

Table of Contents

Chapter 1: Subject-Matter Jurisdiction	1
1-1 INTRODUCTION.....	1
1-2 CASE OR CONTROVERSY.....	4
1-2:1 Standing.....	5
1-2:2 Mootness.....	7
1-2:2.1 Capable of Repetition, Yet Evading Review.....	8
1-2:2.2 Other Exceptions.....	9
1-2:3 Ripeness.....	10
1-3 FEDERAL QUESTION.....	12
1-3:1 Pleading Requirements.....	14
1-3:2 Exclusive vs. Concurrent Jurisdiction.....	15
1-3:3 Amount in Controversy.....	15
1-4 DIVERSITY AND ALIENAGE.....	15
1-4:1 Amount in Controversy.....	16
1-4:1.1 Pleading the Amount in Controversy and the Legal Certainty Test.....	17
1-4:1.2 Determining the Amount in Controversy.....	19
1-4:2 Citizenship of the Parties.....	21
1-4:2.1 Complete Diversity.....	21
1-4:2.2 Citizenship of Individuals.....	22
1-4:2.3 Citizenship of Corporations.....	24
1-4:2.4 Citizenship of Unincorporated Associations/ Partnerships/Trusts.....	26
1-4:2.5 Citizenship of Insurance Companies in Direct Actions.....	27
1-4:2.6 Applying Citizenship Rules to Parties.....	27
1-4:2.7 Realignment.....	28
1-5 SUPPLEMENTAL JURISDICTION.....	28
1-5:1 Pendent and Ancillary Jurisdiction.....	28
1-5:2 Requirements for Supplemental Jurisdiction.....	30
1-5:3 Diversity Cases and Pendent Party Jurisdiction: Subsection 1367(b).....	30
1-5:4 Discretion to Decline Supplemental Jurisdiction: Subsection 1367(c).....	32

Table of Contents

1-5:4.1	Novel or Complex Issues of State Law: Subsection 1367(c)(1).....	32
1-5:4.2	State Claim Substantially Predominates: Subsection 1367(c)(2).....	33
1-5:4.3	All Claims of Original Jurisdiction Dismissed by District Court: Subsection 1367(c)(3).....	33
1-5:4.4	Exceptional Circumstances and Compelling Reasons: Subsection 1367(c)(4).....	34
1-5:5	Tolling of State Law Claims: Subsection 1367(d).....	35
1-5:6	Special Consideration: New Jersey's Entire Controversy Doctrine	35
1-6	ABSTENTION	36
1-6:1	<i>Pullman</i> Abstention	36
1-6:2	<i>Burford</i> Abstention	37
1-6:3	<i>Younger</i> Abstention	38
1-6:4	<i>Colorado River</i> Abstention.....	40
Chapter 2: Service of Summons and Personal Jurisdiction.....		41
2-1	INTRODUCTION.....	41
2-2	SERVICE OF SUMMONS.....	41
2-2:1	Issuance of the Summons by the Clerk	42
2-2:1.1	Electronic Summonses	42
2-2:1.2	Hard Copy Summonses	43
2-2:1.3	Amended Summonses.....	43
2-2:2	Who May Serve the Summons	44
2-2:3	Service of the Summons	44
2-2:3.1	Waiving Service.....	44
2-2:3.1a	Who May Be Asked to Waive Service... ..	45
2-2:3.1b	How to Request a Waiver of Service	45
2-2:3.1c	Consequences of Waiving and Refusing to Waive	46
2-2:3.1d	Filing of Waiver	47
2-2:3.1e	Risks and Limitations of Waiver Procedure.....	47
2-2:3.2	Formal Service.....	48
2-2:3.2a	Service Upon Individuals Within a Judicial District of the United States.....	49
2-2:3.2a.1	Incorporation of State Methods of Service.....	49
2-2:3.2a.2	Federal Methods of Service	49

Table of Contents

	2-2:3.2a.2a	Personal Service on Defendant	50
	2-2:3.2a.2b	Leaving Process at Defendant’s Dwelling or Usual Place of Abode.....	50
	2-2:3.2a.2c	Service on Authorized Agent.....	52
2-2:3.2b		Service Upon Corporations, Partnerships, and Associations	53
	2-2:3.2b.1	Service on Organization’s Officer	53
	2-2:3.2b.2	Service on Organization’s “Managing or General Agent”.....	54
	2-2:3.2b.3	Service on Authorized Agent.....	56
2-2:3.2c		Service Outside New Jersey	57
	2-2:3.2c.1	Service Pursuant to State Long-Arm Rule	57
	2-2:3.2c.2	Service Pursuant to the Federal Long-Arm Rule	59
2-2:3.2d		Service Outside the United States.....	60
2-2:3.3		Time for Service.....	61
	2-2:3.3a	Mandatory Extension for “Good Cause”.....	62
	2-2:3.3b	Discretionary Extension.....	64
	2-2:3.3c	Sua Sponte Dismissal.....	65
2-2:3.4		Waiver of Defects in Service	66
2-2:3.5		Filing of Proof of Service	67
2-2:3.6		Motion Practice	67
2-2:3.7		Miscellaneous Matters	68
	2-2:3.7a	Actual Notice Is Not Sufficient	68
	2-2:3.7b	Service in Separate Capacities	69
	2-2:3.7c	Finality of Orders Regarding Service	69
	2-2:3.7d	Service by Publication and Other Alternative Methods	70

Table of Contents

2-3	PERSONAL JURISDICTION	70
2-3:1	Jurisdiction Over Defendants Served in New Jersey.....	71
2-3:2	Jurisdiction Over Defendants Served Outside New Jersey	72
2-3:2.1	Minimum Contacts—General and Specific Jurisdiction	73
2-3:2.1a	General Jurisdiction.....	73
2-3:2.1b	Specific Jurisdiction	74
2-3:2.2	Fair Play and Substantial Justice	75
2-3:2.3	Intentional Torts.....	76
2-3:2.3a	The Supreme Court’s <i>Calder</i> Doctrine.....	76
2-3:2.3b	The Third Circuit’s Application of the <i>Calder</i> Doctrine	77
2-3:2.4	National-Contacts Theory	79
2-3:3	Practice and Procedure	80
2-3:3.1	Assertion of Personal-Jurisdiction Defense	80
2-3:3.2	Motions to Dismiss for Lack of Jurisdiction	81
2-3:3.3	Jurisdictional Discovery.....	82
2-3:3.4	Transfer Instead of Dismissal	83
2-3:3.5	Appeal	84
2-3:4	Frequently Recurring Issues.....	85
2-3:4.1	Advertising	85
2-3:4.2	Telephone and Mail	85
2-3:4.3	Stream-of-Commerce.....	86
2-3:4.4	Corporate Employees	88
2-3:4.5	Corporate Subsidiaries.....	89
2-3:4.6	Contracts	89
2-3:4.7	Foreign Entity Registered Agent Statutes	90
2-3:4.8	Waiver and Forum Clauses	91
2-3:4.9	Internet Presence	92
2-3:4.10	Class and Collective Action Litigation.....	93
2-3:4.11	Attorneys.....	93
2-3:4.12	Property Interests in Forum State	94
2-3:4.13	Miscellaneous	95
	Chapter 3: Venue	97
3-1	INTRODUCTION.....	97
3-1:1	Venue Distinguished From Jurisdiction	97
3-1:2	Venue Distinguished From Allocation	98
3-2	STATUTORY REQUIREMENTS FOR VENUE	99
3-2:1	General Venue: 28 U.S.C. § 1391	99

Table of Contents

3-2:2 Venue in Diversity and Federal-Question
Actions: 28 U.S.C. § 1391(b) 100

3-2:3 Residence of Parties..... 101

3-2:3.1 Generally 101

3-2:3.2 Natural Persons and Public Officials..... 101

3-2:3.3 Corporate Parties 102

3-2:3.4 Unincorporated Associations 102

3-2:4 District Where a Substantial Part of the Events
Giving Rise to the Claim Occurred 103

3-2:5 Venue in Suits Against a Foreign State:
28 U.S.C. § 1391(f) 104

3-2:6 Venue in Suits Involving a Noncitizen..... 104

3-2:7 Venue in Mass Disaster Suits: 28 U.S.C. § 1391(g) 104

3-2:8 Special Provisions 105

3-2:8.1 Admiralty 105

3-2:8.2 Antitrust 106

3-2:8.3 Arbitration..... 106

3-2:8.4 Banking 107

3-2:8.5 Bankruptcy 108

3-2:8.6 Freight Shipments..... 109

3-2:8.7 Civil Rights..... 109

3-2:8.8 Copyright 109

3-2:8.9 Eminent Domain 110

3-2:8.10 Employment Discrimination..... 110

3-2:8.11 ERISA 111

3-2:8.12 Interpleader 111

3-2:8.13 Labor Statutes 111

3-2:8.14 Miller Act 112

3-2:8.15 Patent 112

3-2:8.16 Racketeering..... 114

3-2:8.17 Securities 114

3-2:8.18 Taxes..... 115

3-2:8.19 Trademark 115

3-2:8.20 United States as a Defendant..... 115

3-3 TRANSFER OF VENUE: 28 U.S.C. § 1404 116

3-3:1 Plaintiff’s Ability to Transfer 117

3-3:2 Defendant’s Ability to Transfer..... 118

3-3:3 Grounds for Transfer 118

3-3:3.1 Convenience of Parties 121

3-3:3.2 Convenience of Witnesses..... 121

3-3:3.3 Interests of Justice 122

Table of Contents

3-3:3.4	Forum-Selection Clauses	124
3-3:3.4a	Enforcement.....	124
3-3:3.4b	Clause as Basis for Transfer	127
3-3:3.4c	Distinguished From Improper Venue and Forum Non Conveniens....	128
3-3:4	District to Which the Matter May Be Transferred	129
3-3:4.1	Severance and Transfer	129
3-3:4.2	Choice of Law After Transfer	129
3-3:4.3	Jurisdiction After Transfer	130
3-4	TRANSFER WHERE VENUE IMPROPER:	
	28 U.S.C. § 1406	130
3-4:1	Generally	130
3-4:2	Waiver	132
3-4:3	Transfer to Cure Jurisdictional Defect: 28 U.S.C. § 1631	133
3-4:4	Multi-District Litigation: 28 U.S.C. § 1407	134
3-5	FORUM NON CONVENIENS.....	135
3-5:1	Generally	135
3-5:2	Adequacy of Alternate Forum.....	137
3-5:3	Plaintiff’s Choice of Forum	138
3-5:4	Public and Private Interests.....	140
3-5:5	Distinguished From Improper Venue.....	141
Chapter 4: Removal		143
4-1	INTRODUCTION.....	143
4-2	WHY REMOVE?.....	144
4-3	WHICH CASES CAN BE REMOVED?	147
4-3:1	Federal Question Removal	147
4-3:1.1	The Well-Pleaded Complaint	148
4-3:1.2	Preemption	149
4-3:1.3	Separable Claims, Cross-Claims, and Counter-Claims	151
4-3:1.4	Amending Federal Claims	153
4-3:2	Diversity Removal	154
4-3:2.1	Parties and the Forum Defendant Rule.....	154
4-3:2.1a	Changes in Parties.....	157
4-3:2.2	Amount in Controversy	160
4-3:3	Other Grounds for Removals.....	165
4-4	HOW TO REMOVE	167
4-4:1	Generally	167
4-4:2	Timeliness.....	169
4-4:2.1	Service Issues	169
4-4:2.2	“Order or Other Paper” Issues	171

Table of Contents

4-4:3 The “All Defendants” Rule 173

4-4:4 Filings..... 176

4-4:5 Post-Removal Proceedings 177

 4-4:5.1 Allocation and Venue..... 177

 4-4:5.2 Service 178

 4-4:5.3 Time to Answer 178

 4-4:5.4 State Court Orders..... 178

 4-4:5.5 Pending Motions 179

 4-4:5.6 Jury Demands..... 179

 4-4:5.7 Abstention 179

 4-4:5.8 Eleventh Amendment 180

4-4:6 Remands..... 180

 4-4:6.1 Requirements and Effects of a Motion to
 Remand 180

 4-4:6.2 Remand or Dismissal..... 181

 4-4:6.3 Who Decides Remand?..... 184

 4-4:6.4 Attorneys’ Fees on a Motion to Remand 184

4-5 AFTER REMAND..... 185

4-6 APPEALS 186

 4-6:1 Timing 187

 4-6:2 Appellate Review Barred..... 187

 4-6:3 Appellate Review Allowed 187

 4-6:4 Review of “Collateral Orders” 189

 4-6:5 Review by Mandamus..... 189

 4-6:6 When Remand Is Denied 190

 4-6:7 Appeal of Multiple Orders 190

Chapter 5: The Complaint 193

5-1 INTRODUCTION..... 193

5-2 BASIC CONSIDERATIONS IN DRAFTING COMPLAINTS 193

5-3 SUBSTANTIVE ELEMENTS OF THE COMPLAINT 195

 5-3:1 Statement of Subject-Matter Jurisdiction 196

 5-3:1.1 Federal-Question Jurisdiction 196

 5-3:1.2 Diversity Jurisdiction 197

 5-3:1.2a Citizenship..... 198

 5-3:1.2b John Doe Defendants 200

 5-3:1.2c Amount in Controversy 201

 5-3:1.3 Supplemental Jurisdiction..... 201

5-3:2 Statement of the Claim 202

 5-3:2.1 Heightened Pleading Requirements 204

 5-3:2.2 Pleading Fraud or Mistake 205

 5-3:2.3 Pleading Special Damages 208

Table of Contents

5-3:3	Demand for Judgment	209
5-3:4	Personal Jurisdiction.....	210
5-3:5	Venue.....	211
5-4	PARTIES.....	211
5-5	THE FORMAT OF THE COMPLAINT	214
5-5:1	Clarity and Brevity	214
5-5:2	Numbered Paragraphs	214
5-5:3	Adoption by Reference	215
5-5:4	Conclusory Allegations.....	216
5-5:5	Alternative, Hypothetical, and Inconsistent Claims	216
5-5:6	Upon Information and Belief	217
5-6	CAPTION OF THE COMPLAINT	218
5-7	OTHER ITEMS IN THE COMPLAINT	219
5-7:1	Signature.....	219
5-7:2	Other Actions and Parties.....	221
5-7:2.1	Certification of Other Pending Actions	221
5-7:2.2	Other Prior Actions	221
5-7:2.3	Other Parties	221
5-7:3	Exhibits	221
5-8	DEMAND FOR JURY TRIAL	222
5-9	FILING THE COMPLAINT	223
5-9:1	Electronic Filing	223
5-9:2	Other Documents Accompanying the Complaint	224
5-9:2.1	Disclosure Statement	224
5-9:2.2	Civil Cover Sheet	225
5-9:2.3	Summons.....	225
5-9:2.4	Arbitration Certification	226
5-9:2.5	Service of the Complaint	226
Chapter 6: Responding to the Complaint		229
6-1	INTRODUCTION.....	229
6-2	TIME TO ANSWER	229
6-3	RESPONSIVE PLEADINGS.....	230
6-4	ANSWER OR “OTHERWISE MOVE”	231
6-5	ANSWERS.....	232
6-6	“OTHERWISE MOVE” WITH RESPECT TO THE COMPLAINT	234
6-6:1	Lack of Subject-Matter Jurisdiction Versus Failure to State a Claim	234
6-6:2	Lack of Subject-Matter Jurisdiction	235
6-6:3	Failure to State a Claim	236
6-6:3.1	Enforcement of Forum-Selection Clauses	240

	6-6:3.2 Dismissal Based Upon Affirmative Defense.....	243
	6-6:3.3 Consideration of Materials Beyond the Pleadings	244
6-6:4	Dismissal for Lack of Personal Jurisdiction.....	247
6-6:5	Dismissal for Improper Venue	250
6-6:6	Dismissal Related to Insufficient Process and Service of Process	250
6-6:7	Dismissal for Failure to Join a Party Under Federal Rule 19.....	251
6-6:8	Stay Pending Arbitration	252
6-7	OTHER MOTIONS	254
6-7:1	More Definite Statement.....	254
6-7:2	Striking Allegation or Defense.....	255
6-7:3	Failure to Plead Fraud With Particularity.....	256
6-8	ALLOWING AMENDED PLEADINGS TO CURE DEFICIENCIES—THE “TWO BITES RULE”	257
6-9	COUNTERCLAIMS	260
6-10	THIRD-PARTY PRACTICE	261
 Chapter 7: Injunctions		 263
7-1	INTRODUCTION	263
7-2	STANDARDS	263
7-2:1	Preliminary Injunctions	263
7-2:1.1	Likelihood of Irreparable Harm	266
7-2:1.2	Likelihood of Success on the Merits	275
7-2:1.3	Possibility of Harm to Other Interested Persons (Balance of the Equities).....	276
7-2:1.4	The Public Interest.....	276
7-2:2	Temporary Restraining Orders	278
7-2:3	Permanent Injunctions.....	278
7-2:4	Mandatory Injunctions.....	279
7-2:5	Filing Injunctions	279
7-3	DISTRICT COURT PROCEEDINGS	280
7-3:1	Jurisdiction and Venue.....	280
7-3:2	Notice and a Hearing.....	282
7-3:2.1	Preliminary Injunctions	282
7-3:2.1a	Notice	282
7-3:2.1b	Hearing.....	283
7-3:2.2	Temporary Restraining Orders	284
7-3:2.3	Expedited Discovery	287
7-3:3	Evidence	287
7-3:4	Consolidation of Hearing With Trial on Merits.....	288

Table of Contents

7-3:5	Findings of Fact and Conclusions of Law	289
7-3:6	Bond Requirement.....	290
7-3:7	Scope of Injunction or Restraining Order.....	293
7-3:8	Who Is Bound?.....	294
7-3:9	Motions to Modify or Dissolve Injunctions.....	295
7-3:10	Contempt.....	296
7-4	INJUNCTIONS PENDING APPEAL.....	298
7-4:1	In the District Court.....	298
7-4:2	In the Court of Appeals.....	299
7-5	APPEALS	300
7-5:1	Appellate Jurisdiction	300
7-5:1.1	Preliminary Injunctions	300
7-5:1.2	Temporary Restraining Orders	302
7-5:1.3	Permanent Injunctions.....	303
7-5:2	Appellate Review	304
7-5:2.1	Preliminary Injunctions	304
7-5:2.2	Permanent Injunctions.....	305
7-6	FEDERAL INJUNCTIONS: A CHECKLIST	305
7-6:1	Order to Show Cause for Temporary Restraining Order at the Outset of the Case.....	305
7-6:1.1	Papers Necessary	305
7-6:1.2	Substantive Requirements for Temporary Restraining Order and Preliminary Injunction Shown in Moving Papers	307
7-6:1.3	Unique Procedural Requirements of Order to Show Cause for Preliminary Injunction With Temporary Restraining Order.....	308
7-6:1.4	Form of Proposed Order to Show Cause With Temporary Restraints	310
7-6:1.5	Contents/Form of Proposed Preliminary Injunction Order.....	311
7-6:1.6	Filing Bond or Other Security	312
7-6:2	Application for Order to Show Cause Without Temporary Restraints	312
7-6:3	Application by Motion for Preliminary Injunction Without Temporary Restraints After Case Commenced.....	313
7-6:4	Contents of Papers or Oral Argument Opposing TRO Application or Seeking Vacatur of Order to Show Cause, Once Granted, on or Before Return Date for Preliminary Injunction.....	313

Chapter 8: Pretrial Management	315
8-1 PRINCIPLES OF CASE MANAGEMENT	315
8-1:1 Overview of Federal Case Management	315
8-1:2 Roles of District Judges, Magistrate Judges, and Lawyers	317
8-1:3 Federal Rules and Local Rules Governing Case Management	319
8-1:3.1 Federal Rule 16.....	319
8-1:3.2 Local Rules 16.1 and 26.1	322
8-2 IMPLEMENTING CIVIL CASE MANAGEMENT.....	323
8-2:1 Civil Case Management Conferences and Orders	323
8-2:1.1 Initial Conference of Parties and Proposed Discovery Plan.....	323
8-2:1.2 Initial Scheduling Conference	327
8-2:1.2a Arbitration and Mediation.....	328
8-2:1.2b Settlement	329
8-2:1.2c Scheduling Orders.....	329
8-2:1.3 Status Conference	331
8-2:1.4 Final Pretrial Conference	331
8-2:2 Enlargements of Time and Amending Orders.....	332
8-2:2.1 Scheduling Orders.....	332
8-2:2.2 Joint Final Pretrial Order.....	335
8-2:3 Enforcing Case Management Orders and Sanctions	336
8-2:4 Settlement Conferences and Processes	338
8-2:5 Putting Your Best Case Forward: Practice Pointers	341
Chapter 9: Discovery	345
9-1 INTRODUCTION: THE APPLICABLE RULES	345
9-2 GENERAL PROVISIONS GOVERNING DISCOVERY	346
9-2:1 Scope of Discovery	346
9-2:2 District Court’s Authority to Manage Discovery	348
9-2:2.1 Discovery Disputes and Motions.....	348
9-2:2.2 Appeals to the District Judge.....	349
9-2:2.3 Review by the Court of Appeals	350
9-3 DISCOVERY PRIOR TO FILING SUIT	352
9-3:1 Rule 11 Obligation to Investigate	352
9-3:2 Sources of Information Prior to Filing Suit.....	353
9-3:3 Protection of Privileged Materials Created Prior to Suit.....	355
9-3:3.1 Privileged Communications	355
9-3:3.1a Privileges Recognized Under Federal Evidence Rule 501	356
9-3:3.1b The Attorney-Client Privilege	358

Table of Contents

9-3:3.2	The Attorney Work-Product Doctrine.....	363
9-3:3.2a	The Doctrine Protects Tangible and Intangible Work Product.....	365
9-3:3.2b	The Thing Protected Must Be Prepared in Anticipation of Litigation	366
9-3:3.2c	The Doctrine Protects the Disclosure of Opinions, Not Facts	367
9-3:3.2d	Work Product Is Not Limited to Materials Prepared by an Attorney	368
9-3:3.2e	Federal Rule 26 Provides Work-Product Protection for Draft Expert Reports and Most Communications Between Counsel and Expert	369
9-3:3.2f	The Protection of Work Product Is Durable.....	370
9-4	PRESERVING EVIDENCE PRIOR TO SUIT.....	371
9-5	FORMAL DISCOVERY AMONG PARTIES	371
9-5:1	Sequence and Timing of Discovery.....	371
9-5:2	Initial Disclosures	373
9-5:3	Interrogatories	378
9-5:3.1	Form and Content of Interrogatories	378
9-5:3.2	Form and Content of Answers to Interrogatories	381
9-5:4	Requests for Inspection.....	384
9-5:4.1	Inspection of Documents	384
9-5:4.1a	Requests for Production.....	384
9-5:4.1b	The Response and Production	385
9-5:4.2	Inspection of Things and Entry Upon Land.....	387
9-5:5	Depositions Upon Oral Examination	388
9-5:5.1	The Purpose of a Deposition.....	388
9-5:5.2	When a Deposition May Be Taken	389
9-5:5.3	How Many Depositions May Be Taken	390
9-5:5.4	Where a Deposition May Be Taken	391
9-5:5.4a	Parties.....	391
9-5:5.4b	Non-Parties.....	392
9-5:6	Persons Before Whom a Deposition May Be Taken.....	393
9-5:6.1	Methods of Taking Depositions	393
9-5:6.2	The Notice of Deposition	394
9-5:6.3	Who May Attend a Deposition.....	395
9-5:6.4	Conduct of the Deposition	396

Table of Contents

9-5:6.5 Using Documents at a Deposition 401

9-5:6.6 Submission of the Deposition to the Witness 402

9-5:7 Failure to Appear or Attend; Failure to Serve a
Subpoena 403

9-5:8 Depositions Upon Written Questions 404

9-5:9 Physical and Mental Examinations 405

9-5:10 Requests for Admission 407

9-5:10.1 Form of the Request 407

9-5:10.2 Content of the Answer 408

9-5:10.3 Remedy for Failure to Admit 409

9-6 FORMAL DISCOVERY FROM NONPARTIES 410

9-6:1 Inspections and Document Productions 410

9-6:2 Depositions 412

9-7 DISCOVERY OF EXPERTS 413

9-8 OBJECTIONS TO DISCOVERY REQUESTS 415

9-8:1 General Objections 415

9-8:2 Assertions of Privilege 417

9-9 DISCOVERY MOTIONS 419

9-9:1 Form and Content of Discovery Motions 419

9-9:2 Protective Orders 420

9-9:2.1 By Agreement 420

9-9:2.2 By Motion 425

9-9:2.3 Modification 428

9-9:3 Motions to Compel 429

9-9:4 Motions for More Specific Answers 430

9-10 DISCOVERY SANCTIONS 431

Chapter 10: E-Discovery 437

10-1 INTRODUCTION 437

10-2 RULES GOVERNING E-DISCOVERY 439

10-2:1 The Federal Rules 439

10-2:2 The Local Rules 439

10-3 THE DUTY TO PRESERVE 440

10-4 FEDERAL RULE 26(f) MEET AND CONFER 442

10-5 PROPORTIONALITY 444

10-6 TWO-TIERED DISCOVERY—ACCESSIBILITY
OF REQUESTED INFORMATION 445

10-7 SAMPLING AND COST-SHIFTING 448

10-7:1 Sampling 448

10-7:2 Cost-Shifting 448

10-7:3 “Predictive Coding” (Technology/Computer
Assisted Review) 449

Table of Contents

10-8	FORM OF PRODUCTION	449
10-9	ASSERTION AND WAIVER OF PRIVILEGE	451
	10-9:1 Assertion	451
	10-9:2 Waiver of Privilege	451
10-10	SUBPOENA.....	453
10-11	SPOILIATION AND SANCTIONS.....	454
10-12	TAXATION OF E-DISCOVERY COSTS AGAINST LOSING LITIGANTS	458
Chapter 11: Motions.....		461
11-1	INTRODUCTION.....	461
11-2	PREPARING THE MOTION PAPERS.....	461
	11-2:1 Standard Operating Procedure: Local Rule 7.1	462
	11-2:1.1 Filing the Motion and Return Date	462
	11-2:1.2 Requesting Oral Argument	463
	11-2:1.3 Time for Filing Opposition and Reply	464
	11-2:2 The Moving Papers.....	466
	11-2:2.1 Form—Local Rule 10.1	466
	11-2:2.2 Notice of Motion	467
	11-2:2.3 Briefs	468
	11-2:2.4 Affidavits or Certifications/Declarations	470
	11-2:2.5 Exhibits	472
	11-2:2.6 Proposed Form of Order	473
	11-2:2.7 Proof of Service.....	474
	11-2:3 Opposition and Reply.....	475
	11-2:4 Cross-Motions	476
11-3	ELECTRONIC FILING.....	477
	11-3:1 How to File Electronically	478
	11-3:2 Special Procedures Introduced by Magistrate Judges and District Court Judges.....	479
	11-3:3 Consequences of Electronic Filing.....	479
	11-3:4 Electronic Service of Documents on All Parties.....	479
	11-3:5 Electronic Submission of Sealed Documents	480
	11-3:6 Technical Difficulties	481
11-4	DISCOVERY MOTIONS	482
11-5	MOTIONS FOR RECONSIDERATION	483
11-6	MOTIONS FOR PROTECTIVE ORDER AND CONFIDENTIALITY AGREEMENTS.....	485
	11-6:1 Discovery Materials and Confidentiality Agreements.....	486
	11-6:2 Timing and Requirements of a Motion to Seal.....	487
	11-6:3 Filed Materials and Judicial Proceedings.....	488

Table of Contents

11-7 MOTIONS FOR SUMMARY JUDGMENT..... 489

11-7:1 Which Party May File Summary Judgment and When 490

11-7:2 Papers in Support of Motion for Summary Judgment 492

11-7:2.1 Briefs 492

11-7:2.2 Statement of Material Facts 492

11-7:2.3 Affidavits and Other Documents 493

11-7:3 Opposition to Motion for Summary Judgment..... 494

11-7:4 Federal Rule 56(d) Continuance 495

11-7:5 Summary Judgment Standard May Be Applicable
to Motions to Compel Arbitration 495

11-8 MOTIONS FOR ADMISSION PRO HAC VICE..... 497

11-9 MOTIONS TO INTERVENE..... 499

11-10 MOTIONS TO AMEND OR SUPPLEMENT
PLEADINGS 500

11-11 MOTIONS FOR DISMISSAL 502

11-12 MOTIONS TO DISMISS FEWER THAN ALL CLAIMS..... 503

Chapter 12: Final Pretrial Orders 505

12-1 INTRODUCTION..... 505

12-2 AN OVERVIEW 506

12-3 FORM AND CONTENT OF THE ORDER..... 507

12-4 PREPARATION OF THE FINAL PRETRIAL ORDER 509

12-5 THE FINAL PRETRIAL CONFERENCE 511

12-6 EFFECT OF THE FINAL PRETRIAL ORDER 513

Chapter 13: Trials 519

13-1 INTRODUCTION..... 519

13-2 JURY SELECTION..... 520

13-2:1 General Guidelines 520

13-2:1.1 Preparation 520

13-2:1.1a The Case Statement 520

13-2:1.1b Voir Dire Questions 520

13-2:1.2 The Jury Pool and Background..... 521

13-2:1.3 The Size of the Civil Jury..... 521

13-2:1.4 The Size of the Panel 522

13-2:2 Challenges for Cause 522

13-2:3 Peremptory Challenges 523

13-2:3.1 The Number and Order of Challenges..... 523

13-2:3.2 Forfeiture..... 523

13-2:3.3 Batson and Related Issues..... 524

13-2:4 Seating the Jury 525

13-2:5 Questioning and Note-Taking by Jurors 525

Table of Contents

13-3	OPENING STATEMENTS	526
13-3:1	Generally	526
13-3:2	Preliminary Questions	526
13-3:2.1	Do Counsel Have a Right to Open and What Is the Purpose?	527
13-3:2.2	What Is the Order and Timing of Openings?	527
13-3:2.3	Is There a Right to Present Rebuttal?	527
13-3:2.4	What Are the Limits on Lengths of Openings?	528
13-3:2.5	May Counsel Waive Openings?	528
13-3:2.6	May Demonstrative Evidence Be Used During Openings?	528
13-3:2.7	Where Do Counsel Stand?	528
13-3:2.8	Can Counsel Object During an Opening?	529
13-3:2.9	What Motions May Be Directed to an Opening Statement?	529
13-4	CLOSING ARGUMENTS	530
13-4:1	Objectives and Guidelines	530
13-4:2	The Court's Control of Closing Remarks	530
13-4:3	Comments to Avoid in Closing	531
13-4:3.1	Reference to Facts Not in Evidence	531
13-4:3.2	Appeals to the Jury's Bias, Sympathy, or Emotion	532
13-4:3.3	Assertions of Personal Knowledge of Facts in Issue	533
13-4:3.4	Expressions of Personal Opinion Regarding the Justness of the Client's Cause or the Credibility of a Witness	534
13-4:3.5	Personal Attacks on Counsel or Witness	534
13-4:3.6	Reference to the Fact That Party Is Insured or Uninsured	534
13-4:3.7	Reference to Disparities in the Relative Wealth of the Parties	535
13-4:3.8	Request that the Trier of Fact Award a Specific Amount for Pain and Suffering	535
13-4:3.9	Appeals to Apply the "Golden Rule"	537
13-4:3.10	Deliberate Factual Misstatements	538
13-4:4	What Should Counsel Do When Faced With Objectionable Closing Remarks?	538
Chapter 14: Trial and Post-Trial Motions		541
14-1	INTRODUCTION	541
14-2	TRIAL MOTIONS	541

14-2:1	Motion to Exclude Witnesses.....	541
14-2:2	Motion In Limine	543
14-2:3	Motion for Judgment as a Matter of Law.....	546
14-2:4	Motion for Judgment on Partial Findings.....	549
14-2:5	Other Trial Motions.....	550
14-3	POST-VERDICT MOTIONS	551
14-3:1	Motion for Judgment as a Matter of Law.....	551
14-3:2	Motion for a New Trial.....	553
14-3:3	Remittitur	557
14-3:4	Motion to Alter or Amend Judgment	558
14-3:5	Other Post-Verdict Motions.....	560

Chapter 15: Significant Variations Between the Federal and State

	Evidence and Court Rules	561
15-1	INTRODUCTION.....	561
15-2	EVIDENCE RULE 607—IMPEACHMENT	562
15-3	EVIDENCE RULE 608—CHARACTER EVIDENCE	563
15-4	EVIDENCE RULE 609—IMPEACHMENT BY A CRIMINAL CONVICTION	565
15-5	EVIDENCE RULE 615—SEQUESTRATION OF WITNESSES.....	568
15-6	EVIDENCE RULE 703—ADMISSION OF INADMISSIBLE EVIDENCE RELIED ON BY EXPERTS.....	570
15-7	EVIDENCE RULE 807—RESIDUAL HEARSAY.....	570
15-8	OTHER EVIDENCE RULES	573
15-8:1	Evidence Rule 803—Exceptions Against Hearsay-Recorded Recollection	573
15-8:2	Evidence Rule 706—Court-Appointed Expert Witnesses.....	573
15-8:3	Evidence Rule 901—Authenticating or Identifying Evidence.....	574
15-9	THE SCOPE OF ALLOWABLE DISCOVERY IN FEDERAL AND STATE COURTS.....	574
15-10	ELECTRONICALLY STORED INFORMATION	577
15-11	FEDERAL AND STATE COURT RULES ON DEPOSITION TESTIMONY.....	579
15-12	PERPETUATION OF TESTIMONY BEFORE FILING OF A LAWSUIT	581
15-13	FEDERAL AND STATE COURT RULES ON EXPERT REPORTS	582
15-14	FEDERAL AND STATE COURT RULES ON OFFER OF JUDGMENT	583

Table of Contents

15-15	SPOILIATION	585
15-16	CONTEMPORANEOUS TRANSMISSION OF TRIAL TESTIMONY	588
15-17	ADVISORY JURY	592
Chapter 16:	Judgments	595
16-1	INTRODUCTION	595
16-2	FORM OF JUDGMENT, PREPARATION, AND NOTICE	595
16-2:1	Retention of Jurisdiction for Purposes of Enforcing Settlement	597
16-2:1.1	Retention of Jurisdiction Requested by Parties	597
16-2:1.2	Retention of Jurisdiction As a Condition Imposed By Court	598
16-2:2	Costs	598
16-2:2.1	Procedure	600
16-2:2.2	Taxable Costs	602
16-2:2.2a	Service Fees	602
16-2:2.2b	Transcripts	603
16-2:2.2b1	Court Proceedings Transcripts	604
16-2:2.2b2	Deposition Transcripts and Videos	604
16-2:2.2c	Fees for Witnesses	606
16-2:2.2d	Costs for Making Copies and Exemplifications	607
16-2:2.2d1	Disbursements for Printing	607
16-2:2.2d2	Exemplifications	608
16-2:2.2e	Docket Fees	608
16-2:2.2f	Court-Appointed Experts, Interpreters, Special Interpretation Services	609
16-2:2.2g	Appellate Costs	609
16-2:3	Attorneys' Fees	609
16-2:4	Interest on the Judgment	611
16-2:4.1	Prejudgment Interest	611
16-2:4.2	Post-Judgment Interest	612
16-2:5	Docketing Judgments	612
16-3	DEFAULT JUDGMENTS	613
16-3:1	General Principles	613
16-3:2	Entry of Default	614

16-3:3	Entry of Default Judgment.....	615
16-3:3.1	Clerk’s Entry of Judgment.....	615
16-3:3.2	District Judge’s Entry of Judgment.....	617
16-3:4	Relief from Default and Default Judgment.....	621
16-3:4.1	Prejudice to Plaintiff.....	623
16-3:4.2	Meritorious Defense.....	623
16-3:4.3	Culpable Conduct.....	624
16-3:4.4	Good Cause to Set Aside Defaults.....	625
16-3:4.5	Conditions.....	626
16-4	MULTIPLE PARTIES AND CLAIMS.....	627
16-4:1	Federal Rule 54(b) Certification.....	627
16-4:1.1	Requirements.....	628
16-4:1.1a	Finality.....	629
16-4:1.1b	No Just Reason for Delay.....	629
16-4:1.2	Examples.....	630
16-5	STAYS OF JUDGMENTS.....	632
16-6	REGISTRATION OF JUDGMENTS.....	633
16-7	ENFORCEMENT OF JUDGMENTS.....	634
16-7:1	The Writ of Execution.....	635
16-7:2	Enforcement Against Certain Public Officers.....	636
16-7:3	Discovery in Aid of Execution.....	636
16-8	SATISFACTION OF JUDGMENTS.....	638
16-9	RELIEF FROM JUDGMENTS.....	638
16-9:1	Clerical Mistakes.....	639
16-9:2	Other Reasons.....	639
16-10	OFFERS OF JUDGMENT.....	641
Chapter 17: Sanctions.....		643
17-1	INTRODUCTION.....	643
17-2	FEDERAL RULE 11.....	643
17-2:1	Generally.....	643
17-2:2	Purpose of Federal Rule 11.....	644
17-2:3	Compliance with Federal Rule 11.....	645
17-2:3.1	The Attorney’s or Party’s Signature.....	645
17-2:3.2	The Reasonable Inquiry.....	646
17-2:3.2a	“Stop, Think, Investigate and Research”.....	646
17-2:3.2b	Reliance on Others.....	648
17-2:3.2c	Duties of Local Counsel.....	648
17-2:3.3	Improper Purpose.....	649
17-2:4	The Motion.....	649
17-2:4.1	Schedule for the Motion.....	649

Table of Contents

	17-2:4.2	Time Limits for the Motion	650
	17-2:5	The Sanction.....	651
	17-2:6	Appeals.....	654
	17-2:7	The Inapplicability of Federal Rule 11 to Discovery	655
17-3		28 U.S.C. § 1927	656
	17-3:1	History of Section 1927	656
	17-3:2	Purpose of Section 1927	656
	17-3:3	The Requirement of Bad Faith	657
	17-3:4	Appeals.....	658
17-4		FEDERAL RULE 37	659
	17-4:1	Generally	659
	17-4:2	Federal Rule 37(e).....	660
	17-4:3	Purpose of Federal Rule 37	661
	17-4:4	Who May Be Subjected to Federal Rule 37	662
	17-4:5	Sanctions Permitted.....	662
		17-4:5.1 Dismissal	662
		17-4:5.2 Other Sanctions	663
	17-4:6	Appeals.....	664
17-5		OTHER SANCTIONS: THE COURT'S INHERENT AUTHORITY	665
		Chapter 18: Attorneys' Fees.....	671
18-1		INTRODUCTION.....	671
18-2		OVERVIEW OF ATTORNEYS' FEES UNDER FEDERAL LAW....	671
18-3		SECTION 1988 AND ITS PURPOSE	673
	18-3:1	Prevailing Party	674
		18-3:1.1 Fee Shifting and Interim Relief.....	679
		18-3:1.2 Fee Shifting and Nominal Damages	680
	18-3:2	Calculating the Fee	681
		18-3:2.1 Generally	681
		18-3:2.2 Hourly Rates.....	683
		18-3:2.3 The Lodestar Approach.....	684
	18-3:3	Enhancement of Fee Awards	685
	18-3:4	Contingent Fees and Other Fee Agreements.....	686
	18-3:5	The Interplay Between Section 1988 and Federal Rule 68	688
	18-3:6	Fee Waiver and Section 1988	692
	18-3:7	Fee Awards and the Eleventh Amendment	693
	18-3:8	Federal Statutory Claims	694
	18-3:9	Fee Awards for Time Spent Participating in Administrative Proceedings	695
	18-3:10	Awards for Fees and Expenses Incurred in Separate Litigation	695

18-3:11	Fee Awards for Time Spent by Paralegals and Law Clerks.....	695
18-3:12	Fees for Experts	696
18-3:13	Attorneys’ Fee Awards to Pro Se Litigants and Public Interest Law Firms	697
18-3:14	Fee Awards for Time Spent Preparing Fee Petitions	698
18-3:15	Fee Awards for Improper Removal of Case From State to Federal Court.....	698
18-3:16	Fee Awards for Exceptional Circumstances Even When a Case Is Voluntarily Dismissed With Prejudice.....	698
18-3:17	Post-Judgment Interest on Attorneys’ Fee Awards.....	699
18-4	FEE AWARDS AGAINST THE UNITED STATES	699
18-5	AWARDS OF COUNSEL FEES AND COSTS IN ACCORDANCE WITH LOCAL RULE 54.2	703
18-5:1	Time for Filing Applications.....	703
18-5:2	Contents of Applications.....	704
18-5:3	Opposing a Fee Application.....	704
18-6	APPEALS	705
18-7	TABLE OF FEE-SHIFTING STATUTES	706
18-7:1	Attorneys’ Fees Referred to as “Costs”	706
18-7:2	Attorneys’ Fees Not Referred to as “Costs”.....	710
18-7:3	Costs and Expenses, Including Attorneys’ Fees	713

**Chapter 19: Alternative Dispute Resolution: Arbitration, Mediation,
and More..... 715**

19-1	INTRODUCTION.....	715
19-2	ARBITRATION	716
19-2:1	Overview.....	716
19-2:2	Cases Subject to Arbitration.....	717
19-2:2.1	Mandatory Assignment to the Arbitration Program.....	717
19-2:2.2	Voluntary Assignment to the Arbitration Program.....	718
19-2:2.3	Voluntary Private Arbitration	718
19-2:3	Preparing for Arbitration.....	718
19-2:3.1	Completion of Discovery and Motion Practice	718
19-2:3.2	Submissions to Arbitrator.....	719
19-2:3.3	Pre-hearing Conference with Arbitrator	719
19-2:4	Arbitration Hearing.....	720
19-2:4.1	Generally	720
19-2:4.2	Evidence by Proffer and by Live Testimony	720
19-2:4.3	Resolving Questions of Law	721
19-2:4.4	Duty of Meaningful Participation	721

Table of Contents

19-2:5	Arbitration Award; Judgment	722
19-2:6	Trial De Novo Request	723
19-2:7	Compliance Judge for Arbitration	724
19-3	MEDIATION.....	724
19-3:1	Introduction	724
19-3:2	Getting to Mediation	725
19-3:3	Mediators: Role, Selection, Compensation, and Ethical Obligations	726
19-3:4	Compliance Judge for Mediation.....	728
19-3:5	Mediation Features.....	729
19-3:6	Preparing for Mediation	731
19-4	OTHER ADR OPPORTUNITIES	732
19-4:1	Summary Jury Trials and Mini-Trials	732
19-4:2	Settlement Protocol	734
19-5	ONLINE DISPUTE RESOLUTION	735
Chapter 20: Appellate Review		737
20-1	INTRODUCTION.....	737
20-1:1	The U.S. Court of Appeals for the Third Circuit	737
20-1:2	Contact With the Court.....	737
20-1:2.1	Filing of Papers	738
20-1:2.2	Electronic and Facsimile Filing.....	738
20-1:2.3	Third Circuit Website.....	740
20-1:3	Pro Se Cases	740
20-2	GOVERNING RULES.....	741
20-2:1	Federal Rules of Appellate Procedure.....	741
20-2:2	Local Appellate Rules.....	741
20-2:3	Internal Operating Procedures	741
20-2:4	Computation of Time.....	741
20-3	APPELLATE JURISDICTION	742
20-3:1	Review of Final Decisions	742
20-3:1.1	Finality in General.....	742
20-3:1.1a	Creating Finality.....	744
20-3:1.1b	Practical Finality of Post-Judgment Orders.....	744
20-3:1.2	Partial Finality Under Federal Rule 54(b).....	745
20-3:2	The Collateral Order Doctrine.....	748
20-3:2.1	General Considerations	748
20-3:2.2	Orders Reviewable as Collateral Orders	749
20-3:2.3	Remand of Removed Actions	751
20-3:3	Interlocutory Appeals of Right	752
20-3:3.1	28 U.S.C. § 1292(a).....	752

	20-3:3.1a	Injunctions.....	753
	20-3:3.2	Interlocutory Appeals Involving Arbitration	755
20-3:4		Permissive Interlocutory Appeals	756
	20-3:4.1	Permission to Appeal Under Section 1292(b)	756
		20-3:4.1a Controlling Question of Law	757
		20-3:4.1b Substantial Ground for Difference of Opinion	758
		20-3:4.1c Advance Termination of Litigation....	758
	20-3:4.2	Certification of Class Actions	758
	20-3:4.3	Remand of Class Actions Removed Under CAFA	760
20-3:5		Review by Extraordinary Writ	761
	20-3:5.1	General Considerations	761
	20-3:5.2	Ground for Issuance	762
	20-3:5.3	Procedure for Petition.....	764
20-3:6		Special Jurisdictional Statutes.....	765
20-3:7		Review of Administrative Agency Decisions and Orders	766
20-3:8		Appeals from Magistrate Judge Decisions	766
20-4		PROCEDURE TO APPEAL	766
	20-4:1	Appeal as of Right.....	766
		20-4:1.1 Notice of Appeal	766
		20-4:1.1a Filing Effective on Receipt	767
		20-4:1.1b Effect of Filing in the Court of Appeals.....	767
	20-4:1.2	Contents of the Notice of Appeal.....	767
	20-4:1.3	Time for Filing Notice of Appeal	768
		20-4:1.3a Timely Filing Jurisdictional	768
		20-4:1.3b Premature Filing	769
		20-4:1.3c Extension of Time for Excusable Neglect or Good Cause.....	770
		20-4:1.3d Reopening of Time	770
20-4:2		Discretionary Appeals	771
	20-4:2.1	Content and Form of Petition	771
	20-4:2.2	Time for Filing Petition	771
	20-4:2.3	Response and Disposition.....	772
20-4:3		Perfection of the Appeal.....	772
	20-4:3.1	Fees	772
	20-4:3.2	Civil Appeals Information Statement.....	773
	20-4:3.3	Transcript Order	773
	20-4:3.4	Corporate Disclosure Statement	773
	20-4:3.5	Appearance of Counsel	773

Table of Contents

20-5	THE RECORD	774
20-6	THE BRIEF AND APPENDIX	774
20-6:1	Checklist	774
20-6:2	Briefs	774
20-6:2.1	Contents of the Appellant’s Brief	774
20-6:2.2	Contents of the Appellee’s Brief	776
20-6:2.3	Contents of the Reply Brief	777
20-6:2.4	Briefs of Amicus Curiae	777
20-6:2.5	Citation of Authority.....	777
20-6:2.6	Supplemental Citations.....	778
20-6:2.7	Decorum.....	778
20-6:2.8	Format, Length, and Signing of Briefs	778
	20-6:2.8a Format	778
	20-6:2.8b Length	778
	20-6:2.8c Signing.....	779
20-6:3	The Appendix	780
20-6:3.1	Contents of the Appendix.....	780
20-6:3.2	Electronic Filing and Service Options for Appendix	781
20-6:3.3	Form of Appendix.....	781
20-6:3.4	Cost of the Appendix	781
20-6:4	Filing and Service of Briefs and Appendix	781
20-6:4.1	Filing and Service	781
20-6:4.2	Time for Filing.....	782
20-6:4.3	Five O’Clock Deadline for Electronic Filing.....	782
20-7	ORAL ARGUMENT OR SUMMARY DISPOSITION.....	782
20-7:1	Scheduling of Oral Argument.....	782
20-7:2	Presentation of Oral Argument	783
20-8	MOTIONS	784
20-8:1	Filing and Service of Motions	784
20-8:1.1	Procedure for Filing Motions.....	784
20-8:1.2	Service of Motions	784
20-8:1.3	Uncontested Motions	785
20-8:2	Form of Motion Papers.....	785
20-8:3	Disposition of Motions	786
20-8:4	Motion Practice.....	786
20-8:4.1	Motions to Stay or for Injunction Pending Appeal	786
20-8:4.2	Motions for Summary Action.....	787
20-8:4.3	Motions to Extend Time and Enlarge Length of Brief.....	788

	20-8:4.4	Motion to Expedite Consideration	788
	20-8:4.5	Motions to Seal	789
	20-8:4.6	Motions for Certifying Question to New Jersey Supreme Court	789
20-9	SCOPE AND STANDARDS OF APPELLATE REVIEW		790
	20-9:1	Generally	790
	20-9:2	Plenary Review	790
	20-9:3	Clearly Erroneous	790
	20-9:4	Abuse of Discretion.....	791
	20-9:5	Mixed Questions.....	791
20-10	FURTHER REVIEW		791
	20-10:1	Options for Further Review	791
	20-10:2	Panel Rehearing.....	791
	20-10:3	Rehearing <i>En Banc</i>	792
	20-10:4	Petition for Writ of Certiorari.....	794
20-11	DAMAGES AND COSTS ON APPEAL		794
20-12	MEDIATION.....		795
20-13	SPECIAL MASTERS		796
Chapter 21: Class Action Litigation.....			797
21-1	INTRODUCTION.....		797
21-2	NECESSARY ELEMENTS OF A CLASS ACTION.....		797
	21-2:1	Numerosity	798
	21-2:2	Commonality.....	799
	21-2:3	Typicality.....	800
	21-2:4	Adequacy of Representation	802
21-3	MAINTAINABILITY		806
	21-3:1	Undesirability of Individual Adjudications: Federal Rule 23(b)(1)	806
	21-3:1.1	Prejudice to Non-Movants: Federal Rule 23(b)(1)(A).....	806
	21-3:1.2	Prejudice to Class Members: Federal Rule 23(b)(1)(B)	806
	21-3:2	Injunctive or Declaratory Relief: Federal Rule 23(b)(2)	807
	21-3:3	Common Questions Predominate/Superior Method of Adjudication: Federal Rule 23(b)(3)	808
	21-3:3.1	Predominance	809
	21-3:3.2	Superiority.....	811
21-4	LITIGATION PROCEDURE		812
	21-4:1	Pleadings (Complaint)	812
	21-4:1.1	Jurisdiction	813
	21-4:1.2	Structure of Complaint.....	815

Table of Contents

21-4:1.3	Definition of Appropriate Class.....	815
21-4:2	Answering Pleading	817
21-5	CASE MANAGEMENT	818
21-6	CLASS CERTIFICATION MOTION	820
21-7	DISCOVERY	822
21-8	NOTICE TO ABSENT CLASS MEMBERS.....	823
21-9	SETTLEMENT PROCEEDINGS.....	824
21-9:1	Settlement Before Class Certification.....	824
21-9:2	Settlement Contingent on Class Certification	825
21-9:3	Settlement After Class Certification.....	826
21-10	FAIRNESS HEARINGS	827
21-11	SETTLEMENT CHALLENGES	829
21-12	ATTORNEYS' FEES.....	830
Chapter 22: Conflict of Laws		837
22-1	INTRODUCTION.....	837
22-1:1	Application of Foreign National Law	837
22-1:2	Application of Federal or State Law	839
22-1:3	Determining Which Law to Apply and How to Apply It	839
22-2	WHETHER TO APPLY FEDERAL OR STATE LAW	839
22-2:1	The Erie Doctrine	839
22-2:2	Supreme Court Refinements to <i>Erie</i>	840
22-2:3	Applications of Erie Within the Third Circuit	846
22-2:3.1	The Third Circuit Three-Part Test	846
22-2:3.2	State Law	848
22-2:3.2a	Forum-Selection Clauses.....	852
22-2:3.2b	Arbitration Clauses.....	854
22-2:3.2c	New Jersey's Entire Controversy Doctrine.....	863
22-2:3.3	Federal Law	866
22-3	SELECTING THE APPLICABLE FEDERAL LAW.....	870
22-4	SELECTING THE APPLICABLE STATE LAW	871
22-4:1	Original Cases.....	871
22-4:2	Transferred Cases	879
22-4:3	Determining State Law	883
22-4:4	The Internal Affairs Doctrine	886
22-5	MISCELLANEOUS ISSUES	887
22-5:1	Federal Common Law	887
22-5:2	"Religious" Law.....	891
22-5:3	Comity.....	893
22-5:4	The SPEECH Act.....	900

Chapter 23: Estoppel Principles 901

23-1 INTRODUCTION..... 901

23-2 RES JUDICATA (CLAIM PRECLUSION)..... 901

 23-2:1 Res Judicata Is an Affirmative Defense..... 902

 23-2:2 Three Elements of a Res Judicata Defense..... 902

 23-2:2.1 Final Judgment on the Merits..... 903

 23-2:2.2 Same Parties or Their Privies..... 904

 23-2:2.3 Same Factual Circumstances 905

 23-2:3 Counterclaims May be Barred by Res Judicata 906

 23-2:4 New Jersey’s “Entire Controversy Doctrine”..... 906

 23-2:5 Res Judicata Generally Applies Following Dismissal
 After a Settlement Agreement..... 909

 23-2:6 Res Judicata May Apply Following a Dismissal
 for Failure to Prosecute..... 910

 23-2:7 Standard of Review 910

23-3 COLLATERAL ESTOPPEL (ISSUE PRECLUSION) 911

 23-3:1 Collateral Estoppel Applies Only to Issues Directly
 Decided 911

 23-3:2 Collateral Estoppel Is an Affirmative Defense 912

 23-3:3 The Four Elements of a Collateral Estoppel Defense 912

 23-3:4 Mutuality Is Not Required for Collateral Estoppel 914

 23-3:5 Standard of Review for Collateral Estoppel Decisions..... 915

 23-3:6 When Collateral Estoppel May *Not* Be Applied..... 915

 23-3:6.1 Where Non-Mutual Offensive Estoppel
 Would Result in Unfairness 915

 23-3:6.2 If the Higher Burden of Proof in the
 First Action Was Not Met 916

 23-3:6.3 If the Facts Between Successive Cases are
 Materially Distinguishable..... 917

 23-3:6.4 If the Controlling Law Has Changed..... 917

 23-3:6.5 If the Fairness of the Prior Judgment Is
 in Doubt 917

 23-3:6.6 If the First Decision Does Not Make Clear the
 Basis of the Court’s Holding..... 917

 23-3:6.7 As Against the United States Government..... 917

23-4 FULL FAITH AND CREDIT..... 918

 23-4:1 Law Governing Full Faith and Credit and
 Preclusive Effect..... 918

 23-4:2 Three Elements Required for Application of
 Full Faith and Credit Doctrine 919

 23-4:2.1 Finality of the Prior Judgment 919

Table of Contents

23-4:2.2 Validity of the Prior Judgment..... 920

23-4:2.3 “On the Merits” 921

23-5 PRECLUSIVE EFFECT OF ARBITRATION AWARDS 922

23-6 PRECLUSIVE EFFECT OF ADMINISTRATIVE AGENCY
DECISIONS..... 923

23-7 JUDICIAL ESTOPPEL..... 924

23-8 LAW OF THE CASE..... 926

Chapter 24: Special Considerations in Cases Involving Foreign Parties 929

24-1 INTRODUCTION..... 929

24-2 SERVICE OF PROCESS 929

24-2:1 The Service Conventions..... 930

24-2:1.1 Applicability of the Hague Service Convention 931

24-2:1.2 Procedures Under the Hague Service
Convention 932

24-2:2 The Inter-American Convention 936

24-2:3 Service Under Federal Rule 4..... 938

24-3 DISCOVERY OUTSIDE THE UNITED STATES 940

24-3:1 The Hague Evidence Convention..... 941

24-3:1.1 Applicability of the Hague Evidence
Convention 942

24-3:1.2 Mechanics of Requests for Discovery 944

24-3:1.2a Letters of Request..... 944

24-3:1.2b Diplomatic Officers and
Commissioners..... 947

24-3:2 The Inter-American Convention on Letters Rogatory 950

24-3:3 Letters of Request 950

24-3:4 Blocking Statutes 952

24-4 FOREIGN DISCOVERY IN THE UNITED STATES 954

24-5 ENFORCEMENT OF JUDGMENTS AND
ARBITRATION AWARDS 957

24-5:1 Foreign Country Judgments..... 957

24-5:1.1 Generally 957

24-5:1.2 Comity..... 958

24-5:1.3 Foreign Country Money-Judgments
Recognition Act..... 960

24-5:1.4 Other Applicable New Jersey Statutes..... 962

24-5:1.4a Foreign-Money Claims Act..... 962

24-5:1.4b Uniform Child Custody
Jurisdiction Act..... 963

24-5:2 Arbitration Awards..... 963

24-5:2.1 New York Convention 964

24-5:2.2 Panama Convention 966

24-5:3 International Mediation..... 967

24-5:4 U.S. Judgments in Foreign Courts 967

24-6 PRELIMINARY RELIEF 968

24-7 THE FOREIGN SOVEREIGN IMMUNITIES ACT 969

24-7:1 Defining the “Foreign State” 970

24-7:2 Qualifications and Exceptions..... 971

24-7:3 The “Commercial Activity” Exception..... 973

24-7:4 Federal Jurisdiction 974

24-7:5 Prejudgment Attachment..... 975

24-7:6 Two Forms of Service Under the FSIA..... 976

24-7:6.1 Service on a Foreign State..... 976

24-7:6.2 Service on an Agency..... 976

24-7:7 Removal..... 977

24-7:8 Venue..... 978

24-7:9 Discovery..... 978

24-7:10 Choice-of-Law 978

24-7:11 Limited Liability..... 979

24-7:12 Post-Judgment Remedies 979

24-7:12.1 Foreign State Property 979

24-7:12.2 Agency or Instrumentality Property 980

24-8 ALIEN TORT STATUTE..... 981

Chapter 25: Special Considerations in Cases Involving Civil RICO 983

25-1 INTRODUCTION..... 983

25-2 ISSUES PERTAINING TO SUBSTANTIVE RICO VIOLATIONS..... 983

25-2:1 18 U.S.C. § 1962(a) 983

25-2:2 18 U.S.C. § 1962(b) 984

25-2:3 18 U.S.C. § 1962(c)..... 985

25-2:3.1 Generally 985

25-2:3.2 “Employed By or Associated With” 985

25-2:3.3 “Conduct or Participate” 986

25-2:4 18 U.S.C. § 1962(d)..... 987

25-3 CAUSATION, INJURY, AND DAMAGE 988

25-3:1 Proximate Cause 988

25-3:2 Injury and Damage..... 989

25-3:3 Attorneys’ Fees 992

25-4 JURISDICTION, VENUE, AND RELATED MATTERS..... 992

25-4:1 Jurisdiction 992

25-4:2 Venue and Service of Process..... 993

25-4:3 Removal..... 994

Table of Contents

25-4:4	Arbitration	995
25-5	THE RICO CASE STATEMENT.....	995
25-6	RICO PLEADING REQUIREMENTS.....	996
25-7	STATUTE OF LIMITATIONS	997
25-8	RICO BUILDING BLOCKS.....	997
25-8:1	Enterprise	997
25-8:2	Pattern of Racketeering Activity.....	1000
25-8:3	Racketeering Activity.....	1002
25-9	MISCELLANEOUS CIVIL RICO ISSUES.....	1004
25-9:1	Respondeat Superior.....	1004
25-9:2	Aiding and Abetting.....	1004
25-9:3	New Jersey State RICO	1005
25-9:4	New Jersey Litigation Privilege.....	1005

Chapter 26: Special Considerations in Cases Involving Intellectual

	Property	1007
26-1	INTRODUCTION.....	1007
26-2	SUBJECT-MATTER JURISDICTION	1008
26-2:1	Patent and Copyright Cases.....	1009
26-2:2	Trademark and Other Unfair Competition Cases.....	1010
26-2:2.1	Registered Trademarks	1010
26-2:2.2	Unregistered Trademarks and Trade Dress	1012
26-2:2.3	Misrepresentations in Advertising.....	1013
26-2:2.4	Dilution of a Famous Trademark.....	1014
26-2:2.5	Registering or Trafficking in Domain Names of Marks	1014
26-2:3	Trade Secrets Cases	1016
26-3	VENUE.....	1017
26-3:1	Patent Cases.....	1018
26-3:2	Copyright Cases.....	1018
26-3:3	Trademark Cases	1018
26-3:4	Joinder of Defendants in Patent Actions	1018
26-3:5	False Patent Marking.....	1019
26-4	CONTROLLING PRECEDENTS	1019
26-4:1	Generally	1019
26-4:2	Patent Cases.....	1020
26-4:3	Trademark and Copyright Cases	1021
26-5	DISTRICT OF NEW JERSEY PATENT RULES	1021
26-5:1	Scope of Rules.....	1021
26-5:2	Discovery.....	1021
26-5:3	Disclosure of Infringement and Invalidity Contentions	1022

26-5:4 Claim Construction Proceedings..... 1025

26-6 PROVISIONAL REMEDIES 1027

26-6:1 Patent Cases..... 1027

26-6:2 Trademark Cases 1029

26-6:2.1 Seizure Orders Against Counterfeiting 1029

26-6:2.2 Preliminary Injunctions Against
Trademark Infringement..... 1029

26-6:3 Copyright Cases..... 1032

26-6:4 Trade Secrets Cases..... 1033

26-6:4.1 Preliminary Seizure Orders 1033

26-6:4.2 Injunctions..... 1034

26-6:4.3 Orders to Preserve Confidentiality 1035

26-7 STAYS IN VIEW OF RELATED PROCEEDINGS 1035

26-7:1 Generally 1035

26-7:2 Patent Cases..... 1036

26-7:3 Trademark Cases 1038

26-7:4 Copyright Cases..... 1039

26-8 SUMMARY JUDGMENT MOTIONS..... 1039

26-8:1 Patent Cases..... 1039

26-8:2 Trademark Cases 1040

26-8:3 Copyright Cases..... 1041

26-9 SEPARATE TRIALS OF ISSUES..... 1041

26-9:1 Patent Cases..... 1041

26-9:2 Trademark and Copyright Cases 1042

26-10 JURY TRIALS..... 1042

26-10:1 Generally 1042

26-10:2 Patent Cases..... 1042

26-10:3 Copyright Cases..... 1044

26-11 REMEDIES 1044

26-11:1 Patent Cases..... 1044

26-11:2 Trademark Cases 1046

26-11:3 Copyright Cases..... 1048

26-11:4 Trade Secrets Cases..... 1049

26-12 THE IMPACT OF ARTIFICIAL INTELLIGENCE 1050

26-12:1 Copyrights and Authorship 1050

26-12:2 Patents and Inventorship 1051

**Chapter 27: Special Considerations in Cases Involving Labor and
Employment Law..... 1053**

27-1 INTRODUCTION..... 1053

27-2 SUBJECT-MATTER JURISDICTION 1054

27-2:1 Exhaustion of Administrative Remedies..... 1054

Table of Contents

27-2:1.1	Supplemental Jurisdiction.....	1055
27-2:2	Personal Jurisdiction and Service.....	1058
27-3	VENUE.....	1060
27-4	REMOVAL.....	1060
27-4:1	Federal Labor Law Preemption.....	1060
27-4:2	ERISA Preemption.....	1062
27-5	ENFORCEMENT OF AGREEMENTS TO ARBITRATE EMPLOYMENT CLAIMS.....	1064
27-5:1	Federal Arbitration Act Encourages Enforcement of Arbitration Agreements.....	1064
27-5:2	Motions to Enforce Arbitration Agreements.....	1066
27-6	INJUNCTIVE RELIEF.....	1067
27-6:1	Labor Law Cases.....	1067
27-6:2	Employment Litigation.....	1069
27-7	PLEADING AND RESPONDING TO THE COMPLAINT.....	1071
27-7:1	Specificity.....	1071
27-7:2	Timeliness of “Hybrid” LMRA Claims.....	1071
27-7:3	Timeliness of Civil Rights Suits.....	1072
27-7:4	Timely EEOC Charge as Prerequisite to Title VII or ADEA Suit.....	1073
27-7:4.1	300-Day Statutory Limitations Period.....	1073
27-7:4.2	The “Continuing Violation” Theory.....	1075
27-7:4.3	Equitable Tolling.....	1077
27-7:5	Scope of Complaint.....	1077
27-8	PARTIES.....	1078
27-8:1	Liability of Individual Defendants.....	1078
27-8:2	Parties Not Named in EEOC Charges.....	1079
27-9	CLASS ACTIONS AND REPRESENTATIVE LITIGATION.....	1080
27-9:1	Title VII Class Actions.....	1080
27-9:2	ADEA Class Actions.....	1081
27-10	DISCOVERY.....	1083
27-10:1	Scope of Discovery.....	1083
27-10:2	Ex Parte Contact with Former Employees.....	1084
27-10:3	Discovery of Employer’s Internal Investigation.....	1085
27-11	SUMMARY JUDGMENT.....	1086
27-12	TRIALS AND EVIDENCE.....	1092
27-12:1	Admissibility of Evidence of Alleged Prior Discrimination Against Other Employees.....	1092
27-12:2	“After-Acquired” Evidence.....	1093
27-12:3	Admissibility of Administrative Agency Determinations.....	1094
27-12:4	Availability of Directed Verdict.....	1094

Table of Contents

27-12:5 Jury Instructions: Pretext and “Mixed Motives” 1095
27-12:6 Post-Trial Grant of Judgment as a Matter of Law 1098
27-13 DOCTRINES OF PRECLUSION AND BAR 1098
27-14 ATTORNEYS’ FEES AND SANCTIONS 1101
Table of Cases 1103
Table of Statutes 1297
Table of Rules 1309
Table of Conventions 1317
Index 1319