PRACTICE IN FEDERAL COURT
A Guide for New Lawyers

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The fundamentals of practice and procedure in state and federal court are quite similar. Differences between the two systems are often subtle, but an understanding of these differences is essential to the successful federal practitioner. To the extent possible, this chapter will not repeat the basic information contained in the chapters on civil and criminal procedure. Rather, it will concentrate on providing information specific to practice and procedure in the United States District Courts for the Eastern and Western Districts of Kentucky and, to a lesser extent, the United States Court of Appeals for the Sixth Circuit.[2] While much of this information is applicable to other courts as well, the practitioner should always investigate local practice and procedure when appearing in a new forum. Due to space limitations, this is necessarily a general treatment of the subject, but it should provide the new practitioner with either the information needed or directions on where to look to find that information.

I. Admission to Practice

It is very simple to become admitted to practice before the federal courts in Kentucky. Both the Eastern and Western Districts, as well as the Sixth Circuit, provide for admission by application. Copies of the application forms for the Eastern and Western Districts may be found in the appendix to this chapter. To request the application forms for the Sixth Circuit contact the court clerk's office in Cincinnati.

To gain admission in either district court, an attorney must be admitted to practice in Kentucky.[3] The attorney must also be sponsored by a member in good standing of that court's bar. The application for admission must be accompanied by the sponsor's affidavit and an application fee (currently $35.00). Both districts permit attorneys to be admitted by mail without appearing in court to take the oath of admission. However, the federal judges in both districts welcome the opportunity to swear in new attorneys, and the new practitioner may wish to appear in person with their sponsor to take the oath of admission. This is an excellent opportunity for a new attorney to be introduced to the judge.

II. General Information and Practice Pointers

A. Federal Rules of Procedure

The beginning point for practice in the federal district courts in Kentucky is with the various rules of the court. As in every federal court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence are applicable. In addition, special rules may apply to certain cases, such as the Rules Governing Section 2254 (Habeas Corpus) Cases in the United States District Courts. Practice before the Sixth Circuit necessarily involves the Federal Rules of Appellate Procedure.

B. Local Rules

Particularly important to practice in the Eastern and Western Districts are the local rules of the courts. Fortunately for practitioners, the courts have promulgated Joint Local Rules which apply in both districts. Copies of the Joint Local Rules for the Eastern and Western Districts of Kentucky are available from all court clerk's offices in each district.

As with any set of procedural rules, it is critically important that practitioners become familiar with the rules and their applicability and effect. It is always wise to review applicable rules each time they are relevant to a particular case.

The Joint Local Rules govern several aspects of practice before the courts which are not covered in the various federal rules of procedure. Examples include:

1. Criteria for determining the jury division where a complaint should be filed;
2. Instructions for preparation of

process;
3. Guidelines for motion practice, including guidelines for resolution of discovery disputes and time periods for filing responses to motions;
4. Page limitations and citation requirements for briefs and memoranda;
5. Guidelines for discovery practice; and,
6. Special rules for Social Security cases.

There are many other provisions contained in the Joint Local Rules and a new lawyer expecting to practice in federal court would be well-advised to review all of the rules before beginning practice. All judges and magistrate judges will expect each lawyer practicing before them to be intimately familiar with the Joint Local Rules.

If practicing before the Sixth Circuit Court of Appeals, the practitioner should review both the Rules of that court and its Internal Operating Procedures. Copies of both are available from the court clerk's office in Cincinnati.

C. Courtroom Decorum

Federal courts are often more formal than their state counterparts. Although formality may vary depending upon the judge, attorneys in the Eastern District will always be expected to stand when addressing the court or opposing counsel or when questioning a witness. In the Western District, attorneys must use the podium when questioning witnesses. In both instances, the judge may permit an attorney to move about the courtroom, but leave of court should always be requested.

Some of the judges require that all exhibits be handled by the court security officers and do not ordinarily permit attorneys to approach a witness testifying from the witness stand. It is always wise to obtain a scouting report on the level of formality a particular judge expects. In the alternative, it is better to err on the side of being too formal, than to be too informal in court.

The Joint Local Rules have provisions governing which persons are permitted inside the bar of the courtroom. In addition, certain electronic devices, such as cameras and tape recorders are not permitted in federal courthouses. This includes portable dictation equipment, so make certain that hand held tape recorders do not inadvertently appear in the courthouse.

III. Civil Practice

A. Jurisdiction

The jurisdiction of federal courts in civil cases is covered in every first year Civil Procedure course in law school. However, it is worth restating the basics.

United States District Courts have essentially two types of subject matter jurisdiction. Federal question jurisdiction is governed by 28 U.S.C. 1331 which provides that the district courts shall have original jurisdiction of all civil actions which arise under the Constitution, laws, or treaties of the United States. Diversity jurisdiction is governed by 28 U.S.C. 1332 which provides that the district courts shall have original jurisdiction of all civil actions between citizens of different states, including foreign states. For a district court to exercise its diversity jurisdiction the amount in controversy in the case must exceed $50,000, excluding interest and costs.

There are other, more specialized jurisdiction statutes, including, among others, those governing admiralty, civil rights, and antitrust cases. However, the vast majority of civil cases in the federal courts in Kentucky are brought under either 1331 or 1332.

B. Venue

While jurisdiction determines whether a court has the inherent power to hear a particular case, venue is concerned with where the case may be filed. Venue is governed by 28 U.S.C. 1391.

In diversity cases, venue is appropriate in any judicial district where all of the plaintiffs reside, or where all of the defendants reside, or where the claim arose. In federal question cases, venue is appropriate in any judicial district where all of the defendants reside or where the claim arose. Note that in federal question cases, the residence of the plaintiffs is not a factor in determining venue.

Assuming venue is appropriate in either the Eastern or Western District of Kentucky, the case must then be filed in the appropriate venue within the district. The Eastern District is divided into six jury divisions--Ashland, Covington, Frankfort, Lexington, London and Pikeville. The Western District is divided into four jury divisions--Bowling Green, Louisville, Owensboro and Paducah. These jury divisions are not statutory and may be changed by order of the court. The counties currently as-

signed to the jury divisions in each district are set out in Joint Local Rule 2.

Joint Local Rule 4(b)(1) governs the assignment of civil actions to the appropriate jury division and provides that the clerk of the court shall make the assignment at the time the action is filed. When preparing to file a complaint in either the Eastern or Western District be certain to check this rule to determine the proper jury division for filing.

C. Filing a Complaint

The attorney filing a complaint must provide the clerk's office with the original and enough copies for service upon all of the named defendants. The attorney is also responsible for preparing the applicable process forms which accompany the complaint when it is served on the defendants. The clerk's office maintains blank copies of these forms and they should be acquired before the complaint is filed so that the completed forms may be presented to the clerk for signing and sealing at the time the complaint is filed. If some or all of the defendants are to be served via the Kentucky Secretary of State's office, the attorney filing the complaint is responsible for preparing the necessary documents for service by certified mail, and must provide the clerk's office with the necessary envelopes for the mailing.

In addition to preparing the process forms, the attorney filing the complaint will also be required to complete a Civil Cover Sheet. This form is also provided by the clerk's office and elicits relevant information about the case including the basis for the court's jurisdiction and the nature of the suit. Copies of the Summons in a Civil Action and the Civil Cover Sheet may be found in the appendix to this chapter.

The filing fee is currently $120 for a civil action. This fee is subject to revision and it is wise to check with the clerk's office prior to filing a complaint to determine the applicable fees. A complete listing of fees for other types of filings is available in the clerk's office.

Service of process may be accomplished in much the same manner as in state court. Review Federal Rule of Civil Procedure 4 for the requirements.

D. Removal from State Court

Often a plaintiff will file a case in state court which can be removed to federal court. This usually occurs when there is diversity of citizenship between the parties, but it can occur in federal question cases as well.

Determination of whether an action is removable to federal court is made under 28 U.S.C. 1441. The procedure for removal is contained in 28 U.S.C. 1446. Removal must occur within 30 days after the defendant receives a copy of the complaint, or within 30 days after the action otherwise becomes removable. Remember that a case can never be removed more than one year after the action was commenced.

To remove an action to federal court, all defendants must consent to its removal. Removal is accomplished by filing a notice of removal in district court which contains a short and plain statement of the grounds for removal. The notice of removal must also attach copies of all process, pleadings, and orders which have been served on the defendant in the state court action. Removal is ordinary made to the jury division containing the county where the action was filed. After filing the notice of removal, the removing party is required to serve copies of the notice on all adverse parties and with the clerk of the court from which the case was removed.

E. Discovery

Since the Kentucky Rules of Civil Procedure are substantially similar to the Federal Rules, discovery practice in federal court is much the same as in state court. However, practitioners should be aware that amendments to the Federal Rules of Civil Procedure which impact upon discovery practice were pending before Congress at the time of this writing. Final action should occur some time before the end of 1993. Again, it is always wise to review the applicable rules before proceeding with discovery.

The Joint Local Rules have several provisions relating to discovery practice. For example, certain discovery documents do not have to be filed with the court clerk. These include interrogatories, requests for production of documents, and requests for admissions. However, the answers to these discovery requests must be filed with the clerk. In addition, requests for admission must be filed if no response is filed within the time provided by Fed. R. Civ. P. 36.

The Joint Local Rules limit each party to 30 interrogatories and thirty requests for admission to another party. Each subpart is counted as a

separate interrogatory or request. To exceed this number, the attorney must request leave of court.

Often disputes among the parties will arise during the course of discovery. Joint Local Rule 6(a)(2) requires that the parties make a good faith effort to resolve any discovery dispute before seeking court intervention. If it is necessary to file a motion for a discovery order, the party filing the motion must attach a certification of counsel that counsel have conferred and have been unable to resolve the dispute.

Early in the course of the litigation, usually after the pleadings are joined, most judges in both the Eastern and Western Districts now either require the parties to file status reports or attend a status conference. The information gleaned from these reports or conferences permit the judge to establish a schedule for the progression of the litigation. This will usually include deadlines for the completion of discovery and the filing of dispositive motions, and may include dates for pretrial conferences and the trial. Although these deadlines are not set in stone, practitioners are advised to seek extensions of the deadline as soon as they appear necessary. Judges do not look kindly on motions for an extension of time which are filed on the day of the applicable deadline or after the deadline has expired.

F. Motion Practice

The two most important differences between motion practice in state court and federal court are the absence of a motion hour or rule day and the time limits for the filing of responses and replies in opposition and support of motions. Unlike in state court, most federal judges in Kentucky do not have a regular time set aside for hearing motions. Rather, the vast majority of all motions in federal court are decided on the written briefs. While a party can request a hearing on a given motion, the judges simply do not have the time to conduct hearings on most motions. Indeed, it will often be several weeks, or even months, after a motion becomes ripe before a judge will issue a ruling. The burgeoning federal criminal docket has reduced the amount of time judges have for consideration of civil cases.

The Joint Local Rules set time limits for responding to motions and for replying to the response. A party has fifteen days to respond to a motion. The party filing the motion has eleven days after the response is filed to file any reply memorandum in support of the motion. The reply memorandum is limited to those matters newly raised in the response.

All motions, except for routine motions such as for an extension of time, must be accompanied by a supporting memorandum. Memoranda supporting or opposing a motion are limited to 40 pages. Reply memoranda are limited to 15 pages. Memoranda which exceed 15 pages must contain an introduction, a statement (or counterstatement) of points and authorities, a statement (or counterstatement) of the case, an argument, and a conclusion.

All motions filed in district court must be accompanied by a proposed order. The clerk is required by the Joint Local Rules to refuse to accept any motion for filing if it does not attach a proposed order.

Given the heavy docket, it is advisable to keep motions and memoranda as brief as possible. Most judges will greatly appreciate memoranda which come directly to the point and do not waste time and space on irrelevant asides. Editorial comments about the merits of the opposing argument or the character of opposing counsel should be avoided at all costs. These comments appear much too often and are neither appreciated nor welcomed by the court.

G. Trial

A civil trial in federal court is basically conducted in the same manner as in state court. Differences in trial procedure usually result from the personal preference of the judge. If an attorney is unsure as to the procedure before a particular judge, it is essential to learn the appropriate procedure before the trial begins.

Voir dire practices will vary depending upon the judge. Some judges prefer to conduct most of the voir dire themselves. Other judges will leave most of the voir dire to the attorneys. In the Eastern and Western Districts most civil juries will consist of six jurors. However, the judge may impanel one or more additional jurors to ensure that at least six are available to consider the case. The use of alternates is no longer permitted by Fed. R. Civ. P. 48. Consequently, if jurors are not excused during the trial for illness or any other reason, all jurors who remain at the close of trial, so long as it is not less than six nor more than twelve, will participate in the decision.

One major difference the attorney may encounter in federal court is the order of the closing argument.

In state court, the defendant delivers the first closing with the plaintiff going last. Most federal judges ask the plaintiff to give the first argument. The defendant follows, and the plaintiff is then permitted to give a rebuttal argument, if the attorney has reserved rebuttal time. Another difference may involve the reading of the jury instructions. While in state court the instructions are read before the closing arguments, many federal judges read the instructions after the closing arguments. Again, it is wise to know in advance which practice a particular judge will follow.

H. Magistrate Judges

Both the Eastern and Western Districts have several full-time United States Magistrate Judges. The Magistrate Judges are invaluable resources for the judges and the practitioner.

Given the increasing criminal docket in federal court, parties in civil cases can move their cases along more quickly by consenting to practice the case before a Magistrate Judge. This consent must be in writing, and the clerk's offices have forms available for this purpose. There are several advantages in consenting to trial before a Magistrate Judge. These include the opportunity for an earlier trial date. Since a Magistrate Judge cannot conduct criminal trials, his or her docket is often less crowded and a civil trial date is unlikely to be bumped in favor of another proceeding. When the parties consent to a Magistrate Judge conducting all proceedings in a civil case, they may chose between an appeal to the district judge or a direct appeal to the Sixth Circuit. If the appeal is to the district judge then any further review by the Sixth Circuit will be discretionary.

The parties may also consent to have a Magistrate Judge consider particular motions in cases without a complete transfer. In addition, a judge may refer dispositive motions to Magistrate Judges for issuance of a report and recommendation. The parties then have the opportunity to file objections to the report and recommendation with the presiding judge.

Magistrate Judges are also used in civil cases to conduct settlement conferences and other types of pretrial management, including rulings on non-dispositive motions. For the general duties of Magistrate Judges review 28 U.S.C. 636.

IV. Criminal Practice

A. Preliminary Proceedings

A criminal proceeding may begin with the filing of a complaint against the defendant. The complaint must contain the essential facts constituting the offense charged. If the complaint demonstrates that there is probable cause to believe that an offense has been committed, then a warrant of arrest is issued by an appropriate judicial officer.

Once in custody, the defendant makes an initial appearance before the Magistrate Judge. At that time, the defendant is entitled to a preliminary examination by the Magistrate Judge who will determine whether there is probable cause to believe that an offense has been committed. The finding of probable cause may be based in whole or in part on hearsay evidence, and the defendant is given the opportunity to introduce evidence. If the Magistrate Judge determines that probable cause exists, the defendant must be held to answer in district court. If the Magistrate Judge determines that probable cause is lacking, the complaint must be dismissed and the defendant discharged. However, this dismissal does not prevent the United States from instituting a subsequent prosecution for the same offense.

If the Magistrate Judge determines that the defendant must be held to answer in district court and orders the defendant detained, the defendant is entitled to a detention hearing. Release conditions are governed by 18 U.S.C. 3142, and are beyond the scope of this chapter.

B. Indictment or Information

There are two methods of bringing formal charges against a criminal defendant in federal court. A federal grand jury may return an indictment against the defendant. In that instance, the United States Attorney presents testimony and evidence to the grand jury and the asks the grand jury to return the indictment charging specific criminal violations. Grand jury proceedings are secret, but indictments are returned to a United States Magistrate Judge in open court. However, the Magistrate Judge may seal the indictment until the defendant is in custody or has been released pending trial.

An information is similar to an indictment, but it does not come from a grand jury. Rather, an information is a charge made by the United States Attorney. Defendants have a constitutional right to have their case presented to a grand jury. However, a charge may proceed by infor-