

GUIDE TO PRACTICE

**IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF LOUISIANA**

Robert H. Shemwell
Clerk/Magistrate Judge
February 2009

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

300 Fannin Street
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Paula Jordan (Judge Melançon).....593-5005

Greta Roaix (Mag. Judge Hill).....593-5007

Chris Smith (Mag. Judge Methvin).....593-5021

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Lysandra Williams593-5024

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Molly Davenport.....593-5017

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INTRODUCTION

The Guide to Practice in the United States District Court for the Western District of Louisiana is designed for the assistance of practitioners before this Court. **IT IS NOT A DEFINITIVE STATEMENT OF THE LAW AND MAY NOT BE CITED AS SUCH!** The Guide is merely provided for the aid and assistance of those using this Court.

In General

The United States court system is divided into three (3) districts in the State of Louisiana: Eastern 28 U.S.C. 98(a); Middle 28 U.S.C. 98(b); & Western 28 U.S.C. 98(c). The Western District of Louisiana consists of 42 parishes bounded on the east by the Mississippi and Atchafalaya Rivers, on the north by the State of Arkansas, on the west by the State of Texas, and on the south by the Gulf of Mexico. The district is divided into 5 administrative divisions: Alexandria; Lake Charles; Lafayette/Opelousas; Monroe; & Shreveport. Court is regularly held in Alexandria, Lake Charles, Lafayette, Monroe and Shreveport. There are staffed offices of the clerk of court in each division, with the Lafayette/Opelousas office being located in Lafayette.

Filing Pleadings

The filing system for the Western District of Louisiana is electronic. **LR 5.7.01** It is mandatory that pleadings be filed electronically by all attorneys. **SO 1.94** Rules for electronic filing may be found in the "Administrative Procedures for Electronic Filing" a copy of which may be viewed on the court's website WWW.LAWD.USCOURTS.GOV Filings by pro se litigants or attorneys exempted from electronic filings should be mailed as follows:

**United States District Court
Western District of Louisiana
800 Lafayette Street, Suite 2100
Lafayette, La. 70501**

or

**United States District Court
300 Fannin Street, Suite 1167
Shreveport, La. 71101-3083**

If time is of the essence, pleadings may be filed at any division office of the Clerk. Each office of the clerk of court has a "drop box" for after-hours filing.

Pleadings **MAY NOT BE FILED BY FACSIMILE TRANSMISSION** in the Western District of Louisiana except in emergencies. Under **FRCP (5) (e)** "A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States." This Court has passed a rule permitting facsimile filing of pleadings only in emergency

situations with the prior authorization of a judge of the court **LR**

5.5W. This Court has a standing order prohibiting use of the Court's "FAX" machine for any purpose without prior authorization of a judge.

Location of the Record

Since February 1, 2005, the official record of cases in the Western District of Louisiana is electronic and maintained on the computer of the clerk of court. **LR 5.7.01** This record is available for viewing at any site of the clerk of court and also on-line on PACER. Access to the PACER system may be gained by a link on the court WEB SITE at "**WWW.LAWD.USCOURTS.GOV**".

This district has all case records on microfilm beginning January 1, 1977 and ending December 31, 1998. A complete set of microfiche case records are present in Shreveport at all times. A microfiche copy of each closed case record filed in a particular division is present in the Clerk's office for that division.

Beginning January 1, 1999, all case records have been scanned and recorded as electronic images. Therefore, all documents filed since that time are available at any office of the Clerk of Court on computer. The court has an Internet Web Site making these records accessible through WEB PACER for which a charge of \$0.08/page. The address of the court's Web Site is

WWW.LAWD.USCOURTS.GOV.

Indices

The indices in this Court are on microfilm and on-line on the computer (i.e, PACER or Web PACER). There is present in each division a microfilm index for the entire district both by party and by case. This includes all cases filed on or after January 1, 1977. There is also a computer terminal for on-line searches. There is a card index of earlier cases in Shreveport.

Venue

Venue is the location where the action is pending. As a matter of law, venue only applies to the district. There is no divisional right of venue. (Exception **28 U.S.C. § 1441(a)** which requires that a case be removed to the district & division where it is pending.) Normally cases are assigned to the division where the action arose or where a preponderance of the parties are located. However, assignment of cases is a matter of administration and is accomplished in accordance with the instructions of the Court.

Differences Between State & Federal Court

FEES. In state court a deposit must be made prior to filing a suit, and there is a charge for each document filed in the case. In federal court there is an initial filing fee, normally \$350, for the filing of the Complaint. Generally, there is no fee for filing any subsequent pleadings in the court (one exception is a notice of appeal which costs \$455).

JURIES. In state court a deposit must be made to cover the cost of a jury. In federal court there is no charge when a party

requests a jury. However, if the parties fail to timely notify the Court of a settlement and the jurors appear needlessly, one or both of the parties may be assessed jury costs under **LR 54.1**.

CASE MANAGEMENT. In state court the attorney is permitted to mainly control the pace of the litigation. In federal court once the complaint is filed, the court takes control of the management of the case. Calendaring for scheduling conferences, status conferences, settlement conferences, pretrial conferences and trials is controlled by the Court. Informal or voluntary extensions of time between attorneys are not recognized by the Court, unless ordered or approved by the Court. If the attorneys fail to move the case, the action may be dismissed for failure to prosecute under **LR 41.3W** (e.g. no service of process within 120 days of the filing of the complaint, or failure to join issue by answer or default within 60 days after service of process).

EXECUTION OF JUDGMENTS. This is one area where there is very little difference between state and federal court. Under **FRCP 69 (a)** "The procedures on execution * * * shall be in accordance with the practice and procedure of the state in which the district court is held..." If the judgment is in favor of the United States, however, special rules apply, and the **Federal Debt Collection Procedures Act, 28 U.S.C. 3001, et seq.** should be followed.

Miscellaneous

The Clerk's office will attempt to work with the bar and the public in any way possible. When an attorney presents a document for filing which does not comply with the federal rules or the local rules, the Clerk will bring this to the attention of the attorney to allow the attorney to correct any deficiencies. If deficiencies are not corrected within a reasonable time, the pleadings are subject to being stricken from the record.

The docket records of the court may be accessed electronically by a system known as PACER (Public Access to Court Electronic Records). Under this system an attorney may access the electronic docket records of the court by means of a PC and an internet connection. WEB PACER, which includes images of all documents filed on or after January 1, 1999, also available on the Internet. Information on access to PACER and a link to PACER may be found at the court's website www.LAWD.USCOURTS.GOV

The pages following cover specific areas of practice in this Court. If you have questions which are not covered in this guide, please feel free to call the Clerk's office for assistance.

Robert H. Shemwell
Clerk of Court

GENERAL RULES OF PLEADING

FRCP 10 & 11, LR 10.1 & 38.1

Requirements of Pleadings:

1. Letter-sized paper (8 ½" X 11") **LR 10.1W**
2. Caption **FRCP 10(a) & LR 10.1W**
 - a. Name of the Court.
 - b. Division of the Court.
 - c. Title of the action

NOTE:

In the original Complaint, the title of the action shall include the names of all parties, but in other pleadings it is sufficient to state the name of the first plaintiff, et al., and the name of the first defendant, et al.

- d. Civil Action Number.
- e. Judge & Magistrate Judge designation.
- f. Name of pleading (e.g. "Complaint", "Answer", etc.). See **FRCP 7**.
- g. Jury Demand (if one is contained in the pleading). See **LR 38.1**

EXAMPLE OF A CAPTION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

PAUL PLAINTIFF, ET AL	NO. 5:91cv1234
VERSUS	JUDGE STAGG
DON DEFENDANT, ET AL	MAG. JUDGE HORNSBY

ANSWER WITH JURY DEMAND

3. Signature. **FRCP 11 & LR 11.1W & 11.2**

- a. Original signature of an attorney authorized to practice before this Court.
- b. Attorney Information (printed or typed).
 - (1) Name of Attorney.

NOTE:

If more than one attorney appears for a single party, there must be a designation of Trial Attorney (TA).

- (2) Name of Law Firm.
- (3) Address.
- (4) Telephone Number.
- (5) Attorney Identification Number. (which is the same as the Louisiana Bar Number for attorneys admitted to practice before this Court)

CAVEAT!

Facsimile signatures or a signature by anyone other than the attorney or pro se litigant personally will not be accepted!

NOTE!

Under **Fed.R.Civ.P. 11(a)** an unsigned paper will be filed by the Clerk, but stricken if not signed "promptly after being called to the attention of the attorney or party."

EXAMPLE OF SIGNATURE INFORMATION

I. M. Attorney, T.A.
Attorney, Barrister & Counsel
123 Main Street
Shreveport, LA 71101
(318) 226-1234
ID# 12345

4. Certification of Service. **FRCP 5(d) & LR 5.3**

A copy of all pleadings & motions after the original complaint must be served on all parties and a certification of service must be filed with the pleading or motion with the clerk of court. This does not apply to disclosure or requests for discovery or responses to requests for discovery exempted from filing with the clerk of court under **Fed.R.Civ.P. 5(d)**.

NOTE!!!

Unless time is of the essence, All Pleadings Should Be Filed By Mailing to -

Robert H. Shemwell, Clerk
300 Fannin Street, Suite 1167
Shreveport, La. 71101-3083

or

Robert H. Shemwell, Clerk
800 Lafayette Street, Suite 2100
Lafayette, La. 70501

as set forth on page 2 above.

If time of filing is important, pleadings may be presented in person to any office of the Clerk of Court in the Western District of Louisiana or deposited after hours in the "drop boxes" located at each office of the Clerk of Court.

FILING OF NEW SUITS

CHECKLIST FOR FILING A NEW SUIT:

1. Complaint.
2. Civil Cover Sheet.
3. Filing Fee.
4. Process (for each defendant to be served).
 - a. Summons (original & one copy); &
 - b. Copy of the Complaint.

COMMENTS:

1. Complaint. **FRCP 3, 8, & 10(a)**

In the original Complaint, all parties must be listed in the "Title" of the action. Subsequent pleadings need only list the first plaintiff and the first defendant with an appropriate designation if there are more parties, e.g. "et al."

2. Civil Cover Sheet. **LR 10.1W**

This is a form available at any office of the clerk of court. It facilitates statistical court records which are kept on all actions filed.

3. Filing Fee.

- a. The normal filing fee for a civil action is **\$350. 28 U.S.C. 1914**
- b. The filing fee for an application for a writ of habeas corpus (including a petition under **28 U.S.C. 2254**) is **\$5.00. 28 U.S.C. 1914**
- c. Applications to proceed In Forma Pauperis (i.e. without prepayment of fees) **28 U.S.C. 1915**
 - (1) An application to proceed In Forma Pauperis is required.
 - (2) An affidavit in support of the application must be submitted. The form for this affidavit may be secured from any office of the Clerk of Court.

(3) An order either granting or denying In Forma Pauperis status will issue from the Magistrate Judge.

d. A seaman may proceed without prepayment of costs.

28 U.S.C. 1916

NOTE:

A party who is not responsible for prepayment of costs IS RESPONSIBLE FOR COSTS and will be billed at the conclusion of the case!

4. Process. A summons & a copy of the Complaint must be served upon each defendant, **FRCP 4(a)**, unless defendant signs a waiver of service. **FRCP 4(d)**

a. Waiver of Service. **FRCP 4(d)**

(1) Procedure

(a) Plaintiff sends to defendant a Notice of Lawsuit & Request for Waiver of Service of Process **Form 1A** -

- 1- In writing addressed to the defendant;
- 2- By First Class Mail "or other reliable means"
- 3- Accompanied by a copy of the complaint, identifying the court where it was filed;
- 4- Informing defendant of the consequences of waiver or failure to waive;
- 5- Setting forth the date the notice and request was sent;

NOTE:

It is important that this date be included since it sets the time from which response is due!

- 6- Allowing defendant a reasonable time (at least 30 days) to respond; &
- 7- Providing an extra copy of the notice and request and a prepaid means of compliance in writing.

- (b) If defendant waives service of process, the action proceeds just as if service had been made except - The time for filing an answer is 60 days from the date upon which the notice and request was sent to the defendant. **FRCP 4(d)(3) & 12(a)(1)(B)**
 - (C) If a defendant fails to waive service "costs subsequently incurred in effecting service on the defendant" may be imposed "unless good cause for the failure is shown." **FRCP 4(d)(2)**
- (2) Waiver of service is equivalent to service of process except -
- (a) There is no waiver of "any objection to the venue or to the jurisdiction of the court over the person of the defendant." **FRCP 4(d)(1)**
 - (b) Time to answer is 60 days from mailing of the request for waiver. **FRCP 4(d)(3) & 12(a)(1)(B)**
- b. Issuance. **FRCP 4(b)**
"The plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant."
- c. Obligation to Serve. **FRCP 4(c)(1)**
"The plaintiff is responsible for service of a summons and a complaint. . ."
- d. Who can serve a summons & complaint? **FRCP 4(c)(2)**
"Service may be effected by any person who is not a party and who is at least 18 years of age."
- NOTE:**
- At the request of a party, the court may direct that service be made by the U.S. Marshal or a special process server!
- e. When must service be by a U.S. Marshal or a specially appointed process server? **FRCP 4.1**
"Process, other than a subpoena or a summons and complaint, shall be served by a United States Marshal or deputy United States Marshal, or a person specially appointed for that purpose."

f. How can process be served?

(1) ON AN INDIVIDUAL -

- (a) By personal delivery. **FRCP 4(e) (2)**
- (b) Domiciliary service (i.e. "leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age or discretion then residing therein. . .") **FRCP 4(e) (2)**
- (c) Delivery to an authorized agent. **FRCP 4(e) (2)**
- (d) Under the law of the State of Louisiana **FRCP 4(e) (1)**
For example under Long Arm Service under L.A.-RS 13:3201, et seq.

(e) Under the law of the state where service is effected. **FRCP 4(e) (1)**

(2) ON A CORPORATION, PARTNERSHIP OR UNINCORPORATED ASSOCIATION.

- (a) Delivery to an officer, managing or general agent or to an agent appointed for service of process. **FRCP 4(h) (1)**
- (b) Under the law of the State of Louisiana **FRCP 4(h) (1)**

For example under Long Arm Service under L.A.-RS 13:3201, et seq.

(C) Under the law of the state where service is effected. **FRCP 4(e) (1)**

(3) ON THE UNITED STATES OF AMERICA. **FRCP 4(I)**

(a) Delivery to the United States Attorney by -

-1- Personal delivery to

-a- the U. S. Attorney

-b- an Assistant U. S. Attorney

-c- an employee of the U. S. Attorney
designated for service of process

-2- Registered or certified mail addressed to the
"civil process clerk" at the U. S. Attorney's
office.

- (b) Registered or certified mail to the United States Attorney General.
- (c) Registered or certified mail to the head of any agency of the United States that is being sued.

Note:

If an officer of employee of the United States is being sued in an individual capacity in connection with their service with the government, the United States must be served as set forth above **AND** the officer of employee must be served individually as provided in **Fed.R.Civ.P. 4(e), (f) or (g)** [i.e. normal service on an individual]. **Fed.R.Civ.P. 4(i) (2)**.

g. What is proof of service?

- (1) Form "USM 285" is proof of service by a United States Marshal. **FRCP 4(1)**
- (2) An affidavit of service is proof of service by anyone other than a United States Marshal.
FRCP 4(1)
 - (a) Under **28 U.S.C. 1746** an unsworn declaration under penalty of perjury may be substituted for an affidavit.
 - (b) The proof of service must bear an original signature. A photocopy is not sufficient.
 - (c) If proof of service is made on a copy of the reverse side of a subpoena, the front must also be copied to indicate what was served.
- (3) When Long Arm Service is made, proof of service is an affidavit of mailing along with the return receipt.
L.A.-RS 13:3205

h. How do you serve process in a foreign country? **FRCP 4(f)**

- (1) "by any internationally agreed means reasonably calculated to give notice, such as those means

authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;"

- (2) "if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:
- (a) In the manner prescribed by the law of the foreign country;
 - (b) As directed by the foreign authority in response to a letter rogatory or a letter of request;
 - (c) By personal delivery;
 - (d) By mail from the clerk of court with a return receipt.

Note:

To use this method, deliver to the clerk of court:
 (1) the documents to be served & (2) a check payable to the U. S. Postmaster for the amount of postage required.

I. Is there a time limit for service of process?

- (1) Service of the summons and complaint must be made upon a defendant within 120 days of the filing of the complaint. **FRCP 4(m)**

"the court * * * shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period."

- (2) Under local rule **LR 41.3W** a defendant may be dismissed "where no service of process has been made within 120 days after filing the complaint."

NOTE:

"The Order of Dismissal shall allow for reinstatement of the action within thirty (30) days for good cause shown."

MOTIONS

FRCP 7(b) & LR 7, 37, 56, 58

1. "An application to the court for an order shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." FRCP 7(b)(1)
2. Form.
 - a. NOTICE. It is not necessary for the attorney to file a "notice" with the motion. The Clerk of this Court will issue a "notice" of the motion immediately upon filing.
 - b. BRIEF. A brief must accompany each motion (except for those ex parte motions set forth in **LR 7.4.1W**).
 - (1) A brief may not exceed 25 pages without permission of the Court. **LR 7.8W**
 - (2) A reply brief (which is any brief other than an original brief in support of or in opposition to the motion) may not exceed 10 pages. **LR 7.8W**
 - (3) Any brief exceeding 10 pages must have - **LR 7.8W**
 - (a) A table of contents with page references; &
 - (b) A table of cases (arranged alphabetically), statutes and other authorities cited, with references to the pages of the brief where they are cited.
 - c. MOTIONS NOT REQUIRING A BRIEF. **LR 7.4.1W**
 - (1) Those ex parte motions listed in **LR 7.4.1W** do not require a brief, but "must state the grounds therefor and cite any applicable rule, statute, or other authority justifying the relief sought."
 - (2) "Prior to filing any motion under this section, with exception of a motion to withdraw as counsel, the moving party shall attempt to obtain consent for the filing and granting of such motion and a certificate of this attempt shall be included in the motion."
 - d. MOTIONS FOR LEAVE OF COURT TO FILE A PLEADING OR DOCUMENT. **LR 7.6W**

- (1) Consent of opposing party must be sought prior to seeking leave of Court to file any pleading or document.
- (2) If the opposing party consents, the motion will be considered ex parte.

e. MOTIONS FOR SUMMARY JUDGMENT. **LR 56.1 & 56.2E&W**

- (1) STATEMENT OF MATERIAL FACTS NOT AT ISSUE. "Every motion for summary judgment shall be accompanied by a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried."
- (2) STATEMENT OF MATERIAL FACT AT ISSUE. An opposition to a motion for summary judgment "shall include a separate, short and concise statement of the material facts as to which there exists a genuine issue to be tried."
- (3) ADMISSION OF MATERIAL FACTS. "All material facts * * * will be deemed admitted, for the purposes of the motion, unless controverted as required by this rule."

f. PROPOSED ORDERS (To grant relief sought).

- (1) Every ex parte motion should be accompanied by a proposed order. **LR 7.4.1W**
- (2) Every discovery motion should be accompanied by a proposed order. **LR 37.1W**
- (3) A proposed order shall be on a page separate from the motion and shall bear a caption. **LR 58.1**

3. Notice & Hearing.

a. NOTICE OF MOTION. Immediately upon the filing of every adversary motion, the Clerk will issue a "Notice" setting forth the following:

- (1) The nature of the motion & the name of the party filing such motion;
- (2) The briefing schedule for the parties;
- (3) The judge's policy on oral argument;
- (4) The "hearing" date for the motion.

b. ORAL ARGUMENT.

- (1) "Oral argument will be allowed only when ordered by the Court. All other motions will be decided by the Court on the basis of the record, including timely filed briefs and any supporting or opposing documents filed therewith." **LR 78.1W**
- (2) Oral argument may be granted by the court on the motion of a party or ex proprio motu.

c. HEARING.

- (1) No hearing on a motion will be held unless specifically ordered by the Court. The "hearing" date in the motion notice is the date upon which the motion is submitted to the judge or magistrate judge.
- (2) If a hearing is held, there can be no oral testimony offered without prior authorization of the Court.
LR 43.1

DISCOVERY

FRCP 26-37 & LR 26, 33 & 37

1. DISCOVERY & DISCLOSURE MATERIALS (i.e. discovery requests & responses or any disclosures) ARE NOT FILED WITH THE COURT. **LR 26.5W & FRCP 5(d)**
 - a. Discovery is generally a matter between counsel for the parties.
 - b. Exceptions:
 - (1) Disclosures under Rule 26(a)(1) or (2) and the following discovery requests must not be filed unless **they are used in the proceeding or the court orders filing** .(i) depositions (ii) interrogatories (iii) requests for documents or to permit entry upon land, and (iv) requests for admission. **FRCP 5(d)**
 - c. The party making a discovery request is custodian of any discovery materials produced in response to that request. **LR 26.5**
2. LIMIT ON INTERROGATORIES. No more than 25 interrogatories may be propounded without leave of court. **FRCP 33(a)**
3. REQUESTS FOR PRODUCTION. **LR26.5**
 - a. "Prior notice of any commanded production of documents and things * * * before trial shall be served on each party..." **FRCP 45(b)(1)**
4. FORMAT OF DISCOVERY REQUESTS. **LR 26.2M & W**
 - a. Each discovery request shall have a space left after it sufficient to permit response to such request.
 - b. If the space left for response to a request is insufficient, the person responding shall repeat the request prior to making the response.
5. MOTIONS TO COMPEL DISCOVERY. **FRCP 37(a)(2)(A) & LR 37.1W**
 - a. Requirements:

- (1) A copy of the discovery request in question along with any response thereto must be attached to any motion to compel.
- (2) A certificate that amicable efforts to resolve the discovery dispute have been attempted must be attached to every motion to compel.
 - (a) Counsel for mover must have arranged a conference either personally or by telephone to settle the dispute.
 - (b) Mover must set forth the reason why settlement was not reached or the fact that the opposing party refused to confer if such is the case.
 - (c) Sanctions may be imposed for failure to confer or failure to confer in good faith.
- (3) Every discovery motion must be accompanied by a proposed order covering the relief sought, which proposed order must bear a caption and be on a separate page from the motion. **LR 37.1W**

- b. Motions to compel are noticed in the same manner as all adversary motions with the notice including briefing times, the judge's policy on oral argument, etc.

6. Depositions **FRCP 30**

- a. Prisoners. A party must obtain leave of court if the person to be examined is confined in prison. **FRCP 30 (a) (2)**
- b. Number of Depositions (without leave of court):
 - (1) Ten (10) per side **FRCP 30 (a) (2) (A)**
 - (2) One (1) per witness **FRCP 30 (a) (2) (B)**
- c. Method of Transcription
 - (1) "The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a

deposition taken by nonstenographic means." **FRCP 30 (b) (2)**

- (2) "The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means."
FRCP 30 (B) 7)

d. Time Limit of Deposition

- (1) A deposition is limited to one day of seven (7) hours.
FRCP 30 (d) (2)
- (2) The court must allow additional time consistent with Fed.R.Civ.P. 26(b) (2) if needed for a fair examination of the deponent or if the deponent or another person or other circumstance impeded or delays the examination.
FRCP 30 (d) (2)

SUBPOENAS

FRCP 45

1. ISSUING COURT. A subpoena can only issue from the Court for the district where the witness is to appear or where production is to be made. **FRCP 45 (a) (2)**

2. WHO CAN ISSUE A SUBPOENA? **FRCP 45 (a) (3)**
 - a. The Clerk of Court; &
 - b. An attorney (as officer of the court) on behalf of -
 - (1) A court where the attorney is authorized to practice; or
 - (2) Another district court if the subpoena "pertains to an action pending in a court in which the attorney is authorized to practice."

3. FORM OF THE SUBPOENA. **FRCP 45 (a)**
 - a. Requirements:
 - (1) Name of the court issuing the subpoena (which must be the district where the defendant will appear);
 - (2) Name of the action, name of the court where the action is pending & the civil action number;
 - (3) A command to appear & give testimony or to produce documents;
 - (4) A recitation of **FRCP 45 (c) & (d)**;
 - (5) Signature of the issuing official (either the Clerk or the attorney).
 - b. There is no longer a requirement that the "Seal" of the Court appear on a subpoena!
 - c. "A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately." **FRCP 45 (a) (1)**
 - d. "The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service." **FRCP 45 (a) (3)**

4. SERVICE OF A SUBPOENA. **FRCP 45 (b)**

- a. Who may serve a subpoena? "A subpoena may be served by any person who is not a party and is not less than 18 years of age."
- b. How is service made?
- (1) By delivering a copy to such person, and
 - (2) By tendering to that person the fees for one day's attendance and the mileage allowed by law (if the person's attendance is commanded).
 - (a) "A witness shall be paid an attendance fee of \$40 per day for each day's attendance." 28 U.S.C. 1821 (b)
 - (b) Mileage allowance is \$0.375 per mile.

Note:

This is the same mileage allowed for federal employees under **5 U.S.C. 5704** and changes from time to time.

c. Where may a subpoena be served?

- (1) A subpoena may be served at any place within the State of Louisiana. See **FRCP 45 (b) (2)**, **L.A.-R.S. 13:3661, & La.CCP 1351 & 1356**
- (2) "At any place * * * that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena." (Including locations outside of the State of Louisiana)

d. Does proof of service of a subpoena need to be filed?

- (1) Ordinarily, proof of service of a subpoena does not have to be filed with the Court.
- (2) Proof of service must be filed whenever there are proceedings to enforce the subpoena or for any other relief connected with such subpoena.

5. NOTICE OF CANCELLATION OF A SUBPOENA. **LR 45.2**

- a. It is the duty of the attorney who issues a subpoena to notify the witness of any cancellation of the trial, hearing or deposition.
- b. Failure to notify a witness of cancellation may result in sanctions on the attorney who issued the subpoena.

DEFAULT JUDGMENT**FRCP 55 & LR 55.1W**

CHECKLIST:

1. Proof of service of process.
2. Motion for entry of default
3. Entry of Default.
4. Judgment by Default.

NOTE:

Under **FRCP 55** default judgment is a two-step process: (1) "Entry" of Default, & (2) "Judgment" by Default. The procedure in this Court parallels the Louisiana State Court procedure of "preliminary" default and "confirmation" of default. Under **LR 55.1W** default is "entered" after delays for answering have elapsed. A ten day delay is required between "entry" and signing of a "judgment" by default.

COMMENTS:

1. ENTRY of Default.
 - a. A request for entry of default must be presented to the Clerk in writing.
 - b. No request for entry of default will be considered unless there is proof of service of the summons and complaint filed in the record.
 - c. Delay for answering. A defendant has 20 days from service of the summons and complaint upon such defendant to file an answer to the complaint, **FRCP 12(a)** EXCEPT as follows:
 - (1) The United States has 60 days to answer;
 - (2) When service is by the Long Arm Statute, **L.A.-R.S. 13:3205**, default cannot be entered until a delay of 30 days from the filing of the affidavit of service has elapsed.

(3) When a motion is filed, the time for answering is extended until 10 days after notice of the Court's action on the motion (or when a motion for more definite statement is granted, until 10 days after service of the "more definite statement"). **FRCP 12(a)**

(4) When there has been a waiver of service, the time for answering is sixty (60) days from the date of mailing of the request for waiver of service. **FRCP 4(d)(3)**

2. JUDGMENT By Default.

a. "A judgment of default shall not be entered until ten (10) calendar days after entry of default." **LR 55.1W (c)**

b. An application for a default judgment should be by a "Motion For Default Judgment" and a proposed "Judgment by Default".

c. Judgment BY THE CLERK. **FRCP 55(b)(1)**

(1) "When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain" the Clerk can enter a judgment by default. **FRCP 55(b)(1)**

Note:

Default judgments by the Clerk normally include actions such as a suit on a promissory note, a suit on open account, etc.

(2) Proof required for default judgment:

(a) "Entry" of default;

(b) Affidavit of account by a proper official (not the attorney for plaintiff);

(c) Affidavit showing the defendant is not an infant or incompetent person; **FRCP 55(b)(1)**

(d) Affidavit showing the defendant is not in the active service of the armed forces; **50 U.S.C.App. 520**

- (e) Any other proof required by the nature of the claim (e.g. a promissory note).
- d. Judgment BY THE COURT. **FRCP 55 (b) (2)**
 - (1) Any claim which cannot be submitted to the Clerk should be submitted to a District Judge.
 - (2) Proof Required for a default judgment:
 - (a) "Entry" of default;
 - (b) Documentary proof;
 - (c) Live testimony.

CAVEAT: If live testimony is required, plaintiff must apply to the Court for an evidentiary hearing and receive permission to present witnesses under **LR 43.1**. A list of witnesses & a brief summary of their expected testimony should be included in any request.

- 3. Setting aside ENTRY of Default or JUDGMENT by Default.
 - a. "Entry" of default can only be set aside by a motion to the Court "upon good cause shown". **FRCP 55**
 - b. "Judgment" by default can only be set aside under **FRCP 60 (b)** .

NOTE!!!

No pleadings will be filed on behalf of a defendant against whom default has been entered except a motion to set aside the default under **FRCP 55 (c)** .

TAXATION OF COSTS

I. Introduction

This section on costs has been prepared to assist attorneys and litigants in the filing of bills of costs. **It is not a definitive statement of the law and may not be cited as such!** Any questions on filing a bill of costs should be directed to the Clerk's Office.

II. Taxation of Costs - In General

A. Award of Costs

Generally, the **prevailing party** is allowed costs as pursuant to **Federal Rule of Civil Procedure 54(d)**. Most of the time a judgment will state who is awarded costs. However, in the absence of such language, the prevailing party will be presumed to have been awarded costs. A prevailing party is allowed a limited range of costs under **28 U.S.C. §1920**.

B. Taxation by the Clerk

In the Western District, costs are taxed by the Clerk's Office. **LR 54.4M&W** A party who disagrees with the clerk's determination of costs may then file a motion to review with the judge who is assigned to the case. **LR 54.5** The judge will then review the costs that were taxed by the clerk and make a ruling.

III. Notice of Application to Have Costs Taxed

A. Notice. A party entitled to costs shall, within **30 days after receiving notice of entry of judgment**, serve on the attorney for the adverse party and file with the clerk a **notice of application to have costs taxed together with a memorandum** signed by the attorney of record. **LR54.3**.

1.. Documentation

a. It is important for counsel to include in their memorandum documentation on each item of costs and an explanation as to why each item of costs should be allowed.

b. In addition, claims for docket fees under **28 U.S.C. §1923** should be itemized.

c. It is important to note that the clerk can disallow any expenses that do not have an explanation or supporting documentation.

B. A party claiming costs should file a verified bill of costs as required by **28 U.S.C. §1924**.

a. A party can file the standard federal form, AO 133, which is available on the court's website (www.lawd.uscourts.gov) or by calling the clerk's office.

b. This form contains a worksheet to capture fees and expenses of witnesses and also contains an affidavit.

NOTE: If you wish to create a Bill of Costs on-line, click on the following "[Form AO 133 Bill of Costs](#)" and you will be able to complete the form on-line and print off the result!

C. Objections to a Bill of Costs.

Objections to a bill of costs must be filed "**within five days**" from the receipt of the application. **LR54.4M&W.**

D. Taxation by the Clerk.

After objections are filed, the clerk then taxes costs. **Pursuant to Fed.R.Civ.P. 54(d)**, costs may be taxed by the clerk on one day's notice.

E. Review of Taxation.

1. A party who is dissatisfied may file **within 5 days after taxation of costs, a motion to review** the action of the clerk. **LR54.5 and Fed.R.Civ.P. 54(d)**.

2. A motion to review is decided by the district judge who is assigned to the case.

IV. Items Taxable As Costs

A. Fees of the Clerk and the Marshal:

1. Filing fee of complaint under **28 U.S.C. §1914** and removal fees.

2. The United States as the prevailing party can recover filing fees under **28 U.S.C. §1914** and docket fees under **28 U.S.C. §1923**, even if these costs were never actually pre-paid.

3. Fees charged by out of district federal courts for filing notice of taking deposition.

_____ B. Fees of the Court Reporter For All or Any Part of the Transcript Necessarily Obtained For Use in the Case:

1. Depositions.

a. Costs are taxed for depositions -

(1) placed into evidence at trial,

(2) used for impeachment and cross-examination purposes

(3) used in support of a successful motion for summary judgment.

NOTE: When depositions are claimed as costs, counsel should provide an explanation of how the deposition was used, the deponent's name and costs for that deposition. If several depositions are listed together on one invoice, counsel should itemize the costs of each deposition and provide the name of the deponent. In addition, counsel should clearly note if the deposition was entered into evidence at trial, used in support of a successful motion, used for impeachment purposes or relied upon for cross-examination.

- b. **Costs are NOT allowed** for depositions
 - (1) that are not entered into evidence,
 - (2) that are used only for discovery purposes,
 - (3) for additional copies of depositions,
 - (4) In addition, travel costs for an attorney to attend a deposition are not allowed.
 - 2. Videotaped Depositions
 - a. Videotaped depositions are allowed as taxable costs if entered into evidence
 - b. Other use of videotaped depositions are only allowed at the discretion of the judge.
 - 3. Other deposition and transcript costs may be taxed only at the discretion of the district judge.
- C. Fees for Witnesses
- 1. Allowance of witness fees is limited to those days on which trial testimony is actually given.
 - 2. Allowance of witness fees for attendance at trial on days other than on which testimony is given is a matter left to the trial court's discretion, based upon the necessity of the presence of the witness.
 - 3. Allowable fees for a witness:
 - a. **Attendance Fees.** Attendance fees of \$40.00 per day are allowed for each day the witness testified. **See 28 U.S.C. §1821(b).**
 - b. **Mileage Fees.**
 - (1). **Privately Owned Automobile:** Mileage fees to and from the courthouse are allowed for the use of privately owned automobiles at the government rate in effect at the time of the trial.

NOTE: Current mileage fees are 40.5 cents per mile which became effective February 4, 2005. Contact the clerk's office for prior rates.
 - (2) **Common Carrier:** A witness who travels by common carrier shall be paid for the actual

expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

See 28 U.S.C. §1821 (c) (1) .

NOTE: If counsel does not provide a receipt, costs will automatically be disallowed!

c. **Subsistence Fees:** A subsistence allowance is paid to a witness when an overnight stay is required because the witness lives too far to travel back and forth each day from their residence to the courthouse to attend trial. A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to **5 U.S.C. §5702 (a)**, for official travel in the area of attendance by employees of the Federal Government. Please contact the clerk's offices for the current per diem amounts in the individual cities in the Western District. A witness is allowed a reduced amount (presently \$38.00) for the last day of testimony, which involved an overnight stay, to return to their residence.

d. **Federal employees** are not allowed attendance fees but may receive the mileage and subsistence allowance for overnight stays.

e. **Real parties in interest** are not entitled to fees or allowances as witnesses.

f. **Expert witnesses** are allowed only the same fees as other witness are allowed - attendance fees, mileage and subsistence. Special "expert" witness fees are not allowed.

g. Toll charges or toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees shall be paid in full to witnesses incurring such expenses. **See 28**

U.S.C. §1821 (c) (3) .

D. Fees for Service of Summons and Subpoena. It is the policy of this office to allow service fees for those witnesses who testified at trial and whose deposition attendance fees were determined to be properly taxable. The following service fees are allowed:

1. Service fees for summons and other initial process.
2. Service fees for trial subpoenas for witnesses who testified at trial

3. Service fees for deposition subpoenas for witnesses whose depositions were used at trial
4. United States Marshal fees pursuant to **28 U.S.C. §1921.**

E. Fees for Printing, Photocopying and Exemplification.

1. It is the policy of this office to allow the copying costs of those documents which are placed in evidence at trial or those which were used for a successful motion for summary judgment or other successful motion.
2. Items which are obtained merely for the convenience of a party in preparing for trial **are not taxable without pre-trial authorization from the trial court.**
3. Routine copy expenses such as copies of documents to exchange between counsel are not allowed.
4. Expenses for photographs, graphic enlargements, charts, models, demonstrative evidence, and other exhibits are not allowed unless ordered by the court.

F. Other Costs that are Taxable. Other costs that are taxable include the following:

1. Bond premiums
2. Interpreter fees upon order of court.
3. Burning of CD's for use in trial if ordered by the court
4. Costs on Appeal: The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs (see FRAP 39):
 - a. Preparation and transmission of record;
 - b. Reporters transcript, if needed, to determine the appeal;
 - c. Premiums paid for a supersedeas bond or other bond to preserve the rights pending appeal;
 - d. The fee for filing the notice of appeal.

V. Items Not Taxable As Costs

- A. "Special" expert witness fees (Experts allowed same costs as any other witness)
- B. Attorney travel expenses to attend depositions
- C. Attorney fees (Not taxable by the clerk in a bill of costs; must be applied for in a motion filed with court within 14 days of judgment)
- D. Postage
- E. Federal Express or other like charges
- F. Long distance telephone calls

- G. FAX charges
- H. Copies sent to opposing counsel
- I. Investigative or consulting services

VI.. Appeal of Taxation of Costs

- A. District Court
 1. A party who does not agree with the clerk's taxation of costs can then file a **motion to review costs within 5 days of the clerk's taxation of costs. Fed.R.Civ.P. 54(d) and LR 54.5.**
 2. The motion to review will be considered by the judge who tried the case.
 3. A motion to review will be considered on the basis of material already submitted to the court in the bill of costs.
- B. Court of Appeal
 - 1.If a party is still unhappy with the judge's ruling, then the party can appeal to the Court of Appeal.
 2. The standard for appellate review of a district court's determination of costs is abuse of discretion.

VII. Miscellaneous Items on Taxation of Costs

- A. Filing of an appeal does not suspend taxation of costs unless a judge has stayed the case pending appeal.
- B. If post trial motions are filed, the bill of costs must be filed 30 days after the ruling on the last post trial motion.
- C. A judgment is "entered" on the date that it is recorded in the court's docket.
- D. The clerk's office cannot review a motion for costs that also contains a motion or application for attorney's fees. It is therefore recommended that prevailing parties not combine an application for attorneys fees in a bill of costs. These should be submitted as two separate documents.
- E. If parties settle costs before costs have been taxed, counsel should notify the clerk's office that the matter has been settled and shall file a stipulation stating that the issue has been resolved.
- F. For Costs on Appeal, see **F.R.A.P. 39.**

G. Once the matter of costs has been determined, costs should be paid directly to the prevailing party and not the court.

H. For problems with collection of costs, prevailing parties should consult Louisiana law on procedures to execute judgment.

REMOVAL OF CASES FROM STATE COURT

28 U.S.C. 1441, et seq.

CHECKLIST:

1. Notice of Removal
2. Copy of State Court filings
3. Filing Fee (\$350)
4. Civil Cover Sheet
5. Notice to other parties & the Clerk of the State Court.

COMMENTS:

1. ACTIONS REMOVABLE GENERALLY **28 U.S.C. 1441**

"Any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

2. NOTICE OF REMOVAL **28 U.S.C. 1446(a)**

a. Formerly known as a "petition for removal".

b. Requirements:

- (1) Signed in accordance with **FRCP 11**;
- (2) "A short and plain statement of the grounds for removal";
- (3) "A copy of all process, pleadings, and orders served upon" the party removing the action.

3. TIME FOR REMOVAL **28 U.S.C. 1446(b)**

a. Notice of removal must be filed within 30 days of -

- (1) Service of summons or initial pleadings in an action, or

- (2) "Receipt by the defendant * * * of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. 1446(b)

Note:

If the case arises under diversity of citizenship jurisdiction, the case must be removed within 1 year of commencement of the action.

4. REMOVAL ORDER

- a. Immediately upon the filing of a notice of removal, an order will issue from the Court setting forth the requirements for the parties to the removed action.
- b. Contents of the removal order. **28 U.S.C. 1447**
- (1) Obligations of removing defendant:
- (a) File a list of all attorneys appearing in the case together with the parties they represent;
 - (b) File copies of all records and proceedings which occurred in the State court prior to removal;
 - (c) File a list of all documents filed in the State court, arranged by date of filing;
 - (d) File a certificate that the entire State court record has been filed in the federal court;
 - (e) Transfer any "registry" funds from the State court to the federal court;

Note:

This only includes funds held for the benefit of the litigants, not any funds on deposit with the State court to cover the costs of filing documents.

(2) Obligations of all parties:

- (a) Refile any pending and undecided State court exceptions or motions as "Motions" in the federal court; (if not refiled, State Court exceptions or motions will not be decided)
- (b) If any attorney who appeared in the State court action is not admitted to practice before the federal court, within 20 days from removal, the attorney must:
 - 1- File an application to practice before the federal court; or
 - 2- File a motion for admission to practice before the federal court "pro hac vice"; or
 - 3- Secure a substitute attorney qualified to practice before the federal court.

5. NOTICE TO OTHER PARTIES & THE STATE CLERK OF COURT
U.S.C. 1446(d)

28

- a. "Promptly after the filing" of a notice of removal "defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice of removal with the clerk of such State court".
- b. Filing of a copy of the notice of removal with the State clerk "shall effect the removal and the State court shall proceed no further unless and until the case is remanded."

6. NO BOND IS REQUIRED FOR REMOVAL OF A STATE COURT ACTION!

7. REMAND. **28 U.S.C. 1447© & (d)**

- a. A motion to remand for a procedural defect must be filed within 30 days of filing of the notice of removal.
- b. A motion to remand for lack of subject matter jurisdiction may be filed at any time before final judgment.

- c. Joinder of Parties in a Removed Civil Action. **LR 7.7W** If a motion for joinder of parties is filed in a removed civil action & joinder of such parties may serve as grounds for a remand to state court, the motion must -
- (1) State that granting of the motion to join parties may be grounds for a remand to state court,
 - (2) Set forth sufficient facts for the court to make a determination of whether joinder is appropriate in light of **28 U.S.C. 1447(e)**.
- d. Remand order.
- (1) "May require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."
 - (2) "A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court."
- e. Appeal. 28 U.S.C. 1447(d) "An order remanding a case to the State court from which it was removed is not reviewable on appeal..."

ADMIRALTY & MARITIME CLAIMS**FRCP 9(h) & Supplemental Rules for
Certain Admiralty & Maritime Claims**

There are special provisions and procedures for claims falling within the framework of **FRCP 9 (h)** and which involve one of the following remedies:

- (1) Maritime attachment & garnishment;
- (2) Action in Rem;
- (3) Possessory, petitory & partition actions;
- (4) Actions for exoneration from or limitation of liability.

This section addresses the rules and procedures which govern such actions.

ATTACHMENT AND GARNISHMENT UNDER RULE B

"If the defendant shall not be found within the district" therefore preventing in personam jurisdiction, an action ("Quasi In Rem") may be commenced by attachment of assets. It is to be noted that any judgment rendered is enforceable only to the extent of the value of the attached property. **Rule B & LAR 4.1 A**

Checklist for an Attachment & Garnishment Complaint under Rule B:

1. Complaint.
2. Civil Cover Sheet.
3. Filing Fee.
4. Process of attachment and garnishment, including
 - (1) A proposed order for attachment & garnishment; and
 - (2) A proposed warrant of arrest.
5. Security for costs.
6. Arrangements for Substitute Custodian & Movement of the Vessel.

(NOTE: Although, not required by law, in order to expedite completion of the seizure of the vessel, counsel should prepare a separate motion and order to appoint a substitute custodian and an order for movement of the vessel within the district.)

COMMENTS:

1. Complaint.

In the original Complaint, all parties must be listed in the "Title" of the action. Subsequent pleadings need only list the first plaintiff and the first defendant with an appropriate designation if there are more parties, e.g. "et al." **FRCP 3, 8, & 10(a)**

In an Attachment and Garnishment action brought under **FRCP 9 (h)** in Admiralty, the Complaint must:

1. Specifically set forth an admiralty and maritime claim for which in personam jurisdiction will lie;
2. Be verified by the plaintiff (or the attorney if the client is not found in the District).
3. Contain a prayer for attachment of the defendant's goods or chattels or credit (garnishment).

4. Be accompanied by a separate affidavit by the plaintiff or the attorney stating that, to the best of his information or belief, the defendant cannot be found in the district.

Rule B & LAR 4.1 A

2. Civil Cover Sheet. **LR 10.1W**

This is a form available at any office of the clerk of court. It facilitates statistical court records which are kept on all actions filed.

3. Filing Fee.

a. The normal filing fee for a civil action is **\$350. 28 U.S.C. 1914**

b. Applications to proceed In Forma Pauperis (i.e. without prepayment of fees) **28 U.S.C. 1915**

(1) An application to proceed In Forma Pauperis is required.

(2) An affidavit in support of the application must be submitted. The form for this affidavit may be secured from any office of the Clerk of Court.

(3) An order either granting or denying In Forma Pauperis status will issue from the Magistrate Judge.

c. A seaman may proceed without prepayment of costs. **28 U.S.C. 1916**

NOTE:

A party who is not responsible for prepayment of costs IS RESPONSIBLE FOR COSTS and will be billed at the conclusion of the case!

4. Process **Rule B (1) & LAR 4.1**

The court will then review the verified complaint and affidavit and, if the requirements set forth in the rules have been met, will sign the proposed order authorizing process of attachment and garnishment.

If exigent circumstances exist which make review by the court impossible, the attachment can be ordered by the Clerk provided that

the court hold a post-attachment hearing wherein the plaintiff must show the exigent circumstances. However, EVERY effort should be made to secure judicial review before resorting to this procedure.

5. Security for Costs **LAR 65.1.1**

Unless a party is proceeding in forma pauperis or is relieved from pre-payment of costs by statute (e.g. a seaman's suit, **28 U.S.C. 1916**) or unless otherwise ordered by court, security in the sum of \$250.00 shall be posted (cash or surety).

Note:

The United States Marshal for the Western District of Louisiana requires that a separate check payable to the Marshal accompany the request for service as a deposit for costs incurred in seizing and maintaining the vessel. The check shall be in the amount of \$5,000 if a substitute custodian of the vessel will be appointed or \$15,000 if the U. S. Marshal will be required to hire a guard to take custody of the vessel. The unused portion of these funds will be returned upon the vessel's release. However, please bear in mind that the vessel will not be released until all costs of court and the seizure have been paid in full.

Responsive Pleadings **Rule B (3)**

Defendants shall have 30 days after process has been executed within which to file an answer.

Garnishees shall file and serve an answer to the complaint and any garnishment interrogatories within 20 days after service or else compulsory process may be awarded against the garnishee.

Note:

If the garnishee is in possession of assets of the defendant, he is to hold those assets, or deposit them into the registry of the court, subject to further order of the court.

Default Judgment **Rule B (2)**

Prior to entry of a judgment by default in an attachment and garnishment case under **Rule B**, the appropriate delays as set out above in "Responsive Pleadings" must have elapsed after one of the following methods of notice has been effected:

- (1) that the plaintiff or garnishee has given proper notice of the action to the defendant by mail requiring a return receipt;
- (2) that the complaint, summons and process of attachment or garnishment was served on the defendant under **FRCP 4(d)** or **(I)** or
- (3) that the plaintiff or the garnishee has made diligent efforts to give notice to the defendant and has been unable to do so.

Note:

See page 25 of this Guide for the procedure for entry of a default and taking of a judgment by default in a civil case.

ARREST OF A VESSEL UNDER RULE C

In order to "enforce any maritime lien" or "whenever a statute of the United States provides for a maritime action in rem" an action ("In Rem") can be filed to arrest the vessel and also to proceed "in personam against any person who may be liable." **RULE C (1)**

Checklist for Arrest of a Vessel under Rule C:

1. Complaint.
2. Civil Cover Sheet.
3. Filing Fee.
4. Process

- a. Summons (original & one copy for each defendant to be served);
 - b. Proposed order authorizing a warrant for the arrest of the vessel; &
 - c. Proposed warrant of arrest.
5. Security for costs.
6. Arrangements for Substitute Custodian & Movement of the Vessel.

(NOTE: Although, not required by law, in order to expedite completion of the seizure of the vessel, counsel should prepare a separate motion and order to appoint a substitute custodian and an order for movement of the vessel within the district.)

COMMENTS:

1. Complaint.

In the original Complaint, all parties must be listed in the "Title" of the action. Subsequent pleadings need only list the first plaintiff and the first defendant with an appropriate designation if there are more parties, e.g. "et al." **FRCP 3, 8, & 10(a)**

2. The complaint must:

- a. Be verified;
- b. Describe, with reasonable particularity, the property to be arrested; and
- c. State that the property is now, or will be, within the district during the pendency of the litigation.

RULE C & LAR 4.1

Note:

Those wrongfully deprived of a vessel or other maritime property, those seeking to perfect title to a vessel, and those seeking the judicial sale of a vessel & the distribution of the proceeds among the owners of the

vessel may avail themselves of the in rem procedures of **Rule C** and the notice procedures of **Rule B (2)**. **Rule D**

2. Civil Cover Sheet. **LR 10.1W**

This is a form available at any office of the clerk of court. It facilitates statistical court records which are kept on all actions filed.

3. Filing Fee.

- a. The normal filing fee for a civil action is **\$350. 28 U.S.C. 1914**
- b. Applications to proceed In Forma Pauperis (i.e. without prepayment of fees) **28 U.S.C. 1915**
 - (1) An application to proceed In Forma Pauperis is required.
 - (2) An affidavit in support of the application must be submitted. The form for this affidavit may be secured from any office of the Clerk of Court.
 - (3) An order either granting or denying In Forma Pauperis status will issue from the Magistrate Judge.
- c. A seaman may proceed without prepayment of costs. **28 U.S.C. 1916**

NOTE:

A party who is not responsible for prepayment of costs IS RESPONSIBLE FOR COSTS and will be billed at the conclusion of the case!

4. Process **Rule C (1) & LAR 4.1**

The court will then review the verified complaint and any supporting papers and, if the requirements set forth in the rules have been met, will sign the proposed order authorizing the issuance of a warrant for arrest of the vessel. If the property is freight or proceeds of property, the Clerk shall issue a summons to the person having control of the property or funds to show cause why such property or funds should not be placed in the registry of the court.

Note:

Any person possessing property that is the subject of the action but has not been brought within control of the court (i.e. part of a vessel's gear within the district but not on the vessel when arrested) may, by motion, be ordered to show cause why the property should not be turned over to the U.S. Marshal or placed in the registry of the court. **RULE C (5)**

If exigent circumstances exist which make review by the court impossible, the attachment can be ordered by the Clerk provided that the court hold a post-attachment hearing wherein the plaintiff must show the exigent circumstances. However, EVERY effort should be made to secure judicial review before resorting to this procedure.

Note:

In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances. **RULE C (3)**

5. Security for Costs **LAR 65.1.1**

Unless a party is proceeding in forma pauperis or is relieved from pre-payment of costs by statute (e.g. a seaman's suit, **28 U.S.C. 1916**) or unless otherwise ordered by court, security in the sum of \$250.00 shall be posted (cash or surety).

Note:

The United States Marshal for the Western District of Louisiana requires that a separate check, payable to the Marshal accompany the request for service as a deposit for costs incurred in seizing and maintaining the vessel. The check shall be in the amount of \$5,000 if a substitute custodian of the vessel will be appointed or \$15,000 if the U. S. Marshal will be required to hire a guard to take custody of the vessel. The unused portion of these funds will be returned upon the vessel's release. However, please bear in mind that the vessel will not be released until all costs of court and the seizure have been paid in full. To expedite matters, counsel is advised to contact the U. S. Marshal for specific instructions and required paperwork regarding the actual seizure PRIOR to filing the complaint!

Notice **RULE C (4)**

If the property is not released within ten days after execution of process, "the plaintiff shall promptly...cause public notice of the action and arrest to be given in a newspaper...designated by order of the court." Depending on the division of this court where the action is filed, those newspapers are as follows:

Alexandria Division	The Alexandria Daily Town Talk
Lafayette/Opelousas Division	The Daily Advertiser
Lake Charles Division	Lake Charles American Press
Monroe Division	Monroe Morning World
Shreveport Division	The (Shreveport) Times

LAR 64.1

The publication should contain:

1. The title and number of the suit;
2. The date of the arrest and a description of the property;
3. The name of the U. S. Marshal;
4. The name and address of the attorney for the plaintiff; and
5. A statement of interest in or right against the property must be filed with the Clerk and served on plaintiff's counsel within 15 days after first publication (or within such further time as ordered by the court) and answers must be served within 20 days after filing their claim subject to default or adjudication of a later claim as untimely.

Note:

When the arrested property is released pursuant to Rule E(5) (by giving of security, by stipulation or by order of the court), no notice other than the execution of the judgment is required. **RULE C (4)**

In any claim wherein publication is necessary under Rule C(4), the time for filing a statement of interest in or right against the property is extended for fifteen days from the date of publication. **LAR 64.1**

Responsive Pleadings **RULE C (6)**

"The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim.

MISCELLANEOUS ADMIRALTY & MARITIME MATTERSMovement of a Seized Vessel. **LAR 64.3**

A vessel under seizure may be moved within the district *without a separate order* -

- (1) whenever the U. S. Marshal deems necessary; or
- (2) at the joint written request of the detainee and the owner of a vessel provided that a "hold harmless" agreement is executed in favor of the U. S. Marshal.

Note:

To expedite matters, a separate motion and order for movement of the vessel within the district should be filed with the complaint!

Appointment of a Consent Guardian.

The U. S. Marshal is authorized, *without special order of the court*, to appoint the master or other competent person as substitute custodian of a vessel under seizure provided that all parties have agreed, in writing, to the appointment and have agreed, in writing, to

hold the U. S. Marshal harmless from any liability as a result of the appointment.

Note:

To expedite matters, a separate motion and order to appoint a substitute custodian should be filed with the complaint!

Security for Release of the Vessel

Supplemental **Rule E(5)** and **LAR 64.2** provide the specifics for securing the release of the seized property by substituting adequate security. Normally, this is done by the filing of a "special bond" as described in **Rule E(5) (a)**. The amount of the bond shall be approved by the Clerk or the court, or by stipulation of the parties. If fixed by the court, the bond shall not be no more than the value of the property or twice the amount of the claim, whichever is less, with interest at 6 per cent per annum.

If the release is by stipulation, the seizing party must also agree, in writing, to hold the U. S. Marshal harmless for any liability resulting from the release of the property. **LAR 64.2**.

If it appears that additional claims may be filed, a vessel owner may file a "general bond" as provided for in **Rule E(5) (b)**, which should prevent the subsequent seizure of the vessel in this district as long as the bond is in an amount at least twice that of all aggregate claims.

At any time, any party may petition the court for a decrease, increase or alternate form of security. **Rule E(6)**.

LIMITATION OF LIABILITY ACTIONS

The Limitation of Liability Act (**46 U.S.C. §§ 181- 195** and Supplemental **Rule F**) allows shipowners to petition U.S. District Courts for a certain degree of protection from losses that may exceed the value of the vessel and its pending freight.

Who May File?

A limitation action may be brought by a vessel's owner or demise charterer (i.e. where all control of the vessel is taken from the owner and vested in the charterer) who does not have privity or knowledge of the events causing the loss. The action is not generally available to voyage or time charterers. **46 U.S.C. § 183**.

When must the action be filed?

A limitation action must be filed "not later than six months after receipt of a claim in writing..." Supplemental **Rule F(1)**. This need not be a formal claim, but is adequate if it informs the owner, whether directly or indirectly, of a claimant's intention to look to the owner for damages.

Where should the action be filed? **Rule F (9)**

If a vessel has been attached or arrested, a limitation of liability action should be filed in the district & division where the vessel has been attached or arrested.

If a vessel has not been attached or arrested, but the owner has been sued with respect to a claim relating to the vessel, a limitation of liability action should be filed in the district and division where the action is pending.

If a vessel has not been arrested or attached and no suit has been filed, a limitation of liability action should be filed in the district and division in which the vessel is located.

If a vessel has not been arrested or attached, no suit has been filed and the vessel is not located in the district, a limitation of liability action may be filed in any district.

Note:

The action may be transferred to another district pursuant to the regular venue provisions.

What should be included in the Complaint? **Rule F (2)**

The following information should be included in a limitation of liability action:

1. Facts on which right to limitation can be determined;
2. Demand for exoneration from or limitation of liability;
3. Description of the voyage on which the claim(s) arose, including the date and place of its termination;
4. A statement of the known claims or liens against the vessel arising out of that voyage;
5. The value of the vessel and its pending freight at the end of the voyage and
6. An allegation that the claim arose without the privity or knowledge of the Plaintiff in limitation.

Note:

Additionally, at the time of filing, Plaintiff shall deposit with the court an amount equal to the value of the owner's interest in the vessel and the pending freight at the end of the voyage **or** approved security in that amount with interest at 6% per annum. At the owner's option, he may turn over the vessel and pending freight to a trustee appointed by the court in lieu of depositing security. Sums sufficient to cover costs and expenses must also be deposited, however.

What will the court do?

Upon complete compliance with the above, the court will, upon application by the plaintiff, enjoin the further prosecution of any claims subject to limitation.

The court will also issue a notice to all persons asserting claims subject to limitation admonishing them to file their claims with the Clerk. The deadline for so filing shall be no less than 30 days after issuance of the notice. **The plaintiff in limitation** shall publish this notice in a newspaper as the court shall direct once a week for four successive weeks prior to the date fixed for filing claims and shall mail a copy of the notice to each known claimant no later than the date of the second publication. Supplemental **Rule F(4)**

Note:

Counsel for the plaintiff in limitation should prepare the proposed order of injunction and the notice to be published!

What the claimants must do? Rule F (5)

Prior to the date fixed for filing claims, each claimant must file and serve their claim which must include:

1. Specific facts in support of the claim;
2. The specific items of the claim; and
3. The date on which the claim accrued.

Note:

If the claimant wishes to contest the right to exoneration or limitation, he should also file an answer to the complaint.

Note:

If any claimant wishes to contest the adequacy of the security, he may do so, by motion, at any time. Thereafter, the court will cause due appraisal and adjust the security accordingly. Supplemental **Rule F(7)**

What happens after the claims are filed? **Rule F (6)**

Within 30 days after the deadline for filing claims, the plaintiff shall send to each claimant's attorney (or to any pro se claimants) a list consisting of:

1. The name of each claimant;
2. The name and address of each claimant's attorney; and
3. The nature and amount of each claim.

APPEALS

CHECKLIST:

1. Notice of Appeal.
2. Filing Fees (\$455).
3. Transcript.

COMMENTS:

1. APPEALS FROM CIVIL CASES.

a. What judgments are appealable?

(1) A judgment or order that is "final"!

(a) A judgment is "final" if it disposes of all claims as to all parties.

(b) "When more than one claim for relief is presented in an action * * * or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." FRCP 54 (b)

(2) Certain interlocutory decisions.
FRAP 5 & 28 U.S.C. 1292

Note:

Leave to appeal from an interlocutory order must be sought by petition from the Court of Appeals!

(a) A decision containing a statement from the district judge that "such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."
28 U.S.C. 1292 (b)

(b) Certain interlocutory orders listed in **28 U.S.C. 1292 (a)**, including orders involving injunctions, orders involving receiverships, and decrees involving admiralty cases.

(3) Appeal of order of district court granting or denying class action certification. Must be made within 10 days after entry of order. **Fed.R.Civ.P. 23(f)**.

b. When may a case be appealed? **FRAP 4**

(1) Generally, a notice of appeal must be filed with the clerk of the district court within 30 days of the "entry" of the Fed.R.Civ.P. 58 separate judgment, if required, or 150 days of entry of the judgment or order on the docket. (Fed.R.Civ.P. 58)

Note:

"Entry" of judgment is the date upon which the clerk of the district court places an entry on the docket sheet signifying the judgment. A "date of entry" stamp is placed on the judgment by the clerk.

FRAP 4(a)(7), FRCP 58 & 79(a)

(2) In cases involving the United States, the time for appeal is 60 days from "entry" of judgment in the district court.

(3) IN PERMISSIVE APPEALS UNDER **FRAP 5** a petition for permission to appeal must be filed within 10 days of entry of judgment with the clerk of the court of appeals.

(4) EXTENSION OF TIME TO APPEAL FOR LACK OF NOTICE.
FRAP 4(a)(6)

(a) District Court must find:

-1- Party did not receive notice of the entry of the judgment within 21 days of the date of entry of the judgment either from the clerk or from any party (See **FRCP 77(d)**); &

-2- "No party would be prejudiced."

- (b) Motion must be filed within "180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier."
- © The time for appeal may be reopened for "a period of 14 days from the date of entry of the order reopening the time for appeal."

c. A notice of appeal must conform to **FORM 1, FRAP.**

Note:

All parties joining in a notice of appeal must be listed in the notice. The designation "et al." is not sufficient to include parties not specifically listed. **Morales, et al. v. Pan American Life Ins. Co.**, 914 F.2d 83 (5th Cir., 1990).

d. What happens to a notice of appeal filed prior to "Entry" of Judgment?

Generally, "a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed on the date of and after entry." **FRAP 4(a)(2)**

e. How is a notice of appeal affected by the filing of post-trial motions? **FRAP 4(a)(4)**

(1) "If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Rules of Civil Procedure:

- (a) for judgment under **FRCP 50(b)** (i.e. Judgment as a Matter of Law);
- (b) to amend or make additional findings of fact under **FRCP 52(b)**, whether or not granting the motion would alter the judgment;
- (c) to alter or amend the judgment under **FRCP 59**;
- (d) for attorney's fees under **FRCP 54** if a district court under **FRCP 58** extends the time for appeal;
- (e) for a new trial under **FRCP 59**; or

- (f) for relief under **FRCP 60** if the motion is filed within 10 days after entry of judgment.

Note:

A notice of appeal filed prior to the timely filing of one of these motions is ineffective until entry of the order disposing of the motion. If such order is being appealed, the notice of appeal must be amended.

f. How can you "stay" execution of a judgment?

- (1) AUTOMATIC 10 DAY STAY!

Generally, "No execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry." **FRCP 62(a)**

Note:

There are some exceptions for injunctions, receivership actions, patent actions, etc. See **FRCP 62(a) & ©**

- (2) SUPERSEDEAS BONDS! **FRCP 62(d)**

- (a) Filing of a supersedeas bond acts as a stay from execution of a judgment on appeal.
- (b) A supersedeas bond may be filed at any time on or after the time the appeal is taken.
- © A supersedeas bond is effective from the time of approval by the court.
- (d) For a money judgment, a supersedeas bond is set at 120% of the judgment. **LR 62.2E & W** (Unless the Court orders otherwise!)

g. Is it necessary to file a cost bond? **FRAP 7**

While a cost bond may be required by the district court, this Court does not require a cost bond UNLESS SPECIFICALLY REQUIRED BY COURT ORDER.

2. **APPEALS FROM CRIMINAL CASES FRAP 4(b)**

a. When may a case be appealed?

- (1) "In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from or a notice of appeal by the Government."
- (2) The notice of appeal by the Government "must be filed in the district court within 30 days after (I) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant."
- (3) "A notice of appeal filed after the announcement of a decision, sentence or order - but before entry of the judgment or order - is treated as filed on the date of and after the entry."
- (4) Time for appeal may be extended until 10 days following disposition of the following motions:
 - (a) A Motion Arresting Judgment; **FRCrP 34**
 - (b) A Motion For New Trial on grounds other than newly discovered evidence; **FRCrP 33**

Note:

Both of these motions must be filed within 7 days after verdict or finding of guilty or after plea of guilty or nolo contendere.

- (c) A Motion For New Trial on the grounds of newly discovered evidence filed within 10 days after entry of judgment.
- (d) Motion for Judgment of Acquittal (Fed.R.Cr.P. 29)
- (e) Motion for Reconsideration.
- (5) An extension of up to 30 days may be granted by the district court for either good cause or excusable neglect.

3. RULES APPLYING TO ALL APPEALS.

a. Fees.

- (1) \$5 for filing the notice of appeal in the district court. **28 U.S.C. 1917**
- (2) \$450 for docketing the case in the Court of Appeals. **28 U.S.C. 1913**

Note:

Both of these fees should be paid to the clerk of the district court. However, "failure of an appellant to" submit the fee with the notice of appeal "does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal."

FRAP 3

b. Ordering a transcript.

- (1) Upon filing a notice of appeal, the clerk of the district court will provide appellant with a form entitled "Transcript Order".
- (2) It is the obligation of appellant to make satisfactory arrangements with the court reporter for providing the transcript.
- (3) When ordering a transcript, appellant should mail copies of the order form as directed on the back of that form. Copy 6 should be mailed to:

Appeals Unit
United States Clerk of Court
300 Fannin Street, Suite 1167
Shreveport, La. 71101-3083

Note:

A transcript should be filed by the court reporter within 30 days of completion of the "Transcript Order", unless an extension is granted by the court of appeals.

c. Filing of the record on appeal. **FRAP 10**

- (1) "The record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court."

- (2) When the record on appeal is completed by the clerk of the district court, it is transmitted to the court of appeals. This transmission is normally:
 - (a) Within 15 days of the filing of the transcript, or
 - (b) Within 15 days of the notice of appeal if no transcript is ordered. **Fifth Circuit Loc. R. 11.2**

REGISTRATION OF JUDGMENTS**28 U.S.C. 1963**

CHECKLIST:

1. Certified Copy of the Judgment of any court of appeals, district court, bankruptcy court or the Court of International Trade.
2. Either -
 - a. A certification from the Clerk that the judgment is final either by appeal or by the expiration of the time for appeal (see Form AO-451).

OR

- b. An order from the Court that entered the judgment that the judgment should be registered in another district (Issuance of this order requires a showing of good cause.)
3. A filing fee of \$39.

COMMENTS:

1. A judgment in an action for the recovery of money or property entered in any United States District Court may be registered in any other United States District Court.
2. A judgment registered in another district shall have the same force and effect as a judgment entered in such district court.
3. A satisfaction of judgment may be registered in a like manner. All that is required is a certified copy of the satisfaction of judgment.

SCHEDULE OF FEES

<u>New Suits</u>	\$350
<u>Habeas Corpus</u>	\$5
<u>Miscellaneous</u>	\$39
A filing not in a pending action, e.g.:	
-Petition to Perpetuate Testimony	
FRCP 27(a)	
-Trustee Filings under 28 U.S.C. 754	
-Letters Rogatory	
-Registration of a Judgment	
28 U.S.C. 1963	
-Notice of a Deposition (out-of-district)	
<u>Appeal</u>	\$455
(\$5 for District Court & \$450 for Court of Appeals)	
<u>Appeal of a Magistrate Ruling</u>	\$32
(In a Criminal Misdemeanor Case)	
<u>Deposit for Garnishment</u>	\$15
(For answering the interrogatories)	
<u>Attorney Admission</u>	\$175
(Note: A duplicate certificate is \$15)	
<u>Attorney Admission, Pro Hac Vice</u>	\$25
<u>Certificate of Good Standing</u>	\$15
<u>Records Search & Certification</u>	\$26
<u>Exemplification Certificate</u>	\$18
<u>Retrieval of Record from Federal Records Center</u>	\$45
<u>Certification of a Copy</u>	\$9
<u>Photocopying</u>	\$0.50/page
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