UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

PRO SE HANDBOOK

February 1, 2011
Revised: April 25, 2011

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1. Introduction

Welcome to the United States District Court for the Southern District of West Virginia. We have prepared this handbook specifically for the person who is representing him or herself as a party to a lawsuit: the pro se litigant. This handbook is a practical and informative means of providing assistance to those individuals who are litigating claims pro se in a federal forum. **It is important that you read this entire manual before you ask the Clerk's Office specific procedural questions about your potential lawsuit; many of your questions will undoubtedly be answered in the chapters of this handbook.**

While this handbook should be helpful for any person who is involved in litigation without the aid of an attorney, much of it is intended to inform the pro se *plaintiff*, i.e. the person who files the complaint. There are, however, pro se *defendants*, i.e. people being sued, who will also find some important information in this handbook.

The early chapters of this handbook provide information that you should consider before filing your own lawsuit. If, after considering this information, you decide to file a case in federal court, additional information has been provided to assist you in filing your case and utilizing the appropriate rules of procedure for the United States District Court for the Southern District of West Virginia. We have also provided you with an overview of the "ins and outs" of legal research.

This handbook should not be considered the last word, nor should it be your only resource. Rather, this handbook should be considered a procedural aid to help you should you choose to file and litigate a lawsuit.

If, after reading this manual, you still have questions about your case, you may contact the Clerk's Office. Our office is willing to assist you with certain questions you may have regarding the Local Rules of Procedure as well as the Federal Rules of Civil Procedure. Please do not hesitate to contact us regarding a procedural matter. However, **employees of the Court cannot give legal advice.**

For your convenience, the Clerk's Office for the Southern District of West Virginia has offices in the following locations:

Division 1: Bluefield
Elizabeth Kee Federal Building
601 Federal Street, Room 2303
Bluefield, WV 24701
(304) 327-9798

Division 2: Charleston
Robert C. Byrd United States Courthouse
300 Virginia Street, East, Suite 2400
Charleston, WV 25301
(304) 347-3000

Division 3: Huntington
Sidney L. Christie Federal Building
845 Fifth Avenue, Room 101
Huntington, WV 25701
(304) 529-5588

Division 5: Beckley
Robert C. Byrd United States Courthouse & IRS Complex
110 North Heber Street, Room 119
Beckley, WV 25801
(304) 253-7481

Division 6: Parkersburg
United States Federal Building
425 Juliana Street, Room 5102
Parkersburg, WV 26101
(304) 420-6490

Additionally, this manual, together with blank forms for the most common types of actions and a glossary of common legal terms, is available on the Court's website at the following address: www.wvsd.uscourts.gov.

2. Representation by an Attorney

This handbook was developed to address the needs of the litigant who is filing a lawsuit without the aid of an attorney. However, there may be alternatives to representing yourself if you are unable to afford to hire counsel.

2.1. Obtaining an Attorney on a Contingency Basis or Pro Bono

Some attorneys may be willing to accept your case on what is called a contingency basis, which means the attorney would receive a fee based upon a percentage of your recovery if you win your case, and the attorney would get nothing if you do not prevail. You should note that attorneys are careful when screening cases before agreeing to accept them on a contingency basis, and may reject your case. However, if you would like assistance finding an attorney who may consider taking your case on a contingency basis, there are lawyer referral services that may be

willing to help you. For a list of the Lawyer Referral Services located within the Southern District of West Virginia, visit http://www.wvbar.org/referral.

In addition, there are attorneys and organizations, such as legal aid societies, that may be willing to represent you "pro bono," that is, free of charge. For a list of the Legal Aid Offices located within the Southern District of West Virginia, visit http://www.lawv.net/Home/PublicWeb.

2.2. Appointment of Counsel by the Court

If a pro se litigant's income and financial resources are low enough, the Court may determine that the person is "indigent." Typically the Court would recognize that a litigant is indigent by granting the litigant's *Application to Proceed Without Prepayment of Fees and Costs* (LR Civ P 3.5). For more information regarding the *Application to Proceed in District Court Without Prepaying Fees or Costs* and the effects of being permitted to proceed without prepayment of fees and costs, please refer to Section 5.2. of this handbook.

A litigant who has been permitted to proceed without prepayment of fees and costs may request, by submitting a written motion, that the Court request an attorney to represent the litigant **if he or she is otherwise unable to obtain counsel**. Before you submit such a motion, you must try to obtain counsel on your own. You should know that there are many more litigants seeking counsel than there are attorneys willing to take such cases. Furthermore, while in a **criminal** case, a defendant is **entitled** to legal counsel by the United States Constitution and one is provided if the criminal defendant is indigent, a party to a **civil** case is **not entitled** to an attorney, even if he or she is indigent. A federal judge cannot require an attorney to take a civil case.

If you are granted permission to proceed without prepayment of fees and costs and you decide to make a motion for the appointment of counsel, you must include with your motion details of your efforts to obtain counsel by means other than court appointment. In addition, you must include letters you received from the attorneys that you contacted regarding your case. **Failure to include documentation that substantiates your attempts to obtain counsel on your own will result in the denial of your motion for appointment of counsel.**

2.3. Sanctions and How They Apply to the Pro Se Litigant

Representing yourself in a lawsuit carries certain risks and responsibilities. If you decide to proceed pro se, you will be responsible for learning about and following all the procedures that govern the court process.

The Court may penalize a party or attorney for failing to comply with a law, rule or order at any point while a lawsuit is pending. Such penalties are called sanctions, and pro se litigants are subject to the same sanctions as licensed attorneys. For example, when a party to a lawsuit presents a document to the Court, that party is verifying the accuracy and reasonableness of that document. Federal Rule of Civil Procedure 11 states that if such a submission is false, improper or frivolous, the party may be liable for monetary or other sanctions.

Rule 11 provides in pertinent part, as follows:

> **(b) Representations to Court**. By presenting to the court ... a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –
>
>> **(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>>
>> **(2)** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>>
>> **(3)** the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>>
>> **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
>
> **(c) Sanctions**. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may ... impose an appropriate sanction

> upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
>
> ***
>
> **(2) Nature of Sanction; Limitations**. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.... [T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or ... an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

As Rule 11 states, sanctions imposed by a Court could consist of, among other things, a monetary penalty or an award of the prevailing party's attorney fees, which could be a substantial sum. The Court may also prevent or "enjoin" a party from filing any future lawsuits until sanctions from an earlier lawsuit have been paid. Sanctions can be imposed on individuals who are incarcerated.

3. The Seven Questions to Answer Before Filing a Lawsuit

There are seven important questions you should consider ***before*** you file a case in federal court. This list is not exhaustive – there may well be other important considerations that are not listed here. However, these seven questions are essential to every lawsuit filed in federal court. You should also be aware that even if you answer "yes" to all seven of these questions, and you believe you should prevail in your lawsuit, there is always a possibility that you may not ultimately prevail.

3.1. Have I Suffered a Real Injury or Wrong?

You cannot sue someone just because you are angry at him or her, nor can you sue someone simply because he or she has committed some illegal act. In order to maintain a lawsuit against someone, the person you are suing must have caused you to be harmed or wronged in some real, concrete way.

A plaintiff must be asserting his or her own personal legal interests. Typically a person may not sue to assert the rights of a third party. In other words, a litigant normally must assert that he himself has suffered the injury, or that a distinct group of which he is a part has suffered the injury. A court generally will not address a "generalized grievance," which is an injury that is shared in "substantially equal measure by all or a large class of citizens." *See* U.S. v. Hayes, 515 U.S. 737 (1995). Finally, the plaintiff must have actually suffered the harm already, or else

the plaintiff must be about to suffer the harm "imminently," meaning the plaintiff will actually suffer the harm in the immediate future.

3.2. Does the Federal District Court Have Jurisdiction to Hear My Claim?

In general, a court must have the power to decide a particular case; this is called jurisdiction.

There are two court systems in the United States: the state court system and the federal court system. In West Virginia, the County and Circuit Courts are the courts of "general jurisdiction," which means they can hear and decide almost any kind of legal controversy between two parties.

Federal courts, on the other hand, only have jurisdiction over certain limited types of cases and controversies. A federal court has jurisdiction when the United States is a defendant in the action. Additionally, federal court jurisdiction may be based on either a federal question or diversity of citizenship. A federal question case is one that alleges that a federal law (either a statute or a provision of the United States Constitution) has been violated. Examples of claims that fall under the court's federal question jurisdiction are civil rights claims under 42 U.S.C. § 1983 and employment discrimination claims under Title VII of the Civil Rights Act of 1964. A case's federal jurisdiction is based on diversity of citizenship when the parties reside in different states, or a state and a foreign country. In order for a federal court to exercise jurisdiction over a case based on diversity of citizenship, the amount that the parties are disputing must be more than $75,000.

If there is no federal statute governing your situation, and you and any of the defendants are citizens of the same state and/or the amount in controversy is less than $75,000, a state court may be the proper place to bring your case.

3.3. Is the Southern District Court the Proper Venue for My Action?

If you decide that your claim may be brought in a federal court because there is either a federal question, or there is diversity of citizenship and the amount in controversy is more than $75,000, you must then determine in ***which*** federal court to file. In order to decide a case, a court must have some logical relationship either to the litigants or to the subject matter of the dispute; this is called venue.

There are two United States District Courts in West Virginia: the Southern District and the Northern District. Generally, you may only file an action in the Southern District of West Virginia if the actions or inactions that you believe violated your rights occurred within the boundaries of this District. Below is a list of the

divisions and counties that are located within the Southern District to help you determine whether you should file your lawsuit in this District or another District Court.

(i) **Beckley Division**: Greenbrier, Raleigh, Summers, Wyoming;

(ii) **Bluefield Division**: McDowell, Mercer, Monroe;

(iii) **Charleston Division**: Boone, Clay, Fayette, Jackson, Kanawha, Lincoln, Logan, Mingo, Nicholas, Roane;

(iv) **Huntington Division**: Cabell, Mason, Putnam, Wayne;

(v) **Parkersburg Division**: Wirt, Wood.

3.4. Will My Claim Be Timely If I File it Now?

Usually a claim must be filed within a certain period of time after an injury occurs or is discovered. This time bar is called the statute of limitations, and the length of the statute of limitations varies depending on the type of claim.

You should make sure your claim is not time barred before you file a lawsuit. Whether your claim is barred by the statute of limitations is a legal question which may require you to do some legal research.

3.5. Am I Able to Determine and Name the Proper Defendants for My Action?

When determining whom you should name as a defendant in your lawsuit, there are several factors you should consider.

First, you must allege that **each** person or entity you are suing engaged in wrongful conduct that caused you harm. Thus, you should only name a defendant if you are able to describe his or her actions or inactions that you believe were wrongful and how you believe those actions harmed you.

Second, you must list individuals by their names whenever possible. Avoid suing groups of people such as "the personnel department" or "the medical staff." Also, you should know that service of process cannot be effectuated on "John Doe" or "Jane Doe" defendants. If one of your defendants cannot be served, you will not be able to prevail in your lawsuit against that person. It is your responsibility, and not the duty of the Court, to ascertain the identities and addresses of those individuals whom you believe caused you to be injured.

Third, you should be aware that some people cannot be held liable for actions they take while performing the duties of their jobs. This is called immunity. For example, when a judge decides a case, he or she is immune from lawsuits for actions taken in the process of deciding that case. However, if a judge has operated a car illegally and caused you to be harmed, you can sue the judge for the damages you sustained because driving a car does not fall under the duties of being a judge. Similarly, prosecutors are immune from liability for actions they take in prosecuting or failing to prosecute individuals.

There may also be other legal defenses that a person can assert which will protect him or her from liability.

3.6. Will I Be Able to Establish Sufficient Facts to Support My Claims?

In a lawsuit, the burden is on the plaintiff to prove that the defendant(s) violated the plaintiff's rights. Therefore, in order to win a case, a plaintiff must be able to present facts that support his or her claims. Asserting the mere conclusion that the defendant(s) caused you harm or violated your rights will be insufficient.

Before you begin a lawsuit, be sure you can allege sufficient facts to support your claim that the defendant(s) violated your rights. Such facts should include who each defendant is, specifically what he or she did or did not do that you believe was wrongful, when the incident took place, and where the incident happened. You should also be able to identify how each defendant's actions or inactions caused you harm.

In order to prove your case, you must be able to provide evidence that supports the facts you allege. In addition, you need to be able to identify any witnesses whom you believe observed the incident. You may also be called upon to present actual articles of evidence such as a memorandum, police report, medical records or other proof.

3.7. Have I Exhausted All Other Available Remedies That I Am Required to Exhaust?

You should be aware that, in some instances, it is necessary for you to pursue certain remedies **before** you can properly pursue a claim in federal court. There are four areas in particular where this is likely to arise:

(i) if you are appealing a federal agency's decision;

(ii) if you wish to sue a current or former employer for employment discrimination;

(iii) if you are seeking a writ of habeas corpus in federal court; or

(iv) if you are a prisoner and you seek to challenge prison conditions under 42 U.S.C. § 1983.

3.7.1. Administrative Grievance Procedures

People frequently want to appeal the decision of a governmental agency that affects them. For example, a person may want to appeal the decision of the Social Security Administration that denied him or her social security benefits.

If you want to appeal the denial of a benefit that is provided through an agency of the United States government, you must pursue **all** of the administrative procedures established by the agency for appealing its rulings **<u>before</u>** you file a lawsuit. **<u>Only after</u>** you have exhausted your administrative remedies, and you still believe you are entitled to a benefit that you have not received, can you initiate a lawsuit.

3.7.2. Employment Discrimination Claims

A person who believes he or she has been illegally discriminated against by an employer may wish to bring a lawsuit against that employer under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, or the Equal Pay Act. However, before a person can bring such a lawsuit, he or she must first file a complaint with either the Equal Employment Opportunity Commission ("EEOC") or the West Virginia Human Rights Commission ("WVHRC"), and obtain from the EEOC or WVHRC what is called a "right-to-sue letter." Only if a person properly files a complaint with the EEOC or WVHRC, and receives a right-to-sue letter from the agency, may he or she then file a complaint in federal court based on the allegations the person has made in their complaint to the EEOC or WVHRC. A copy of the right-to-sue letter should be attached to the complaint the person files with the court.

3.7.3. Petition for Writ of Habeas Corpus under 28 U.S.C. §§ 2254 or 2241

A person who is incarcerated or is otherwise "in custody" pursuant to a judgment of conviction rendered in a state court order may wish to challenge the **<u>fact</u>** or **<u>duration</u>** of this confinement. Such a challenge would be brought as a petition for a writ of habeas corpus under 28 U.S.C. § 2254, and it would be brought against the person who holds the inmate in custody, i.e., the

prison's superintendent. If the person can successfully prove that a constitutional right was violated, and that if that right had not been violated the person would not have been incarcerated at all (the "fact of incarceration") or the duration of the incarceration would have been shorter, the Court will grant a writ of habeas corpus.

However, before a petition under 28 U.S.C. § 2254 can properly be filed in the federal court, the petitioner must pursue and exhaust **all** available state law remedies. This means that if you want to challenge a conviction or a sentence, you must pursue your rights of appeal under West Virginia law, in West Virginia State courts. You may also be required to file a petition for post-conviction relief under West Virginia law, pursuant to West Virginia Code § 53-4A-1. Federal constitutional claims must be exhausted in State courts before bringing them to Federal court.

A petitioner must exhaust all administrative remedies before filing a habeas action pursuant to 28 U.S.C. § 2241.

You should also realize that there are time limits that apply to petitioners seeking a writ of habeas corpus. Habeas petitions brought under 28 U.S.C. § 2254 may be filed no later than one year after the completion of state court direct review, with certain limited exceptions. *See* 28 U.S.C. § 2244(d)(2). The time during which a properly filed state court application for collateral review is pending is excluded from the one-year period. *See* 28 U.S.C. § 2244(d)(2). Therefore, if you are contemplating filing a habeas petition, you should be sure to file your action in a timely fashion.

3.7.4. Prisoner Challenges to Prison Conditions Under 42 U.S.C. §1983 and *Bivens*

The Prisoner Litigation Reform Act (PLRA) was passed by Congress in 1995. The PLRA requires that prisoners exhaust all available administrative remedies before they file a lawsuit under 42 U.S.C. § 1983 to challenge the conditions of their confinement or allege other civil rights violations. This means that, if you are a prisoner, you must utilize your facility's grievance procedures first in an attempt to resolve your problem. Generally, you may only file a lawsuit under § 1983 if you have already pursued your grievance through each stage of the facility's grievance process but still not obtained redress.

A § 1983 action is brought against state actors. If a prisoner wishes to bring an action for a violation of constitutional rights by a federal actor, he or she would instead file what is called a "*Bivens*" action. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388

(1971). A *Bivens* action, though not precisely parallel, is much like a § 1983 action, and a prisoner must also exhaust administrative remedies before bringing a *Bivens* action.

In conclusion, it is important that you consider all of these questions before you file a case. After all of these factors have been considered, you must still follow the procedures set out by the particular court with which you decide to file your case. Many of the specific procedural rules for the Southern District of West Virginia are set forth in the Local Rules of Procedure, and in Section 4 of this handbook we will discuss the rules and procedures for filing lawsuits in the United States District Court for the Southern District of West Virginia. If your case needs to be filed in any other court, you should contact the Clerk's Office of that court for information regarding local rules and procedures for filing your case.

4. Rules and Procedures for Filing a Case in the Southern District of West Virginia

If you are a party to a lawsuit, you are subject to the specific rules of procedure for the Court in which your case is filed. Federal courts are governed by the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") as well as other rules of procedure regarding specific areas, such as evidence, appeals, etc.

In the United States District Court for the Southern District of West Virginia, all procedures are governed not only by the Federal Rules but also by the Local Rules of Procedure and the District's General and Standing Orders. The numbering system of the Southern District's Local Rules of Procedure coincides with the numbering system of the Federal Rules for easy reference.

Copies of the Federal and Local Rules of Civil Procedure may be found at county courthouse libraries, law schools, and correctional institutions throughout the state. Additionally, the Federal Rules of Civil Procedure are available online at http://www.law.cornell.edu/rules/frcp/overview.htm, and the Local Rules of Procedure for the Southern District of West Virginia are available at http://www.wvsd.uscourts.gov/Rules/LocalRules.htm.

Alternatively, you can request, either in person or by mail, a free, personal copy of the Southern District's Local Rules of Procedure and/or this Handbook from any of the Clerk's Offices listed in Section 1 of this handbook.

It is important to remember that, as a pro se litigant, **you are responsible for becoming familiar with and following the Court's local rules and procedures.** Therefore, before you begin drafting your complaint or take any other action, you should read the Federal and Local Rules of Procedure and become familiar with them. Not only may you be subject to sanctions for failing to follow the Rules, but the Rules will also help answer many questions that you may have as you begin and proceed with a lawsuit.

5. Getting Started: the Complaint and How to File It

In order to begin a lawsuit in Federal Court, a pro se plaintiff must submit to the Clerk of the Court the following documents:

(i) A civil cover sheet (non-prisoner cases only);

(ii) The original complaint. (Keep an identical copy for your records.)

(iii) Either a filing fee or an *Application to Proceed Without Prepayment of Fees and Costs*. Note: An inmate who wishes to proceed without prepayment of fees and costs must have his or her application certified by the proper prison official and must also submit an *Authorization to Release Institutional Account Information and to Pay Filing Fee* form along with his or her application;

(iv) A summons for each defendant;

(v) For non-prisoner cases only. If you are seeking permission to proceed without prepayment of fees and costs and you wish the U.S. Marshals to serve your summons and complaint for you, you must also submit one completed USM-285 form for each defendant.

Each of these will be discussed in more detail in this Chapter. This list is not exhaustive; you should be aware that certain types of actions may require the plaintiff to submit additional documents before the action may properly be filed.

All papers filed with the Court must meet the requirements that are set forth in Fed. R. Civ. P. 8 and 10 and L. R. Civ. P. 5.1.

L. R. Civ. P. 5.1 states:

> Except as otherwise permitted or required by the Federal Rules, these local rules, or order, the original of all papers, not electronically filed, that must be filed with the court shall be filed at the clerk's office at the point of holding court in which the particular action or proceeding is docketed. In emergency situations, due to travel conditions, time limitations or other factors, filings may be made at any of the clerk's offices, in which event the papers so filed shall be forwarded by the receiving clerk's office to the clerk's office at the point of holding court in which the particular action or proceeding is docketed.

Please review the full text of Federal Rules of Civil Procedure 8 and 10 before you start drafting your complaint. The Clerk's Office has prepared some form complaints, such as:

(i) *Complaint by a Prisoner Under Civil Rights Act* under 42 U.S.C. § 1983;

(ii) *Complaint for Violations of Civil Rights of a Federal Prisoner (*Bivens Action);

(iii) *Application for Writ of Habeas Corpus by a Person in State or Federal Custody* under 28 U.S.C. § 2241;

(ivi) *Petition for Relief From a Conviction or Sentence By a Person in State Custody* (Writ of Habeas Corpus) under 28 U.S.C. § 2254;

(v) *Motion to Vacate, Set Aside, or Correct A Sentence By a Person in Federal Custody* under 28 U.S.C. § 2255; and

(vi) *Motion for Modification of an Imposed Term or Sentence of Imprisonment* under 18 U.S.C. § 3582.

The form complaints can be found on the Court's website at http://www.wvsd.uscourts.gov/prisoner/index.htm, in most prison law libraries, and can also be obtained at the Clerk's Office. You may wish to use a form in preparing your complaint.

5.1. The Complaint

5.1.1. Caption

Every document that you file with the Court, including the complaint (whether it is a preprinted form or one you draft yourself), should have a caption at the top of the first page. The format for a caption is as follows:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

(Your Full Name)

Plaintiff,

v. Case No. ________________

(List Each and Every Person you
Wish to Sue, by Name,

Defendant(s).

COMPLAINT

When you first submit a complaint, your lawsuit will not yet be assigned a case number, so you can leave that space blank in the caption. The Clerk will assign your case a number if your complaint is accepted for filing. Once your action is assigned a case action number, that number must appear on each and every document pertaining to your lawsuit that you file with the Court. Likewise, if your complaint is accepted for filing, the Clerk will typically assign one district judge and one magistrate judge to your case.

5.1.2. Body

The main portion of your complaint is called the "body." Fed. R. Civ. P. 10 requires that **each paragraph in the body of the complaint be consecutively numbered**. Your first paragraph should state the basis for the Court's jurisdiction over your claim. *See* Section 3.2 herein. Your second paragraph should state why the Southern District is the proper venue for your action. *See* Section 3.3 herein.

Next you should include one paragraph for each party to the action; in each of those paragraphs you should state the name, title, and address of each party. **If at any time your own address changes you must immediately notify the Court in writing. If your complaint has been accepted by the Court and served on the defendant(s), you must also immediately serve the defendant(s) with a written notice of your change of address.**

Once you have completed the above paragraphs, you should state your claim against the defendant(s). Fed. R. Civ. P. 8 requires that a complaint be a

"short and plain statement of the claim showing that the pleader is entitled to relief." In other words, in short, clear, numbered paragraphs you should describe the actions or inactions of the defendant(s) that you believe violated your rights. You should also state which of your legal rights you believe the defendant(s) violated. Each paragraph should only state one act of misconduct. Furthermore, you should include sufficient facts to support your claims. *See* Section 3.6 herein.

Thus, if you claim that your legal rights were violated by more than one defendant, or on more than one occasion, your complaint should include a corresponding number of paragraphs for each allegation. Each paragraph should specify:

(i) the alleged act of misconduct;

(ii) the date on which the misconduct occurred;

(iii) the names of each and every individual who participated in that misconduct;

(iv) the location where the alleged misconduct occurred; and

(v) the connection between the misconduct and your legal rights.

Your complaint should be limited to a statement of facts; it should not contain legal citations or legal arguments. It is inappropriate to include legal citations or arguments in your complaint because it is the court's function to analyze the law.

5.1.3. Statement of Relief Sought

After you have stated your claims as clearly and concisely as possible, you should briefly state what "relief" you are seeking. In other words, you must state what it is that you wish the Court to do. For example, a plaintiff could be seeking monetary compensation ("damages"), or a court order that the defendant must stop or start doing something ("injunctive relief").

5.1.4. Signing the Complaint

Fed. R. Civ. P. 11 requires that **every plaintiff must sign and date his or her complaint**. If possible, the complaint should be signed and dated in the presence of a notary public. A complaint that is not signed will be dismissed by the Court unless the plaintiff promptly corrects the omission by submitting a signed copy of the complaint.

Remember that by signing or filing your complaint you are certifying to the Court that the statements you have made in the complaint are true, and that you are not filing the complaint for an improper purpose such as to harass the defendant(s). *See* Section 2.3 herein for a discussion of the sanctions that may apply if your complaint is false or submitted for an improper purpose.

5.1.5. Exhibits

While you may choose to submit one or more exhibits along with your complaint, you must set forth your complete claims in the body of your complaint and may not incorporate the exhibits by reference as a means of setting forth your claims. You do not need to submit as exhibits all papers that might be relevant to your complaint and/or used at trial. If you do choose to submit exhibits you must reference those exhibits, by page number, in the body of your complaint. Also, you should only submit copies of documents rather than originals, because the Court will not return your exhibits to you.

5.1.6. Privacy Protection

This Court's General Order entered April 14, 2003, in compliance with the E-Government Act of 2002, requires litigants to redact (omit or obscure) certain information from their pleadings and from any exhibits attached to pleadings. Information that must be redacted includes: Social Security numbers, names of minor children, dates of birth, financial account information, and home addresses. *See* General Order Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files at http://www.wvsd.uscourts.gov/pdfs/GenOrdPrivacy41403.pdf

Transcripts of the administrative record in social security proceedings and state court records relating to habeas corpus petitions do not need to have the above personal identifiers redacted.

5.2. Filing Fees and Proceeding in District Court Without Prepayment of Fees and Costs

Most civil complaints must be submitted with the statutory filing fee set forth in 28 U.S.C. § 1914(a). The current statutory filing fee can be found on the Court's website at http://www.wvsd.uscourts.gov/pdfs/dcfees31507.pdf. You must either pay the statutory filing fee in full at the time you present your complaint to the Court for filing, or, if you are unable to pay the statutory filing fee, you must submit an *Application to Proceed Without Prepayment of Fees and Costs* along with your complaint.

If you file an *Application to Proceed Without Prepayment of Fees and Costs* instead of paying the statutory filing fee, the Court will then consider your application and determine whether you are entitled to proceed without prepayment of fees and costs. *See* L. R. Civ. P. 3.5. If the Court denies your *Application to Proceed in District Court Without Prepaying Fees or Costs*, you must pay the full statutory filing fee within a certain period of time or your action will be dismissed.

If you are an inmate, you will still be required to pay, over time, the entire filing fee even if you are found to be indigent. Inmates are required to submit the Court's form titled "Authorization to Release Institutional Account Information and to Pay Filing Fee," which permits the agency holding the plaintiff in custody to make periodic withdrawals from the plaintiff's inmate account until the entire statutory filing fee is paid.

For non-inmates, being granted permission to proceed in the District Court without prepaying fees or costs typically relieves the litigant of the obligation to pay the statutory filing fee.

In addition to delaying the payment of the statutory filing fee for prisoners or waiving the obligation to pay the statutory filing fee for non-prisoners, being granted permission to proceed without prepayment of fees and costs entitles a person to (a) submit a motion for counsel, and (b) have his or her complaint served on the defendant(s) by the U.S. Marshals. If you paid the filing fee, you will be responsible for serving the summons and complaint on each defendant, in accordance with Fed. R. Civ. P. 4.

You may submit an *Application to Proceed Without Prepayment of Fees and Costs* at any time during the litigation, even if you have already paid the filing fee in full. However, you should note that being permitted to proceed without prepayment of fees and costs after you have paid the fee will not entitle you to the return of the money you have paid.

Pro se litigants proceeding without prepayment of fees and costs are not exempt from other fees and costs in their actions, including but not limited to copying and witness fees. Thus, pro se litigants must still provide identical copies of documents that must be served on the parties that they name in their lawsuit. If you cannot afford to pay for copies, you must handwrite copies of these documents for service on the other parties to the action.

It is important to realize that, even though you believe you cannot afford to pay for copies of documents, neither the Court nor the Clerk's Office can make copies for you free of charge. Therefore, even if you are proceeding with an action without prepayment of fees and costs, copies of documents in the file of your action cannot be provided to you by the Clerk's Office without a charge of $0.50 per page, which

must be paid in advance. **You should always keep a copy, for your own records, of all documents that you send to the Court or the Clerk's Office.**

5.3. Where to File

Except as otherwise permitted or required by the Federal Rules, the original of all papers, not electronically filed, are to be filed at the clerk's office in which the particular action or proceeding is docketed. Please refer to Section 1 for the locations and mailing addresses for the Clerk's Offices in the Southern District of West Virginia. The Southern District does not accept any filings via facsimile.

5.4. Electronic Case Filing

On May 1, 2006, the Southern District of West Virginia implemented a new electronic case filing system called Case Management/Electronic Case Files, or CM/ECF, that allows attorneys to file and view court documents over the Internet. The Administrative Procedures for Electronic Case Filing for the Southern District of West Virginia are available on the Court's website at http://www.wvsd.uscourts.gov/pdfs/ECFAdministrativeProcedures1107.pdf

Non-prisoner pro se filers may be permitted to file electronically only when permission of the Court has been requested, and the Court has granted such request by Order. If, during the course of the action, the non-prisoner pro se filer retains an attorney, the Clerk will terminate that person's registration upon the attorney's appearance.

Incarcerated pro se filers are not permitted to file electronically. They are still required to submit and serve paper originals of all their documents. The Clerk's Office will then scan the pro se party's documents into the CM/ECF system so that those documents can be viewed on-line by the attorneys who represent the opposing party or parties.

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5.5. A Brief Look at the Most Common Documents in a Civil Action in Federal Court

The following table may be used as a quick reference regarding the most common items that must be completed and filed by a party, a brief description of each item, the Federal or Local Rules that relate to each item (if any) and when the item must be submitted to the Clerk.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Complaint	Commences the action when filed by the Clerk of the Court. Names the parties, and succinctly sets forth the controversy, including allegations of fact and the relief sought. Does not include legal argument.	Fed. R. Civ. P. 3, 8 and 10	Initial filing
Application to Proceed Without Prepayment of Fees and Costs	Application made under penalty of perjury which seeks waiver of filing fee. For non-inmates, if granted, filing fee only is waived. No other fee such as witness or copying fees are waived. For inmates, if granted, filing fee need not be paid in full at one time, however it must be paid in accordance with 28 U.S.C. § 1915. In order to have the application granted, inmates must submit an authorization form (see below).	L. R. Civ. P. 3.5	Initial filing.
Authorization to Release Institutional Account Information and to Pay Filing Fee Form (Inmates Only)	Authorizes agency having custody of the inmate to calculate, encumber and/or disburse funds from inmate account in order to pay filing fee.		Initial filing.
USM-285 Form (non-prisoner pro se plaintiffs only)	Directs the U.S. Marshals Service to serve the defendant listed on the form with Summons and Complaint. You must fill out one USM-285 form for each defendant.		Initial filing.
Summons	Served on the defendant with a copy of the complaint. The summons informs the defendant that unless a response to the complaint is filed, a judgment may be entered in favor of the plaintiff.	Fed. R. Civ. P. 4	Initial filing.
	A "Waiver of Service of Summons" can also be served on the defendant along with a copy of the complaint.	L. R. Civ. P. 4.1	

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Answer	Filed by the Defendant(s), the answer is a short and plain statement of the defenses to the claims stated in the complaint. The defendant(s) must either admit or deny each specific allegation in the complaint.	Fed. R. Civ. P. 12	Within 21 days from the date of service of the complaint. The United States and federal officials have 60 days to file the answer.
Pretrial Scheduling Orders (incarcerated plaintiffs only)	Issued by the Court, a Pretrial Scheduling Order sets deadlines for pretrial motions.	Fed. R. Civ. P. 16(b) L. R. Civ. P. 16.1	Issued by the Court after an answer is filed, if deemed necessary by the Court.
Rule 16 Case Management Orders (non-incarcerated plaintiffs only)	Issued by the Court, following a Case Management Conference, which is held shortly after the action is commenced. A Rule 16 Case Management Order sets deadlines for pretrial motions. Parties should confer and file a proposed plan prior to the Case Management Conference.	Fed. R. Civ. P. 16 L. R. Civ. P. 16.2	Issued by the Court after the Case Management Conference.
Motions	A request for an order from the Court on some particular matter during the pendency of a case.	Various Federal Rules, e.g., Fed. R. Civ. P. 5(b), 7(b), 12 and 56. L. R. Civ. P. 7.1	
Response to motions	Response to motion filed by the other party or parties.	L. R. Civ. P. 7.1(a)(7)	Within 14 calendar days from the date of service of the motion.
Reply to Response to motions	Reply memorandum to response motion/memoranda.	L. R. Civ. P. 7.1(a)(7)	Within 7 calendar days from the date of service of the response to motion or memoranda.

ITEM	DESCRIPTION	RULE	WHEN TO SUBMIT
Discovery	All discovery requests, and the responses thereto, must be served upon other counsel and parties. The Certificate of Service only (not the discovery itself) for all discovery is to be filed with the Clerk. Discovery shall **NOT** be filed with the Court except: 1) if the Court orders particular materials to be filed; 2) when a party is making a motion pursuant to Fed. R. Civ. P. 37 regarding particular discovery materials; or 3) materials that are to be used at trial are to be filed with the Court prior to trial.	Fed. R. Civ. P. 26 – 37 L. R. Civ. P. 26.1 – 37.1	Discovery must be completed within Court-imposed deadlines.
Certificate of Service	Any document filed after the complaint must contain a Certificate of Service, which states that a copy of that document was sent to the other party/parties or their attorneys. (See special note regarding Certificate of Service filings for Discovery above.)	Fed. R. Civ. P. 5(d)	Attached to the document sent to the Court or the Clerk. A copy is also attached to the document sent to the other party/parties or their attorneys.

6. Pretrial Proceedings and Case Management

Upon the filing of a pro se complaint and application to proceed without prepaying fees or costs, the Court will review the pleading to determine whether it complies with the pleading requirements of the Federal Rules of Civil Procedure, to assess the sufficiency of the plaintiff's claims, and to decide whether the application should be granted.

When the pro se plaintiff is incarcerated, the Court will issue a Time Frame Order after an answer has been filed on behalf of the defendants. The Order sets deadlines for the filing of dispositive motions and includes important information regarding the other aspects of pretrial proceedings, if deemed necessary by the Court.

In cases where the pro se plaintiff is not incarcerated, a Case Management Conference will be scheduled by the Court shortly after the action is commenced. This conference is sometimes referred to as a Rule 16 Conference.

7. Gathering Information

7.1. Discovery: Gathering Information from Parties

After pleadings are served, each party will typically gather information to support his or her case. (A "party" is a plaintiff or a defendant). This phase of the lawsuit is called "discovery," and is conducted in accordance with Fed. R. Civ. P. 26 through 37. The information can be in the form of oral or written statements made by the parties themselves, or by witnesses, regarding a particular event or series of events. Parties often need to gather documents also, such as medical records, business records, transcripts from prior court proceedings, etc. Sometimes parties will need to collect or examine physical objects, as well.

It is important for you to remember that typically each party in an action will seek some discovery. This means that if you file an action, you will need to seek information from the parties you are suing, and provide information to them. For example, by filing an action in which your medical condition or treatment is in issue, at least some of your own medical records will be relevant to the case and will likely be sought in discovery. You will then need to provide written consent, authorizing release of the relevant medical records to opposing counsel. You may also need to provide such a consent form if you are seeking discovery of your own medical records.

<u>**It is also important for you to know that the costs of discovery remain the responsibility of each party, regardless of whether either party has been granted permission to proceed without prepayment of fees and costs.**</u>

7.1.1. Interrogatories

One of the most cost-effective ways to get a sworn statement from someone who is a party to the action is to serve interrogatories on that party. Interrogatories are written questions that must be answered, under oath, by the party on whom they are served. Fed. R. Civ. P. 33 governs interrogatories.

You should note that you are limited to twenty-five interrogatories, counting each subpart separately, for each party. A person may serve more interrogatories on a party **only** if the Court grants the party special permission to serve more than twenty-five. Also, interrogatories may only be served on people who are parties to the litigation.

7.1.2. Depositions

Another means of obtaining a sworn statement from a party is to conduct an oral deposition of that party. For details regarding oral depositions, please refer to Fed. R. Civ. P. 27, 28, and 30.

While oral depositions can be helpful, you should know that they are expensive. The person who is seeking to conduct a deposition will be responsible for the costs of the deposition, including having it recorded, even if he or she has been granted permission to proceed without prepayment of fees and costs. Since these costs can be considerable, you should first consider whether there are more cost-effective means of gathering the information you seek.

7.1.3. Document Production

A party to a lawsuit may obtain access to documents and objects that are in another party's possession or control, in order to be able to inspect or copy them. The party wishing to make the inspection or copies must serve a request to do so on the party who has possession or control of the items, in accordance with Fed. R. Civ. P. 34. As with other discovery, the person who wishes to make copies of documents he or she inspects is responsible for the costs of doing so.

7.2. Gathering Information from Non-parties

Sometimes it will be necessary for a party to a lawsuit to gather information from people who are not parties to the lawsuit. There are various methods of seeking such information, some of the most common of which are discussed briefly below. As with obtaining discovery from parties to the lawsuit, **the person seeking the information from the non-party will be responsible for all associated costs, even if he or she is proceeding without prepayment of fees and costs.**

7.2.1. Ask First

The best way to gather information or get a statement from someone who is not a party to the lawsuit is to ask him or her. Often, by simply asking the person you can avoid the effort and expense of obtaining a subpoena from the Court.

7.2.2. Subpoenas

Subpoenas are notices, issued by a court, commanding someone to appear at a specified time and place and do some act such as give testimony or produce documents. A party must apply to the Court for a subpoena to be issued. **Subpoenas are not used for parties**; you should use the methods of discovery outlined in Fed. R. Civ. P. 26-37 to gather information from parties. Fed. R. Civ. P. 45 discusses subpoenas.

“Discovery subpoenas” are used during the discovery phase of the lawsuit, and “trial subpoenas” are used to obtain documents and witnesses for trial. You should not attempt to obtain a trial subpoena until after a judicial officer has informed you of a firm trial date for your lawsuit.

7.2.3. Service and Expense of Subpoenas

A subpoena must be served personally on the person(s) asked to appear in person or to produce particular documents. A subpoena may be served by any person who is at least 18 years of age, so long as the person is not a party to the action or proceeding.

Additionally, various fees (such as witness and mileage fees) must be paid to the person named in the subpoena when the subpoena is served.

7.2.4. Opposition to Subpoenas

A motion to “quash” a subpoena is a motion made by the subpoenaed party to vacate or void the subpoena. A subpoena duces tecum (requesting production of documents) is subject to objections as well as a motion to quash. For the restrictions on subpoenas and the reasons they may be quashed or modified, refer to Fed. R. Civ. P. 45(c).

8. Legal Research: an Overview

It is not the purpose of this chapter to teach the pro se litigant all of the intricacies of legal research and writing, nor is it our goal to sort out the complexities of applying the law to the facts of a particular case. In fact, the law prohibits personnel employed by the Court, including its attorneys, from providing information regarding the application of the law to the facts of any case. Instead, we are providing information that is basic to a law library as a guideline for conducting your own research.

While you should not be making legal arguments or using legal citations in your complaint, you may need to file documents that make legal arguments at some point during your case.

One example of a time when a plaintiff will need to make legal arguments and use legal citations is when the defendant(s) have filed a motion to dismiss a complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failing to state a cause of action, and the plaintiff wishes to oppose that motion so the case will go forward. As part of the plaintiff's opposition, he or she would submit a memorandum of law which sets forth the legal reasons the plaintiff believes his or her complaint should not be dismissed.

Just as there are certain standards of procedure for filing documents with the Clerk's Office, there are certain standards for citing authority when applying the law to the facts of a case. The most common source people turn to in determining how to write correct citations is *A Uniform System of Citation*, (Seventeenth Edition), published and distributed by The Harvard Law Review Association. It is more commonly referred to as “The Bluebook.” All of the information required for proper citation format can be found in this one text. This book is available in most law libraries.

“Authority” is the information used by a party to persuade a Court to find in favor of that party's side. Legal authority is divided into two classes – primary and secondary.

8.1. Primary Authority

Primary authority is the most accepted form of authority cited and should be used before any other authority. There are two sources of primary authority: “statutory authority” and “case authority.”

Statutory authority consists of Constitutions, codes, statutes and ordinances of either the United States, individual states, counties or municipalities.

Case authority is comprised of court decisions, preferably from the same jurisdiction where the case is filed (in the Southern District, that includes the Fourth Circuit Court of Appeals and District Court cases from the Southern District of West Virginia). When a particular case is decided by a judge, it becomes “precedent,” which means that it becomes an example or authority to be used at a later time for an identical or similar case, or where a similar question of law exists.

Cases are published in what is called the National Reporter System which covers cases decided by the United States Supreme Court, the Courts of Appeals and the District Courts. Digest systems gather case decisions by subject matter on various points of law. There are many different digests, and they can be found in most law libraries. For example, a person who wishes to bring a civil rights action in federal court can consult digests that contain many cases dealing with the subject of civil rights.

In conducting research, you should try to find cases that have already been decided (precedent) which support the position you are taking in your case.

8.2. Secondary Authority

Secondary authority is found in legal encyclopedias, legal texts, treatises and law review articles. It should not be cited except where no primary authority is located by the party conducting the research. Secondary authority can also be used to obtain a broad overview of the area of law and also as a tool for finding primary authority.

There are various types of secondary authority, including the following:

(i) *Legal encyclopedias* contain detailed information about various topics.

(ii) *Treatises* are texts written about a certain topic of law by an expert in the field.

(iii) *Law review articles* are published by most accredited law schools and sometimes provide a broad overview of a particular subject matter.

(iv) *Index to Legal Periodicals,* which provides reviews of books in the law, as well as comments regarding cases listed in the "Table of Cases."

(v) *American Law Reports Annotated* (A.L.R.) is a collection of cases on more narrow issues of law.

(vi) *Restatements* are publications compiled from statutes and decisions which discuss the law of a particular field.

(vii) *Shepard's Citations* is a large set of law books that provides a means by which any reported case may be checked to see when and how another court has referred to or interpreted the first decision. Looking to see if another court has cited a reported case is commonly referred to as "Shepardizing."

All cases must be checked to make sure another court has not reversed or overruled the case you wish to use to support your position.

8.3. Basic Rules for Conducting Legal Research

(i) Give priority to cases from your own jurisdiction (i.e., Fourth Circuit, Southern District of West Virginia).

(ii) Search for the most recent ruling on a subject matter.

(iii) Use the pocket part if your book contains one. A pocket part is a set of pages inserted in a pocket at the back of the book that includes updates to the information contained in the book.

(iv) All legal citations are written with the volume number first, an abbreviation of the Reporter's name, and the page number. For example, "924 F.2d 345" refers to volume 924 of the Federal Reporter, second series, page 345.

(v) Shepardizing your citations helps you avoid relying on overruled cases.

9. Motions

A motion is an application by a party (the "movant") made to the Court, requesting a ruling or order in favor of the movant. Motions may be used to seek various types of relief while an action is pending, such as a motion to amend the complaint or a motion to compel discovery. However, motions should only be filed when necessary; multiple or frivolous motions can result in sanctions from the Court. *See* Section 2.3 herein.

Local Rule of Civil Procedure 7.1 sets forth the procedure for filing a motion in the Southern District; **motions must be filed in conformity with L. R. Civ. P. 7.1 or else they will be denied**. Please read and become familiar with all of L. R. Civ. P. 7.1 before you begin writing a motion.

Please also note that, as with every document you submit to the Court for filing, each of these documents **must be signed and served on opposing counsel**.

9.1. Documents Required to File a Motion

9.1.1. Memorandum of Law

A memorandum of law is a document prepared by a party arguing his or her position on a legal matter in a case. It should contain a brief summary of the significant facts of the case; pertinent laws, including case law; and an argument as to how the law applies to the facts of the case. A memorandum should also refer to specific sections of any affidavits or exhibits that have been filed along with the motion. A memorandum of law may not exceed twenty (20) pages in length.

9.1.2. Other Documents that May be Required

Often some other document or documents may be required for a particular type of motion. Two of the most common types of motions that require other documents or information are motions to amend and motions to compel.

A motion to amend is filed when a party wishes to amend his or her pleading. For example, a person may want to amend his or her complaint to add a new party, identify a party previously named only as “John Doe,” or add a new cause of action. A motion to amend must be accompanied by the proposed amended pleading, which must be a complete pleading.

A motion to compel is typically used when a party has refused to comply with a discovery request, or when the movant believes the response that was provided to a discovery request is incomplete or insufficient. Before a party may file a motion to compel, the parties must make a good faith effort to resolve the dispute themselves. If they cannot resolve the dispute and a party wishes to file a motion to compel, he or she must provide the Court with both the discovery request itself and the response that is being challenged.

10. Ending a Case Before Trial

Today, most cases never actually go to trial. There are various ways that a case can end before trial, some of the most common of which are discussed below.

10.1. Sua Sponte Dismissal by the Court

If a plaintiff has filed an application to proceed without prepayment of fees and costs, Title 28, Section 1915 of the United States Code governs his or her case. 28 U.S.C. § 1915(d) states that a judge shall dismiss a case if at any time the Court determines that:

(i) the plaintiff's allegations of poverty are untrue;

(ii) the action is frivolous or malicious;

(iii) the plaintiff has failed to state a claim upon which relief can be granted; or

(iv) the plaintiff is seeking monetary relief against a defendant who is immune from such relief.

10.2. 12(b)(6) Motion to Dismiss and 12(c) Motion for Judgment on the Pleadings

A Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is very similar to a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings. Both motions argue that, even if all the facts the plaintiff has alleged are true, the plaintiff has not stated a valid claim under the law. The essential difference is the time at which each is made: a 12(b)(6) motion to dismiss is made by the defendant after the complaint has been served but before the defendant has submitted an answer; a 12(c) motion is made after the defendant has already filed an answer.

10.3. Motion for Summary Judgment

Either the plaintiff or the defendant may move for summary judgment pursuant to Fed. R. Civ. P. 56. In a motion for summary judgment, the moving party argues that there is no question of material fact, or in other words, that the parties agree on the important points of what happened. A trial is only needed if there are material facts in dispute. If the parties agree on the facts, the Court may apply the law to the facts of the case and render judgment without a trial. The plaintiff may wish to make a motion for summary judgment him or herself, or may be called upon to respond to a motion for summary judgment made by the defendant(s).

If the opposing party moves for summary judgment and you do not respond in opposition, summary judgment, if appropriate, will be entered against you. If partial summary judgment is granted against you, the portions of your case as to which summary judgment was granted will be dismissed; there will be no trial as to these portions of your complaint. If summary judgment is granted as to your entire complaint, your case will be dismissed and there will not be any trial concerning any of the claims asserted in your complaint.

10.4. Alternative Dispute Resolution

If the plaintiff is not a prisoner, the Court may direct the parties to participate in Alternative Dispute Resolution, or ADR. The type of ADR that is used in the Southern District of West Virginia is Mediation. Please see L. R. Civ. P. 16.6 for more information on ADR.

10.5. Settlement

Parties will sometimes reach an agreement on their own as to how to end their case. Typically a defendant will agree to give something to the plaintiff in exchange for the plaintiff ending the suit against the defendant. A settlement can

happen any time after initiation of a lawsuit. The process of negotiating a settlement does not usually involve the Court.

10.6. Failure to Prosecute and Default Judgment

A case will only continue to go forward if the plaintiff is actively pursuing his or her lawsuit. Fed. R. Civ. P. 41(b) permits courts to dismiss actions when the plaintiff fails to "prosecute," or pursue the case. Additionally, L. R. Civ. P. 41.1 provides that the judicial officer may give notice to all counsel and unrepresented parties that the action will be dismissed 30 days after the date of the notice unless good cause for its retention on the docket is shown. In the absence of good cause shown within that period of time, the judicial officer may dismiss the action.

A plaintiff can fail to prosecute his or her case in different ways. For example, if a plaintiff fails to provide the Court with an updated address after he or she has moved, or if a plaintiff fails to serve the summons and complaint on the defendant, the case may be dismissed for failure to prosecute. A case may also be dismissed if the plaintiff fails to comply with a Court order.

On the other hand, a defendant may fail to defend him or herself in a case, which can occasionally lead to a default judgment against the defendant, in favor of the plaintiff. Fed. R. Civ. P. 55 governs default judgments. You should note, however, that it is well-settled in the Fourth Circuit that default judgments are not favored, and there is a strong preference for resolving disputes on their merits.

11. Trial

The Federal Rules of Procedure cover all phases of trial preparation from the pretrial conference to the conclusion of a case. The following information is not meant to be all inclusive and you should always consult the Federal Rules of Civil Procedure and the Local Rules of Procedure for Southern District of West Virginia to ascertain what the Court requires of all parties when preparing for trial and trying a lawsuit. In addition, you should become familiar with the Federal Rules of Evidence, which govern the admission of evidence at trial.

11.1. Final Pretrial Conference and Order

Prior to the actual trial, a pretrial conference is usually held between a judicial officer and the parties (or counsel) to determine:

(i) what exhibits and witnesses each side might use during the trial;

(ii) the approximate length of time that will be necessary for the trial; and

(iii) the “ground rules” the Court will utilize before, during and after the trial.

After this conference, an order is usually prepared which sets out the above.

11.2. The Trial – The Role of the Judge and Jury

A trial is defined as “a judicial examination of issues between parties to an action.” If your case proceeds to trial, the parties will each get the opportunity to present their side of the case, and the judge and jury (if the trial is a jury trial) are responsible for entering a verdict and judgment based on the evidence and arguments presented. It is the judge's duty to see that only proper evidence and arguments are presented. In a jury trial, the presiding judge also instructs the jury, which will be called upon at the conclusion of the jury trial to make decisions regarding factual matters in dispute. A judgment will then be entered based on the verdict reached by the jury.

If the parties have not requested a trial by jury, the judge becomes the trier of both law and fact. At the end of the trial, the judge enters “Findings of Fact” and “Conclusions of Law,”sometimes in writing, based on the evidence and arguments presented. A judgment is then entered based on those findings of fact and conclusions of law.

11.3. Selection of the Jury

A jury trial begins with the judge choosing prospective jurors to be called for voir dire (examination). *See* L. R. Civ. P. 47.1. The Court will determine the number of jurors, which is currently at least six (6) and no more than twelve (12).

Peremptory challenges: Each party will be given a number of peremptory challenges which enable the party to reject (in most cases) prospective jurors without cause. This decision is based on subjective considerations of the party when he or she feels a prospective juror would be detrimental to his or her case.

Challenge for Cause: The plaintiff or defendant may also challenge a prospective juror “for cause” when the prospective juror lacks a qualification required by law, is not impartial, is related to either of the parties or will not accept the law as given to him/her by the Court.

11.4. Opening Statements

After the jury is sworn in or “empaneled,” each side may present an opening statement. The plaintiff has the burden of proving that he or she was wronged and

suffered damages from that wrong and that the defendant caused those damages. The plaintiff is allowed to present the opening statement first. This may be followed by a statement by the defendant. The Court will determine the time to be allotted for opening and closing arguments. *See* L. R. Civ. P. 83.9(a).

11.5. Testimony of Witnesses

After opening statements are given, testimony of witnesses and documents are presented to the jury or the Court. The plaintiff presents his/her case first. After the initial examination of a witness (also known as "direct examination"), cross-examination is conducted by the other side. After a party has cross-examined a witness, the opposing side has the opportunity to "redirect" examination in order to re-question the witness on the points covered by the cross-examination.

If a witness testifies as to one fact, and a statement or document in the case file contradicts that testimony, the document can then be used to question the witness on the accuracy of the witness' statements. If the evidence shows that the testimony of the witness is false, the witness is considered "impeached" by the cross-examination.

11.6. Motions During the Course of the Trial

Before the closing arguments and up until the time the case is sent to the jury for deliberation, the following motions may be made:

(i) Motion in Limine: This motion is typically made prior to the jury selection. It requests that the judge not allow certain facts to be admitted into evidence, such as insurance policies, criminal records or other matters which are either not relevant to the particular case or which might unfairly influence the jury. Either party may file a motion in limine.

(ii) Motion for Judgment as a Matter of Law: This motion is usually made by the defendant at the close of evidence presented by the plaintiff. It is based on the premise that the plaintiff has failed to prove his or her case. If this motion is granted, the trial is concluded in the movant's favor. If the Court denies the motion, the trial continues with presentation of the defendant's side.

(iii) Motion for Mistrial: Either party can move for a mistrial if, for example, during the course of the trial certain matters which are not admissible (such as those determined to be inadmissible in a prior motion in limine) are presented by any witness, either purposely or unintentionally, in the presence of the jury. If the judge grants the motion for mistrial, the trial is immediately ended and the jury is dismissed.

(iv) Objections: During the examination of a witness, one side may "object" to the questioning or testimony of a witness, or presentation of evidence, if the litigant believes that the testimony or evidence about to be given should be excluded. If the objection is *sustained* by the judge, that particular testimony or evidence is excluded. If the objection is *overruled* by the judge, the testimony or evidence may be given despite the objection.

11.7. Rebuttal Testimony

After each side has presented its evidence, the plaintiff may be allowed by the judge to present some rebuttal testimony.

11.8. Closing Arguments

Closing arguments to the jury set out the facts that each side has presented and the reasons why each party believes the jury should find in favor of him or her. Time limits are sometimes set by the Court for closing arguments, and each side must adhere to the specified time. *See* L. R. Civ. P. 83.9(b).

11.9. Charge to the Jury

After each side presents testimony and evidence, the judge delivers the "charge" to the jury, usually in the form of written instructions. Each side may present proposed written instructions to the judge for consideration. After the judge has considered all proposed instructions, the jury is given appropriate instructions which set forth the jury's responsibility to decide the facts in light of the applicable rules of law. The jury then returns a verdict in favor of either the plaintiff or the defendant and assesses damages to be awarded, if any.

11.10. Mistrial

If a jury is unable to reach a verdict and the judge declares a mistrial, the case must be tried again before a new jury. A jury which cannot reach a verdict is usually referred to as a "hung jury."

11.11. Judgment and Costs

Following the entry of the jury's verdict, judgment in favor of the prevailing party is entered forthwith by the Clerk.

If costs are awarded to the prevailing party, it is necessary to prepare a "bill of costs" for the approval of the Court. A bill of costs sets forth those costs that were incurred in the suit. *See* L. R. Civ. P. 54.1. A prevailing party may serve a bill of

costs within thirty (30) days after entry of a judgment. If attorney's fees are awarded, an application for attorney's fees must be made by motion filed no later than fourteen (14) days after entry of judgment. *See* Fed. R. Civ. P. 54(d)(2).

11.12. Post-trial Motions and Appeals

If you are unhappy with the ultimate disposition of your action, you may choose to file post-trial motions relating to your case. Additionally, you may choose to appeal the outcome of your civil lawsuit to the Fourth Circuit Court of Appeals within thirty (30) days of the disposition. After entry of judgment or order (App. R. 4(a)(1)(A)) or sixty (60) days after entry of judgment or order in cases in which the United States or its officers or agencies are parties (App. R. 4(a)(1)(B)).