

d. Intentional infliction of emotional distress is not barred by the intentional torts exception. *Truman v. United States*, 26 F.3d 592 (5th Cir. 1994).

3. Combatant activities exception. 28 U.S.C. § 2680 (j). The United States is not liable for any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war. There need be no formal declaration of war for the exception to apply. *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), *cert. denied*; 508 U.S. 960 (1993).

4. Overseas exception. 28 U.S.C. § 2680 (k). Congress did not want the liability of the United States determined by the laws of a foreign country. Therefore, claimants who have been injured by the acts or omissions of Federal employees in foreign countries have no judicial remedy against the United States.

a. If the injury occurred in a foreign country but the negligent act or omission occurred in the United States, the claim is not barred. *In re Paris Air Crash*, 399 F. Supp. 732 (C.D. Cal. 1975).

b. If the land in question is outside the United States but not subject to the sovereignty of another nation, the claim is still barred. *Smith v. United States*, 507 U.S. 197 (1993).

CHAPTER H

INDIVIDUAL LIABILITY OF FEDERAL OFFICIALS

I. INTRODUCTION

A. Overview: The liability of officers within the military service is materially different from officers in civilian employment. Within the military, the emphasis is on preserving good order and discipline of Armed Forces.

B. Constitutional structure: The Constitution grants exclusive responsibility for Armed Forces to legislative and executive branches. Courts have no role in governance of Armed Forces.

1. Congress shall have power to raise and support Armies; to provide and maintain a Navy; to make rules for the government and regulation of the land and naval forces. U.S. Const. art. I, § 8, cls. 12,13,14.

2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States (U.S. Const. art. II , §2, cl. 1).

C. Types of claims arising from military service.

1. FTCA.

2. Individual capacity claims - Bivens; 42 U.S.C. § 1983.

3. Statutory Claims - Title VII; ADA; ADEA, FLSA.

4. State law claims – negligence.

II. REPRESENTATION ISSUES

A. Who Do We Represent? Representation is governed by 28 C.F.R. § 50.15 with regard to scope of employment and the interest of the United States.

B. Overview of Components of Armed Forces.

1. Active-Duty military are always federal employees for representation purposes. 28 U.S.C. § 2671 defines employee of the U.S. government to include members of the military or naval forces of the United States; Army, Navy, Air Force, Marine Corps, Coast Guard; and Title 10 U.S.C.

2. Reservists including Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, and Coast Guard Reserve are federal employees when in military status - Drill, Annual Training; governed by Title 10 U.S.C.

3. National Guardsmen including Army and Air National Guard are joint State/Federal military organizations. They are federal employees EXCEPT when performing state active duty.

   a. Congress shall have power to provide for organizing, arming, and disciplining the Militia . . . reserving to the States respectively, the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress. U.S. Const. art. I, § 8, cl. 16.; Title 32 U.S.C.

   b. 28 U.S.C. § 2671 defines employee of the government to include members of the National Guard when engaged in training or duty under section 115, 316, 502, 503, 504, 505 of Title 32

4. National Guard Technicians: Full-time Federal employees assigned to State military departments who are required to maintain membership in the National Guard as a condition of their federal employment. See National Guard Technicians Act of 1968 - 32 U.S.C. § 709(e).

5. Active Guard Reserve (AGR): Full-time Title 32 active-duty members of National Guard.

C. Intramilitary Immunity

1. 28 U.S.C. § 1346(b) establishes a facially broad waiver of sovereign immunity.

2. 28 U.S.C. § 2671 contemplates that the United States will sometimes be responsible for negligence of military personnel by including members of military and naval forces in FTCA's definition of federal employees.

3. 28 U.S.C. § 2680(j) - FTCA exception for "any claim arising from the combatant activities of the military or naval forces or the Coast guard during time of war."

4. 28 U.S.C. § 2674 - private party analogue - United States shall be liable to the same extent as a private individual under like circumstances.

5. No private party analogue to soldier. No American law has ever permitted a soldier to recover for negligence against either his superior officers or the government he serves.