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## Tips on Federal Practice

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TIPS ON FEDERAL PRACTICE

DEFENSE RESEARCH INSTITUTE  
RENAISSANCE RAMADA INN  
SARATOGA SPRINGS  
September 20, 1984  
5:30 P.M.

TIPS ON FEDERAL PRACTICE

OR

WHAT YOU ALWAYS NEEDED TO KNOW  
ABOUT FEDERAL CIVIL PRACTICE  
BUT NEVER ASKED

1. Intro. Judge Pittman & wife - So. Dist. Ala. J.
2. Should have et
3. Thinks he's Federal Judge
- ✓4. Legend in own mind
- ✓5. Made him - threw away shovel
- ✓6. Self made man who knocked off work too soon
7. Lawyers in Mobile gave J. Pittman dog named "Judge"
8. Membership of DRI broken down by age and sex
9. "For the Defense" June 1984 Issue "Offers of Settlement Under Proposed Rule 68" - costs and expenses including attorney's fees to be imposed on any party who fails to accept a settlement offer if judgment is "not more favorable" than unaccepted offer. Present Rule 68 much more limited (post-offer expenses). Good discussion for pros & cons.

TIP # 1

MAKE SURE THAT THE COURT HAS JURISDICTION OF YOUR CASE

I. The Federal District Courts are Courts of limited jurisdiction.

II. Subject Matter Jurisdiction -

(a) Must be found in Article III of the Constitution

(Judicial Power) and in act of Congress. Creation of District Courts by Congress.

(b) Cannot waive or consent to; may be raised at any time; Court must dismiss sua sponte if lacking. Allege in first paragraph of complaint.

(c) Specific jurisdictional provisions found in 28 U.S.C. §§ 1330-1364 - admiralty; anti-trust; patents, trademarks & copyrights; civil rights; postal matters; commerce & trade; suits against the United States. Many more in Title 28 and spread throughout the U.S. Code - such as labor matters, employment discrimination, social security - many more. Some jurisdiction concurrent with state courts.

(d) Federal question jurisdiction - catch-all provision - 28 U.S.C. § 1331 - "all civil actions arising under the Constitution, laws or treaties of the United States."

(e) Diversity of citizenship jurisdiction -

(1) Citizenship must be completely diverse - no party on one side can be citizen of same state as party on other side. Diversity determined at time of commencement of action. Dogbite; sidewalk.

(2) Corporation is a citizen of any state in which it has been incorporated and of the state where it has its principal place of business. Regarded as citizen of both states. Where corporation is incorporated in Delaware and has principal place of business in N.Y., no diversity if an adverse party is citizen of either Delaware or New York.

(3) Other provisions of the diversity statute relate to aliens and foreign nations. Especially of interest - Louisiana situation where insurer could be sued directly - insured need not be joined as party - gave rise to 1964 amendment to diversity statute - because too many cases clogging the Courts. Insurer now deemed citizen of state where insured is a citizen.

(4) Amount in controversy - \$10,000 exclusive of interest and costs - face of complaint.

(f) Pendent Jurisdiction - involves discretionary authority to hear claims arising out of "a common nucleus of operative fact." Interest of judicial economy. Used by plaintiffs. E.g. 42 U.S.C. § 1983 case.

(g) Pendent party jurisdiction - Generally, pendent jurisdiction involves same parties - pendent party where federal claim against one party joined with state claim against another party and claims closely related. Thought to apply only where there is exclusive jurisdiction over the federal claim. E.g. FTCA.

(h) Ancillary jurisdiction - non-federal claim by defendants asserted in counterclaim, crossclaim or third-party claim - e.g. implead third-party - no diversity required. Again, interests of judicial economy.

(i) No jurisdiction over lawsuit brought against any state-barred by 11th amendment. State against State - orig. jurisdiction in Supreme Court - Article III. May refer. My case.

### III. Personal Jurisdiction

(a) Some think can serve anywhere in U.S. if have subject matter jurisdiction - e.g. diversity.

(b) Basic area where Summons may be served is the state where the District Court sits. Fed. R. Civ. P. 4(b).

(c) The Federal Rules, however, adopt the extra-territorial jurisdiction of the state where the District Court sits. A federal Summons thus can be served beyond the State border to the same extent as a State Summons.

(d) Look, therefore, to the jurisdictional bases provided in NYCPLR 301 & 302 - re doing business - long-arm jurisdiction, etc.

(e) Manner of service of Summons to acquire personal jurisdiction governed by Fed. R. Civ. P. 4(c).

(f) Don't confuse venue & jurisdiction. Venue provision found in 28 U.S.C. § 1391 et seq. In diversity cases venue is in district where all plaintiffs or all defendants reside or where

claim arose; in non-diversity cases, generally where all defendants reside or where claim arose.

IV. No jurisdiction to perform marriages. "Few Words to tide them over the weekend."

TIP #2

COMPLY WITH THE STATUTORY PROCEDURE WHEN REMOVING ACTIONS FROM STATE TO FEDERAL COURT.

I. Consult 28 U.S.C. § 1441-1451. Only defendants may remove.

II. Make Certain the Action is Removable.

1. Cases in which district courts have original jurisdiction are removable. (Obviously, original and concurrent-not original and exclusive).

2. If action arises under Constitution, treaties or laws of the U.S., removable without regard to citizenship or residence of parties.

3. Other actions e.g. Diversity cases removable only if none of the defendants is a citizen of State where action brought. So, if plaintiff from another state brings action in N.Y. state court against N.Y. defendant, action cannot be removed to Federal Court. (Because no prejudice if N.Y. defendant and plaintiff chose state forum)

4. Removal is appropriate where independent removable claim joined with non-removable claim.

5. Provisions for removal of certain cases brought against federal officers; certain criminal cases; certain cases where civil rights cannot be enforced in state courts.

III. Procedure for removal of civil cases - 28 U.S.C. § 1446



1. File verified petition containing brief statement of facts entitling defendant to remove, together with copies of all previous process, pleadings and Orders.

2. Must file within 30 days of receipt of initial pleading by defendant or within 30 days after first paper indicating that case is removable.

3. Petition to be accompanied by Bond with sufficient surety for defendant to pay all costs and disbursements incurred by reason of removal if determined that removal improper.

4. Give written notice of filing of petition and bond to all parties; file copy with Clerk of State Court - no further proceedings in State Court. Removal then is effective.

#### IV. Remand -

1. District Court may order remand if appears case removed improvidently and without jurisdiction. Sua sponte or motion. Order payment of costs.

2. Remand Order not ordinarily reviewable.

3. My case - Family Court removal and remand - [Give \$20 week for support]

TIP #3

FOLLOW THE SPECIFIC INSTRUCTIONS CONTAINED IN THE PRE-TRIAL ORDER

I. Pre-trial Orders reflect major differences between N.Y. and Federal Practice.

II. Required by Fed. R. Civ. P. 16

1. Court must issue order 120 days after complaint filed, except as modified by Local Rule. Our Rule - prisoners - social security - expeditious admin. served.

2. Controls subsequent course of the action.

3. Scheduling dates for discovery completion, further conferences, motions, simplification of issues, pre-trial submissions, almost anything. Deal with any pre-trial matter aiding disposition of case - motions of any kind - adding parties, amending pleadings.

4. Sanctions for failure to comply.

III. RJM Procedures

1. Pre-trial Order #1 - Status Report - must be Joint - 10 questions - constitutes the scheduling conference required by Rule 16.

2. Pre-trial Order #2 = Scheduling Order - cut-off for discovery; discovery issues resolved in conference, dispositive motions within 20 days after discovery complete; meeting of counsel to formulate pre-trial stipulation. File before trial

date with Request to Charge or Findings of Fact (proposed) and Memoranda. Identify Exhibits - etc.

3. Amendment of Scheduling Order - Motion required - show good cause - that discovery diligently pursued - what accomplished - why need longer.

4. Schedule of defendant in criminal case. 85 years old-sentenced to 50 years. "Do as much as you can."

TIP #4

RESOLVE YOUR DISCOVERY ISSUES OR SUFFER THE CONSEQUENCES WHEN THE COURT RESOLVES THEM FOR YOU

I. Major Changes in Federal Rules relating to discovery effective August 1, 1983.

II. Sign discovery request, responses & objections Rule 26(g)

1. Certification that:

(a) Warranted by rules and existing laws or by good faith argument for modifying existing law.

(b) Not interposed for improper purpose such as to harass, cause unnecessary delay or needless increase in cost of litigation.

(c) Not unreasonable, given needs of case, discovery already had, amount in controversy and issues at stake in litigation.

2. Similar language (as to 1st 2 items) in Rule 11, requiring signature on all pleadings, motions and papers. Signature by at least one attorney of record.

3. Remember the liberality of discovery practice in Federal Court - discover any matter not privileged relevant to the subject matter or reasonably calculated to lead to relevant matter.

III. Sanctions

1. May order payment of expenses, including reasonable attorneys' fees. Refer to article "Abuses of Discovery" - Ch. J. Burger - Sept. 1984 Issue of Trial published by ATLA -  
I receive complimentary copy.

IV. Judge about to Impose Sanction on Defendant charged with murder, assault, robbery and rape - what do you have to say for yourself: We is None of Us Perfect.

TIP #5

FAMILIARIZE YOURSELF WITH LOCAL COURT RULES AND THE RULES OF EACH INDIVIDUAL JUDGE

I. Each District Court and each District Judge has his own Rules. Flexibility in system. See N.Y. Law Journal for Rules of S.D.N.Y. Judges.

II. Local Rules N.D.N.Y.

1. Rule 46 - requires counsel to meet and make good faith effort to resolve discovery issues.

2. Dates for filing motions & responding to them.  
10 days - five days filing.

3. Methods of handling habeas corpus, prisoners' complaints - social security - reference to Magistrates.

4. Settlement of Claims of infants & incompetents.

III. RJM Rules

1. Motion Days - insist on strict compliance with Rules for filing motions -

2. Discovery conferences

3. Pre-trial Stips:

(a) Jurisdiction

(b) Id. factual & legal issues

(c) Set forth contentions of parties

(d) Names of witnesses & summary of testimony

(e) Exhibits pre-marked - which agreed to

(f) Id. evidentiary problems

IV. Idiosyncrasies of Judges - N.Y.C. - E. & So.

1. Require conference (permission) before motions
2. Call Chambers only certain hours - tel. ans. machines
3. Special Rules re adjournment - notification
4. Rules re correspondence
  - (a) Loading platform letter

TIP #6

AVOID UNNECESSARY MOTION PRACTICE

I. Judges are beginning to impose sanctions for unnecessary motions.

II. Summary Judgment motions are not favored in federal (or state) practice, and should not be made unless there is a clear entitlement.

III. Motions to add claims by amendment should not be opposed on the ground that the claims are without merit. In federal practice, the merits of the proposed amendment rarely are considered.

IV. Motions to strike and for more definite statements generally are a waste of time.

V. Do not make a motion for a preliminary injunction unless you can meet the necessary Second Circuit criteria:

(1) Irreparable harm and

(2) Either

(a) likelihood of success on the merits or

(b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

VI. After I denied a lawyer's motion for summary judgment, my clerk overheard him say to a colleague, referring to me: "Now I



know whey they say God save the United States when he enters the  
courtroom."

## TIP #7

### BE AWARE OF THE STATUTES AND RULES RELATING TO JURY PRACTICE

#### I. Many differences from N.Y. Practice

#### II. Jury Demand - Rule 38(b)

1. May be made at any time after commencement of action and no later than 10 days after service of last pleading directed to issue. May be indorsed on pleading. May specify certain issues to be tried by Jury. Other party may specify other issues within 10 days after first demand, Rule 38(c).

2. Failure to serve and file demand equals Waiver. Abuse of discretion to allow. Demand made cannot be withdrawn without consent. Don't wait to demand Jury in your Note of Issue. We don't have N/I.

#### III. Method of Jury selection at discretion of Judge

1. Judge asks questions; lawyers ask questions. Combo. of both. My system = limit time in civil cases.

2. Some Courts use "struck panel" system

3. Challenges 28 U.S.C. § 1870 - each party entitled to 3 and 1 for 2 alternates Rule 47(b). Several defendants or several plaintiffs may be considered single party for making challenges or Court may allow additional to be exercised separately or jointly.

#### IV. Second Circuit Experiment

1. Prelim. & final instructions (some use intermediate)
  2. Use of Notes (I allow) (with admonition)
  3. Written or recorded instructions to Jury room
  4. Written questions submitted by Jurors.
- V. Jury - decided didn't want to get involved.

TIP #8

APPLY THE FEDERAL RULES OF EVIDENCE IN FEDERAL COURT TRIALS

I. Many who try cases in our Court not familiar with Federal Rules of Evidence. Simple. Small booklet. State in process of adopting with slight modifications.

II. Some Rules that are Often Overlooked:

1. Duplicates are admissible. Rule 1003
2. Other evidence of contents of a writing or recording is admissible under certain conditions. Rule 1004.
3. Opinion testimony by a lay witness is admissible, under certain circumstances, Rule 701, and an expert witness may qualify on the basis of experience only. Rule 702.
4. The credibility of a witness may be impeached by the party calling that witness. Rule 607.
5. The Court has broad powers to call and interrogate witnesses, Rule 614, and the Court may appoint expert witnesses and direct the parties to pay them. Rule 706. [Don't lose case for me]
6. Testimony on ultimate issues is not objectionable. Rule 704.
7. Evidence of habit and routine practice is admissible to prove conforming conduct. Rule 406.

8. Relevant evidence may be excluded for reasons of undue delay, waste of time or needless presentation of cumulative evidence. Rule 403.

9. Hearsay testimony of an unavailable (defined) witness is admissible under certain circumstances. Rule 804.

10. Public agency reports, including factual findings resulting from an investigation, made pursuant to a duty to report, may be received in evidence. Rule 803 subd. 8.

III. Evidence: "See how going to live on \$100 a month"

TIP #9

KNOW WHEN YOU CAN APPEAL AND WHEN YOU CAN'T

I. United States Courts of Appeals have jurisdiction of appeals from final decision of the district courts. 28 U.S.C. § 1291. Generally, interlocutory orders are not appealable, 28 U.S.C. § 1292.

II. As to non-appealable order, if District Judge is of opinion that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion & that immediate appeal may materially advance the ultimate termination of the litigation, he may so state in the Order. Court of Appeals may, in its discretion, then permit an appeal. 28 U.S.C. § 1292(b).

III. If fewer than all claims are determined, the action is not yet terminated and no appeal is available unless the Court directs entry of judgment and makes an express determination that there is no just reason for delay. Fed. R. Civ. P. 54(b).

"Findings of fact shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52. Note time constraints (strict) on filing briefs. C.A.M.P. Program. Penalties for frivolous appeals. Rehearing - panel & en banc.

TIP #10

DON'T CONFUSE STATE TORT CLAIMS WITH CONSTITUTIONAL CIVIL RIGHTS  
CLAIMS BROUGHT PURSUANT TO 42 U.S.C. § 1983

I. In a 1983 action the Inquiry is whether the conduct complained of was committed by a person acting under color of state law and whether that conduct deprived a person of rights, privileges or immunities guaranteed by the Constitution.

II. Various immunities & the good faith defense must be explored. Respondeat superior doesn't apply. A municipality can be held liable only for establishing a policy of unconstitutional dimensions or for deliberate indifference to misconduct.

III. Identify the Constitutional violations claimed - 4th amendment, 1st amendment - due process. Is it a case of excessive force, false arrest, lack of medical treatment? E.g. an excessive force claim is not the same as a state battery tort claim. "Every push or shove is not a constitutional violation." Different elements. Damages: include constit. violation general; punitive a real possibility (but not against municipality.) N.B. attorney's fees - ethical problem in settlement negotiations.

IV. Continually developing. Supreme Court reshapes & expounds every term.

V. I am holding up the cocktail hour. As W.C. Fields said, "Always carry a bottle of spirits in case of a snakebite. Also, always carrying a small snake."