

PUBLICATION UPDATE

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Moore's Federal Practice®

Publication 410 Release 184

November 2014

HIGHLIGHTS

2014 Proposed Civil and Appellate Rule Amendments

- This release incorporates proposed amendments to Civil Rule 77 and Appellate Rule 6, effective Dec. 1, 2014, unless Congress acts otherwise.

Analysis of Latest Case Law

- This release features analysis of the latest case law pertaining to federal civil and appellate practice.

Release 184 of *Moore's Federal Practice* features analysis of the latest case law and statutory amendments pertaining to federal civil and appellate practice, including the following:

Mandamus Review of Discovery Orders. The Seventh Circuit, in *In re Petition of Boehringer Ingelheim*, 745 F.3d 216 (7th Cir. 2014), observed that although discovery orders are rarely entitled to mandamus review, a discovery order requiring non-party foreign citizens to appear in the United States for depositions amounted to judicial usurpation of power, and was “one of those rare ‘safety valve’ cases for man-

damus because of the risk of international complications.” See Ch. 26, *Duty to Disclose; General Provisions Governing Discovery*, § 26.07[4].

Work-Product Protection for Materials Provided to Expert Witnesses. In *Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014), the Ninth Circuit concluded that “the driving purpose of the 2010 amendments [to Rule 26(b)(4)] was to protect opinion work product—i.e., attorney mental impressions, conclusions, opinions, or legal theories—from discovery.” Nevertheless, while attorneys must have the ability “to confer and strategize with their experts” without fear of compelled disclosure, not all materials provided to testifying experts are presumptively protected as work product. See Ch. 26, *Duty to Disclose; General Provisions Governing Discovery*, § 26.80[1][a].

Changes Permitted to Deposition Transcript. In *Pina v. Children's Place*, 740 F.3d 785 (1st Cir. 2014), the First Circuit held that Rule 30(e) does not limit a party to the correction of stenographic error; it permits changes in form and substance, but the court has discretion to re-

open a deposition when a witness makes substantive changes so that the revised answers may be explored. *See* Ch. 30, *Depositions by Oral Examination*, § 30.60[3].

Using Interrogatory Answers on Motion for Summary Judgment. The court found, in *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350 (4th Cir. 2014), that if a party wishes to use interrogatory answers to support or oppose a motion for summary judgment, the answers must be stated in an affidavit that complies with Rule 56 or is executed on personal knowledge. Interrogatory answers executed by plaintiff “to the best of [her] knowledge, information, and belief,” and admitting that her answers included the knowledge of her agents, representatives, and attorneys, were not based on personal knowledge, and the district court properly excluded those answers from consideration on motion for summary judgment. *See* Ch. 33, *Interrogatories to Parties*, § 33.160.

Imposition of Sanctions in Connection With Subpoena. In *Legal Voice v. Stormans Inc.*, 738 F.3d 1178 (9th Cir. 2013), a case of first impression in the Ninth Circuit, the court held that Rule 45(d)(2)(B)(ii) requires a district court to shift the cost of compliance with a subpoena if those costs are significant. Thus, if a subpoena imposes significant expense on a nonparty, the party seeking discovery must bear at least enough of the cost of compliance to render the remainder “non-significant.” The court also held that sanctions under Rule 45(d)(1), which requires an attorney not to impose an undue burden on a person subject to a subpoena, are discretionary, not mandatory. In addition, the court held that even when collateral order review is available to a nonparty subject to a subpoena, the nonparty is not required to immediately appeal an order denying a motion to quash

or modify a subpoena, but may wait until after final judgment *See* Ch. 45, *Subpoena*, §§ 45.33[1], 45.41[3], 45.71.

Qualified Immunity on Motion for Summary Judgment. In *Plumhoff v. Rickard*, — U.S. —, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014), the Supreme Court ruled that the court of appeals properly exercised jurisdiction over an appeal of a denial of summary judgment on qualified immunity grounds because the defendants raised legal issues and the denial of summary judgment was not based on a question of evidence sufficiency. *See* Ch. 56, *Summary Judgment*, §§ 56.26[2], 56.130[4][a].

Summary Judgment Standard on Motion Seeking Qualified Immunity. In *Tolan v. Cotton*, — U.S. —, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014), the Supreme Court reversed a summary judgment ruling that had found defendant was entitled to qualified immunity; in doing so, the Court applied the well-established principle that a court must view the evidence in the light most favorable to the opposing party in determining whether genuine issue of fact exists. *See* Ch. 56, *Summary Judgment*, §§ 56.24[2], 56.26[2].

Circuit split on recoverability of costs of imaging source media. Disagreeing with the Third and Fourth Circuits, the Federal Circuit has held that the costs of imaging source media and extracting documents so as to preserve metadata are recoverable as costs of “making copies of materials” under 28 U.S.C. § 1920. *See CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320 (Fed. Cir. 2013), now covered in Ch. 54, *Judgment; Costs*, § 54.103[3][d].

Whether patent case is “exceptional,” justifying fee award, is discretionary determination. Rejecting the Federal Circuit’s “overly rigid” test, the Supreme

Court has held that there is no precise rule or formula for determining whether a patent case is “exceptional” for purposes of fee-shifting under 35 U.S.C. § 285. Rather, the determination is to be made in the case-by-case exercise of the district court’s discretion, considering the totality of the circumstances. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 188 L. Ed. 2d 816 (2014), now discussed in Ch. 54, *Judgment; Costs*, § 54.171[3][g][i].

Declaratory-judgment context does not affect burden of proof in patent-infringement case. In *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 187 L. Ed. 2d 703 (2014), the Supreme Court held that in a declaratory-judgment action presenting an issue of patent infringement, a defendant patent holder has the burden of proving infringement, just as it would if it were the plaintiff in an infringement suit. *See* Ch. 57, *Declaratory Judgment*, § 57.62[2][c], [d]; Ch. 132, *Issue Preclusion and Collateral Estoppel*, § 132.02[4][f]; and Ch. 208, *Practice in the Federal Circuit*, § 208.10[2].

Discretionary remand of declaratory-judgment action is reviewable. In *Reifer v. Westport Ins. Corp.*, 751 F.3d 129 (3d Cir. 2014), the Third Circuit held that a remand of a declaratory-judgment action to state court is appealable if it is made pursuant to the district court’s discretion to decline to exercise jurisdiction to issue declaratory relief. *See* Ch. 57, *Declaratory Judgment*, § 57.100.

Eight Circuit expresses general preference for new trial over remittitur. In *Tedder v. Am. Railcar Indus.*, 739 F.3d 1104 (8th Cir. 2014), the Eighth Circuit stated that a new trial ordinarily should be granted, rather than a remittitur, when a district court finds that the jury’s damages

award is within constitutional limits but has been influenced by passion or prejudice. *See* Ch. 59, *New Trial; Altering or Amending a Judgment*, § 59.13[2][g][iii][A].

Circuit split on district court’s power to vacate and reenter judgment to facilitate appeal. Creating a split with the Ninth Circuit, the Fifth Circuit has held that a district court lacks the power under Civil Rule 60(b)(6) to vacate and reenter a judgment solely to restart the time for appeal, even if missing the appeal deadline was the result of attorney abandonment. *See Perez v. Stephens*, 745 F.3d 174 (5th Cir. 2014), now discussed in Ch. 60, *Relief From a Judgment or Order*, § 60.48[4][b].

No presumption of irreparable harm in trademark-infringement cases. The Ninth Circuit has recognized that recent Supreme Court jurisprudence effectively overruled the circuit’s former rule allowing a district court to presume irreparable harm in ruling on a preliminary injunction request in a trademark-infringement case. *See Herb Reed Enters., LLC v. Florida Entm’t Mgmt., Inc.*, 736 F.3d 1239 (9th Cir. 2013), now covered in Ch. 65, *Injunctions and Restraining Orders*, § 65.22[5][i][ii].

Appeal of order finding civil contempt of preliminary injunction. In *Cent. States, Southeast & Southwest Areas Health & Welfare Fund v. Lewis*, 745 F.3d 283 (7th Cir. 2014), the Seventh Circuit held that a party found in civil contempt of a preliminary injunction may pursue an interlocutory appeal. *See* Ch. 65, *Injunctions and Restraining Orders*, § 65.81.

Prevailing plaintiff is not liable for defendant’s attorney’s fees even if plaintiff’s is not more favorable than rejected Rule 68 offer. In *Stanczyk v. City of New York*, 752 F.3d 273, 282 (2d Cir. 2014), the Second Circuit held that a prevailing plaintiff who failed to accept a Rule 68 offer of

judgment must pay the defendant's post-offer costs—but not attorney's fees—if the plaintiff's judgment is less favorable than the unaccepted offer. *See* Ch. 68, *Offer of Judgment*, §§ 68.08[5], 68.09[2], [4][b].

Foreign sovereign is not immune from postjudgment discovery of assets. In *Republic of Arg. v. NML Capital, Ltd.*, 134 S. Ct. 2250, 189 L. Ed. 2d 234 (2014) the Supreme Court held that the Foreign Sovereign Immunities Act does not immunize a foreign sovereign judgment debtor from postjudgment discovery concerning its assets outside the United States. *See* Ch. 69, *Execution*, § 69.04[3].

Amendment of Appellate Rule 6. Effective December 1, 2014, Appellate Rule 6 has been amended, primarily to add a new subdivision addressing permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2). *See* Ch. 306, *Appeal in a Bankruptcy Case*, §§ 306.01, 306.21, 306App.08, 306App.101.

Failure to request postjudgment interest does not preclude award. The Eighth Circuit has held that a prevailing party's failure to request an award of postjudgment interest does not act as a waiver or forfeiture of the award. *See Travelers Prop. Cas. Ins. Co. of Am. v. National Union Ins. Co. of Pittsburgh, Pa.*, 735 F.3d 993 (8th Cir. 2013), now covered in Ch. 337, *Interest of Judgment*, § 337.02.

Bankruptcy Courts. In *Exec. Benefits Ins. Agency v. Arkison*, 189 L. Ed. 2d 83 (2014), the Supreme Court held that when Article III prohibits a bankruptcy court from entering a final judgment on a claim identified in the Bankruptcy Code as a "core proceeding," the bankruptcy court may treat the claim as a non-core proceeding, issuing proposed findings of fact and conclusions of law to be reviewed de novo by the district court. The Court reserved the

question whether Article III permits a bankruptcy court to enter final judgment on such claims with the parties' consent, an issue on which the circuits are split. The cases have been added to Ch. 100, *The Structure of the Federal Judicial System*.

Class Actions and Mass Actions. In *Quicken Loans Inc. v. Alig*, 737 F.3d 960 (4th Cir. 2013), the Fourth Circuit held that named local defendants may be aggregated to satisfy the local defendant element of the local controversy exception to jurisdiction under the Class Action Fairness Act. The case has been added to Ch. 102, *Diversity Jurisdiction*, and Ch. 107, *Removal*.

Foreign Sovereign Immunities Act. In *Sachs v. Republic of Aus.*, 737 F.3d 584 (9th Cir. 2013), the Ninth Circuit held that the sale of a Eurail pass in the U.S. by an agent of a company owned by a foreign country constituted commercial activity in the U.S. for purposes of the commercial activity exception to sovereign immunity under the FSIA.

In *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175 (D.C. Cir. 2013), the D.C. Circuit held that infringement of intellectual property that occurs abroad does not cause a direct effect in the United States for purposes of the exception merely because the property was owned by United States corporations. Both cases have been added to Ch. 104, *Specific Grants of Federal Question Jurisdiction*.

Removal. New subsections have been added to Ch. 107, *Removal*, concerning removal by "real party defendants in interest" and removal when neither of the statutory 30-day periods for removal has been triggered.

Ripeness. *Susan B. Anthony List v. Driehaus*, 189 L. Ed. 2d 246 (2014), in which the Supreme Court questioned the continued vitality of the prudential aspect of

ripeness, has been added to Ch. 101, *Issues of Justiciability*.

Standing. In *Lexmark Int'l, Inc. v. Static Control Components*, 188 L. Ed. 2d 392 (2014), a unanimous Supreme Court threw into doubt the future of prudential limits on standing. Specifically, the Court held that the zone-of-interests test is a question of traditional statutory interpretation, not a question of prudential standing. The Court also made clear that its reluctance to entertain generalized grievances, which had at times been labeled an issue of prudential standing, is really an issue of constitutional standing. The Court also questioned whether the limits on third-party standing are prudential or constitutional, but did not decide the issue because *Lexmark* did not present any third-party standing issues. Several sections in Ch. 101, *Issues of Justiciability*, have been rewritten or reorga-

nized to take into account this development.

Tax Injunction Act. In *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904 (10th Cir. 2013), the Tenth Circuit held that an association's constitutional challenge to Colorado's notice and reporting requirements for retailers who do not collect sales taxes was barred under the TIA even though the association was not the taxpayer. This case, in which the Supreme Court has granted certiorari, has been added to Ch. 21, *The Anti-Injunction Acts*.

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November 2014

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- 2. This Release Number 184 contains packages.
 - Package 1 contains revision pages for volumes 1, 3, 6–9, & 11–15.
 - Package 2 contains revision pages for volumes 16–20A, 22–23, & ★.
- 3. Circulate the “Publication Update” among those individuals interested in the contents of this release.

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| <input type="checkbox"/> | 108-117 | 108-117 thru 108-118.1 |

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| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 110-39 thru 110-40.1 | 110-39 thru 110-40.1 |
| <input type="checkbox"/> | 110-53 thru 110-54.1 | 110-53 thru 110-54.3 |
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| <input type="checkbox"/> | 112-46.1 thru 112-47 | 112-47 thru 112-48.1 |
| <input type="checkbox"/> | 112-83 | 112-83 thru 112-84.1 |

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| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 121-58.1 thru 121-80.3 | 121-59 thru 121-80.13 |
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| <input type="checkbox"/> | 124-104.15 thru 124-107. | 124-105 thru 124-108.9 |

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| <input type="checkbox"/> | 131-33 | 131-33 thru 131-34.1 |
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| <input type="checkbox"/> | 131-104.1 thru 131-107 | 131-105 thru 131-108.1 |
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| <input type="checkbox"/> | 134-77 thru 134-81 | 134-77 thru 134-82.3 |
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| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 202-29 thru 202-49 | 202-29 thru 202-50.3 |
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| <input type="checkbox"/> | iii thru xxiii. | iii thru xxi |
| <input type="checkbox"/> | 301-5 thru 301-8.1 | 301-5 thru 301-8.1 |
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| <input type="checkbox"/> | 304-23 thru 304-24.1 | 304-23 thru 304-24.1 |
| <input type="checkbox"/> | 304-74.3 thru 304-77 | 304-75 thru 304-77 |

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| <input type="checkbox"/> | 305-7 thru 305-17 | 305-7 thru 305-19 |
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| <input type="checkbox"/> | 321-11 thru 321-15 | 321-11 thru 321-15 |
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| <input type="checkbox"/> | 510-33 thru 510-39 | 510-33 thru 510-39 |
| <input type="checkbox"/> | 530-5 | 530-5 |

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