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Federal Procedure

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1. The Supreme Court of the U.S. consists of a Chief Justice of the U.S. and eight associate justices, any six of whom shall constitute a quorum. Note that while the Constitution provides for a Supreme Court the number of the members of that court is fixed by Congress. 28 U.S.C. 1.

2. There are eleven judicial circuits—ten numbered circuits and the District of Columbia. The Chief Justice of the U.S. and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court. A justice may be assigned to more than one circuit, and two or more justices may be assigned to the same circuit.

3. There shall be in each circuit a court of appeals known as the United States Court of Appeals for the circuit. Each court of appeals shall consist of the circuit judges of the circuit. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.

4. Cases in the U.S.Ct. of Appeals shall be heard by a court or division of three judges, unless a hearing before the court on banc is ordered by a majority of the circuit judges of the circuit. Virginia is in the fourth circuit and regular annual sessions are held in Richmond and Asheville.

5. There shall be in each judicial district a district court which shall be known as the U.S. District Court for the district. There are 94 district judges appointed by the President with advice and consent of the Senate during good behavior. Except as otherwise provided by law or rule of court the judicial power of a district court may be exercised by a single judge who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges. Virginia is divided into two judicial districts known as the Eastern and Western districts of Virginia.

6. If a defendant to a complaint brought in a U.S. District Court reasonably believes that the judge thereof is biased against him, or in favor of his adversary, what remedy has he?

Section 144 of the Judicial Code provides that whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief. A party may file only one such affidavit as to any judge. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

7. There are also created a Court of Claims of five judges, a Court of Customs and Patent Appeals of five judges, and a Customs Court of nine judges.

8. In case of necessity circuit judges may be assigned to other circuits, or to act as district judges, and district judges may be assigned to act as district or circuit judges in their own or other circuits.

9. All courts of the U.S. shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions or orders. The continued existence or expiration of a term of court in no way affects the power of the court to do any act.

10. The President appoints a District Attorney for each judicial district, also a U.S. Marshal.

11. A U.S. marshal and his deputies, in executing the laws of the U.S. within a state, may exercise the same powers which a sheriff of such state may exercise in executing the laws thereof. He executes all writs, process and orders issued under authority of the U.S. and may command all necessary assistance to execute his duties.

12. Each district court shall appoint United States commissioners in such number as it deems advisable. 28 U.S.C. 631. They have jurisdiction over petty offenses, and certain preliminary proceedings.

13. In what two types of cases has the Supreme Court original and exclusive jurisdiction? (a) All controversies between two or more States (b) All proceedings against ambassadors or other public ministers of foreign states or their domestics. 28 U.S.C. 1251.
14. In what three types of cases has the Supreme Court original but not exclusive jurisdiction?
   
   (a) All proceedings brought by ambassadors or other public ministers of foreign states or to which consuls of foreign states are parties.
   
   (b) All controversies between the United States and a State
   
   (c) All proceedings by a State against the citizens of another State or against aliens.

15. An agency of the United States sued X in a civil action. X contended that the act creating the agency was unconstitutional, and the federal district court before which the suit was tried so held. To what court should the agency appeal?

By 28 U.S.C. 1252 any party may appeal to the Supreme Court from an interlocutory or final judgment or decree of any Court of the United States holding an act of Congress unconstitutional in any civil proceeding to which the United States or any of its agencies, or employee thereof, as such employee, is a party.

16. In what other type of case does an appeal lie directly from the District Court?

28 U.S.C. 2281, 2282, and 2325 provide for a three judge district court in the following types of cases respectively:

   (a) Injunction against enforcement of State statute.
   
   (b) Injunction against enforcement of Federal statute.
   
   (c) Injunction against enforcement of any order of the Interstate Commerce Commission. An appeal from the decision of such a court lies directly to the Supreme Court by 28 U.S.C. 1253.

17. What are the three methods by which decisions of the court of appeals may be reviewed by the Supreme Court?

By 28 U.S.C. 1254, they are:

   (1) By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree.
   
   (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Federal Constitution, treaties, or laws of the United States.
   
   (3) By certification at any time by a court of appeals of any question of law as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision.

18. What are the three methods by which decisions rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court?

   (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
   
   (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Federal Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
   
   (3) By writ of certiorari in all other cases involving a federal question.

19. What is the appellate jurisdiction of the Courts of Appeals from decisions rendered by the district courts?

The courts of appeals have jurisdiction of appeals from all final decisions of the district courts and also of interlocutory decisions granting or dissolving injunctions (except in case of statutory three judge district court), appointing receivers, and some others. 28 U.S.C. 1291.

20. X wishes to sue Y for $2,000 damages for violation of rights given X by federal laws. Has the state court, federal district court, or both original jurisdiction?

Only the state court unless otherwise specially provided. 28 U.S.C. 1331 reads, "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

21. X, an alien, wishes to sue Y, another alien for $25,000 in a federal district court. If no federal question is involved has that court jurisdiction?
28 U.S.C. 1332 reads: (a) The district courts shall have original jurisdiction of all

civil actions where the matter in controversy exceeds the sum or value of $10,000
exclusive of interest and costs, and is between:

(1) Citizens of different states:

(2) Citizens of a State and foreign states or citizens thereof

(3) Citizens of different States and in which foreign states or citizens thereof are
additional parties.

(b) The word "States", as used in this section, includes the Territories and the
District of Columbia.

So the answer to our question is "No". For a district court to have jurisdiction
two things are necessary: (1) The Federal Constitution must provide for potential
jurisdiction and (2) Congress must have expressly provided for actual jurisdiction.

22. X, a citizen of Bristol, Tenn., worked for Y in Bristol, Va. Y had 27 employees.
X was seriously injured while at work due to Y's negligence and he sued Y for
$21,000 in the federal district court. Does that court have jurisdiction?

No. This is not a case or controversy within the meaning of the Constitution as the
dispute is governed by the Virginia Workmens Compensation Law which gives jurisdiction
to an administrative agency, the Industrial Commission. Even if the case is appealed
to the Supreme Court of Appeals a 1958 amendment to the Judicial Code forbids the
removal of workmen's compensation cases to the federal courts.

23. In what cases have the district courts not only original jurisdiction, but also
jurisdiction exclusive of the courts of the States?

(1) Admiralty and prize cases.

(2) Bankruptcy proceedings

(3) Patent and copyright cases

(4) Civil actions against consuls and vice consuls

(5) Recovery or enforcement of any fine, penalty, or forfeiture incurred under Act
of Congress.

(6) Seizures under any law of the United States.

(7) Civil actions against the United States under the Federal Torts Claim Act.

And the United States cannot be sued in any State court (or at all, for that matter)
without its consent and it has not consented to be sued in any courts but its own.

24. Two persons who are citizens of different states each claim to be entitled to the
proceeds of a certain life insurance policy amounting to $600. Can the Insurance
Company interplead the two claimants in a federal court?

Yes. 28 U.S.C. 1335 provides that the jurisdictional amount in interpleader cases
shall be $500 or more.

25. The X Public Utility of this State claimed that rates fixed by the State Corpora-
tion Commission were so low that it was being deprived of its property in violation
of its rights under the 14th amendment. Is the proper forum a State circuit court,
the State Supreme Court of Appeals, or the federal district court, or, is there a
choice?

28 U.S.C. 1342 provides that if the rate order does not interfere with interstate
commerce and has been made after reasonable notice and hearing and there is a plain,
speedy and efficient remedy in the courts of the State then the district courts shall
not enjoin or suspend the order. Hence the proper forum is the Supreme Court of
Appeals in an appeal from the State Corporation Commission.

26. The district courts have jurisdiction of any civil action authorized by law to
recover damages for injury to person or property because of the deprivation of any
right of a citizen of the United States. Id. 1343.

27. M gave P his note for $25,000 for value. Both M and P were citizens of Virginia.
P indorsed the note to O of Ohio in the ordinary course of business. Does a federal
district court have jurisdiction of a suit on the note by O against M?

Yes. The former assignment clause was "a jumble of legislative jargon". The revised
section (28 U.S.C. 1359) changes the old rule that an assignee cannot sue in the
federal courts unless his assignor could do so by confining its application to cases
wherein the assignment is improperly or collusively made to invoke jurisdiction.
28. M of Virginia wishes to sue the First National Bank of the city in which he resides for $25,000. Has the federal district court jurisdiction?

No, not because one of the parties is a National Bank unless it is a suit by the United States, or its officers to wind up its affairs. Id 1348.

29. May a corporation in which the United States owns a substantial proportion of its stock sue and be used in the federal courts for that reason?

Not unless the proportion is over half. Id 1349.

30. Venue Generally. Id.1391.

Case 1. P of Virginia wishes to sue D of Ohio on a note for $25,000. He serves D in West Virginia. What is the proper venue?

Case 2. P of Virginia wishes to sue D of Ohio in a case involving a federal question. What is the proper venue?

Case 3. P of Virginia wishes to sue an alien who resides in Virginia. He catches him in Ohio. What is the proper venue?

Case 4. A Corporation was incorporated in State A, was duly licensed to do business in State B, and was P.W.O.L. (present without leave) in State C. What is its residence for venue purposes?

Unless otherwise provided by law proper venue where action is founded only on diversity of citizenship(case 1) is the district in which the plaintiff or defendant resides. Hence Virginia or Ohio. In case 2 where action is not founded solely on diversity the venue is the district in which defendant resides. In case 3 an alien may be sued in any district. Case 4 turns on the proposition that for purposes of venue a corporation may be regarded as a resident in any judicial district in which it is incorporated or in which it is licensed to do business, or in which it actually is doing business.

31. If there are defendants residing in different districts of the same state any one of such districts is a proper venue if the action is not of a local nature. If of such nature it may be brought in any district of the state in which all or part of such property is located. Id 1392.

32. Change of Venue. For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. Id 1404.

33. A of Virginia sues B of North Carolina and C of Virginia in the State courts of Virginia for $25,000 due on their joint note. Can B remove to the Federal Courts?

No. All parties defendant (except nominal parties) when properly joined and served must be of different citizenship from all parties plaintiff.

34. A of Virginia sues B of North Carolina on a $25,000 note in the North Carolina State courts. May B remove?

No. Under present statutes if the non-resident is satisfied with the State court the resident cannot remove as the basis for removal is a possibility that State courts might not give outsiders a fair deal.

Note: Actions by injured employees of railways under the Federal Employers Liability Act instituted in State courts cannot be removed. Id 1445. Nor can actions brought under the Jones Act, the Fair Labor Standards Act, or Workmen’s Compensation Acts.

35. To what court and within what time should the defendant apply for removal?

U.S.C. 1446 provides that a defendant desiring to remove any civil action or criminal prosecution from a State Court shall file a petition in the District Court of the U.S. for the district and division in which such action is pending. If it is a civil action the petition must be filed within 20 days after the commencement of the action or service of process whichever is the later.

36. What should be remembered about procedure after removal. Id 1447.

(a) The district court may issue all necessary orders to bring before it all proper parties whether previously served or not.

(b) It may issue a writ of certiorari to the State Court to bring before itself all the records and proceedings in said State Court.

(c) It may order the pleadings recast and the parties realigned according to their real interest.
FEDERAL PROCEDURES

(a) If at any time before final judgment it appears that the case was removed inappropriately the district court shall remand the case to the State Court.

(b) Any attachment, sequestration, bond, injunction, or order in force in the State Court shall continue in force after removal until dissolved or modified by the district court. Id. 1550.

27. Is there a federal common law, or must the federal courts apply the State law where applicable?

Id. 1652 reads: "The laws of the several states except where the Constitution or treaties of the U.S. or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the U.S., in cases where they apply." And in Erie R.R. v. Tompkins, 304 U.S. 64, it was held (reversing Swift v Tyson decided about 100 years before) that federal courts should apply state common law if applicable rather than their own concept of the common law even in matters of general law.

28. Where the genuineness of a person's handwriting is in issue is other handwriting proved or admitted to be genuine admissible for purposes of comparison?

Yes. Congress has expressly so provided. Id 1731.

29. Id. 1732 provides that records made in the regular course of business are admissible. It is further provided that all the circumstances of the making of such writing including lack of personal knowledge by the entrust or maker, may be shown to affect its weight, but not its admissibility.

30. In civil cases such party shall be entitled to three peremptory challenges.

31. X sued Y in a federal district court in Norfolk and secured a judgment against him for $75,000. Y sued in the same court to specifically enforce a contract. The federal judgment was duly docketed in Norfolk but not in Roanoke. If Y were to sell the Roanoke land to a bona fide purchaser for value what would Y's rights be?

Id 1952 provides that every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner as a judgment of a State court of general jurisdiction, and shall cease to be a lien on the same real estate located in the State on which the judgment was rendered, and that whenever the law of any State requires a judgment of a State court to be recorded in a particular manner before such lien attaches such requirements shall apply if the law of such State authorizes federal judgments to be recorded as are state judgments. Virginia law so provides (Va. 775) so X will have lost his lien on the Roanoke land.

40. Can federal courts give declaratory judgments?

Id 2201 provides "In case of actual controversies within its jurisdiction, except with respect to Federal taxes, one court of the U.S., upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

41. When does the writ of habeas corpus extend to a prisoner? Not unless-Id 2241.

(1) He is in custody under color of the authority of the United States; or

(2) (omitted)

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) (omitted)

(5) It is necessary to bring him into court to testify or for trial.

44. If a plaintiff in habeas corpus is in State custody in violation of federal right will the federal courts give relief?

Only if it appears that the applicant has exhausted the remedies available in the courts of the State. Id. 2254.

45. Give the gist of the Federal Tort Claims Procedure Act.

By 28 U.S.C. 2676 the U.S. shall be liable for torts in the same manner and to the same extent as a private individual but not for punitive damages. Some important exceptions are (by Id 2680) exercise of discretionary functions, delivery of the mail,
any claim for damages arising out of assault and battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, deceit, or interference with contract rights.

46. Give the gist of the statute authorizing the Supreme Court to make rules of civil procedure. Id. 2072.

The Supreme Court shall have the power to describe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the U.S. in civil actions. (Note: Rules of criminal procedure have also been authorized and adopted).

Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury.

Such rules shall not take effect until they have been reported to Congress by the Attorney General at the beginning of a regular session and until after the close of such session.

All laws in conflict with such rules shall be of no further force.

47. X of N.Y. wishes to compel Y of Virginia to convey Blackacre to him as he has promised by a valid contract. If X proceeds in the federal courts should he file a bill in equity for specific performance of the contract?

No. All procedural distinctions between law and equity are abolished. Rule 2 states, "There shall be one form of action to be known as 'civil action,' which by Rule 3 is commenced by filing a complaint with the court.

48. Things to remember about Process (Rule 4)

(a) Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person especially appointed to serve it.

(d) The summons and complaint shall be served together. Service shall be made as follows:

(1) Upon an individual other than an infant or incompetent, by delivering a copy of the summons and the complaint to him personally or by leaving copies thereof at his dwelling house with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or incompetent, by serving the summons and complaint in the manner prescribed by the law of the State.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

(f) All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state.

(g) The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process.

49. What pleadings are allowed? Rule 7(a).

There shall be a complaint and an answer; a reply to a counter claim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third-party complaint is served.

No other pleading shall be allowed except that the court may order a reply to an answer or a third party answer.

50. Plaintiff's complaint does not state a cause of action and was brought in the wrong district. Defendant demurred and filed a plea in abatement. Was this proper?
Pleading to a preceding pleading what defenses must be set forth affirmatively? Rule 8(c).
1. Accord and Satisfaction
2. Arbitration and Award
3. Assumption of Risk
4. Contributory Negligence
5. Discharge in Bankruptcy
6. Duress
7. Estoppel
8. Failure of Consideration
9. Fraud
10. Illegality
11. Injury by Fellow Servant
53. Is it necessary for the plaintiff in his complaint to aver his capacity to sue? This is not necessary, under Rule 9(a) except to the extent required to aver the jurisdiction of the court. When a party wishes to raise such an issue he must do so by specific negative averment.
54. Defendant in his answer stated that plaintiff had secured defendant’s signature to the contract by fraudulent representations, and that all conditions precedent to his liability had not occurred. Is this a proper answer? Rule 9(b) reads: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Hence defendant has not complied with this rule as to his allegations of fraud.
Rule 9(c) reads: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally, that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." Since defendant has denied their occurrence a general denial is not sufficient.
55. Within what time must defendant serve his answer? Rule 12(b) provides that a defendant shall serve his answer within 20 days after the service of the summons and complaint upon him. However, the service of a motion permitted under Rule 12 alters the 20-day period as follows: (1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court’s action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.
56. Plaintiff’s complaint fails to state any cause of action. What should the defendant do? Rule 12(b) provides that every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
57. An answer fails to state any legal grounds of defense. What can plaintiff do?

Rule 12(c) provides that after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment upon the pleadings. Note: In this case and in subdivision (6) of question 56 above if matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

58. Plaintiff's complaint charged that defendant had negligently injured him but was so vague as to the details as to make it unreasonable for the defendant to be required to make a responsive plea. Should the defendant ask for a bill of particulars?

All references to bills of particulars in the federal rules have been eliminated. Rule 12(e) now reads, "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order, or within such other time as the court may fix, the court may strike the pleadings to which the motion was directed or make such order as it deems just.

59. In which of the following cases, if any, can defendant bring in a third party under federal third-party practice provisions?

(1) X of N.Y. is assaulted by A and B of Virginia. X sues A. May A bring in B?
(2) X of Ohio is negligently injured in Virginia by the combined negligence of A and B both of Virginia. X sues A. May A bring in B?
(3) X of Ohio is owed by A and B both of Virginia. A is the principal debtor and B his surety. X sues B. Can B bring A in?

Rule 14(a) provides "At any time after the commencement of the action a defendant as a third party plaintiff may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third party plaintiff need not obtain leave to make the service if he files the third party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action". The object of third-party practice is to settle the whole claim in one action.

In situation (1) supra A cannot bring B in because B is liable to the plaintiff only as there is no contribution as between intentional tortfeasors. A cannot force X to sue B as that option is with X alone.

In situation (2) supra A can bring in B as under our Virginia statute V#9-627 contribution is allowed between joint wrongdoers where there is a tort of mere negligence not involving moral turpitude.

In situation (3) B can bring A in as A is under a duty to exonerate B.

60. What should be remembered about the right to amend pleadings?

(1) Rule 15 allows one amendment as a matter of course at any time before a responsive pleading is served.
(2) Otherwise only by leave of court or by written consent of the adverse party.
(3) If evidence is presented at the trial that is not within the issues made by the pleadings the court may allow amendments granting a continuance to the adverse party if the court thinks this necessary to enable him to prepare his case on the amended pleading.
(4) The amendments relate back to the date of the original pleadings.

61. What provision, if any, is made for pre-trial conferences?
Rule 16 provides that in any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

1. The simplification of the issues;
2. The necessity or desirability of amendments to the pleadings;
3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
4. The limitation and number of expert witnesses;
5. Omitted;
6. Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

Is the following complaint good?

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Civil Action, File Number -----

A.B., Plaintiff
v.
C.D. and E.F., Defendants

Complaint

1. Plaintiff is a citizen of the State of Ohio and defendants are citizens of the State of Virginia. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

2. On June 1, 1958, in a public highway called Broad Street in Richmond, Va., defendant C.D. or defendant E.F., or both defendants C.D. and E.F., willfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against C.D. or against E.F. or against both in the sum of twenty thousand dollars and costs.

(Signed) Marshall Wythe
Attorney for Plaintiff

1 old Postoffice Bldg.
Williamsburg, Va.

Notes:
1. Since contributory negligence is an affirmative defense (Rule 8c) the complaint need contain no allegation of due care of plaintiff.

2. In a note to official form 3 it is stated, "In particular the rules permit alternative and inconsistent pleading. See Form 10".

The above complaint is good and is the equivalent of Official Form 10.

62. Is misjoinder of parties ground for dismissal?

No. Rule 21 reads, "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately". However by Rule 62 no rule is to be construed to extend or limit the jurisdiction of the district courts or the venue of actions therein.

63. What is the test as to whether or not a class action will lie?

By Rule 23 the test is whether persons constituting a class are so numerous as to make it impracticable to bring them all before the court. If so, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

64. How if at all may a party ascertain in advance what others know about the controversy?

Rule 26(a) provides that any party may take the testimony of any person including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. "The Rules
permit "fishing" for evidence as they should. Fed. Rules Serv. 3d, ill. Case 2.

Note: By Rule 26(b) it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

66. P sued D for personal injuries. D believes that P has not been hurt as seriously as claimed. Is there any way for D to check on this matter?

Yes. By Rule 35 the court may order P to submit to a physical or mental examination by a physician. D is entitled to a copy of the physician's findings. And if D has other examinations P is entitled to a copy of such findings as a condition to the admissibility of such findings.

67. What are the consequences of a party refusing to answer questions or produce documents or submit to a physical or mental examination in a proper case?

By Rule 37(b) 1. He is guilty of contempt of court.

2. The matter may be taken as established in accordance with the claim of the party not at fault.

3. An order may be issued striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party

68. X sued Y for $2,700.00. When the trial got under way Y demanded a jury. Is he entitled thereto?

By Rule 38 Y has waived a jury trial unless he has demanded one within the time laid down in the rule (not later than 10 days after service of the last pleading). In proper cases either party is entitled to a jury trial as a matter of right (pursuant to the Seventh Amendment) unless waived.

69. Assuming no federal statute may a husband testify for or against his wife in a civil case in the district courts?

Rule 43(a) provides that the admissibility of evidence and the competency of witnesses shall be determined as follows:

If admissible by federal statute, or under the rules of evidence heretofore applied in the courts of the U.S. in equity suits, or under the rules of evidence in force in the State in which the U.S. court is held, the evidence is admissible or the witness is competent.

If the district court was held in Virginia the husband would be a competent witness as he is competent under Virginia law.

70. In the trial of P v. D in a district court the judge over objection allowed improper evidence to be admitted. Is a bill or certificate of exceptions necessary?

No. Rule 66 provides that formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor.

71. In the trial of P v. D the district judge erroneously admitted hearsay evidence over the objection of the other party. Is this ground for a new trial?

Not necessarily. Rule 61 is a sort of federal statute of jefails. It reads, "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

In the Matter of:
Amendment to Local Rules

AMENDMENT TO RULE 18

It is ORDERED that Rule 18 of the Rules of the United States District Court for the Eastern District of Virginia be, and same hereby is, amended to read as follows:

Rule 18
Exhibits

"1. Civil Case: All exhibits, models or diagrams, documentary or physical, introduced in the trial of a civil case or lodged with the Court in anticipation of their introduction into evidence in the trial of a civil case shall be withdrawn by the parties to the litigation or their counsel within sixty (60) days after final judgment or other final disposition of the case, whichever is later. If the exhibits, models or diagrams are not removed by the parties to the litigation or their counsel within the sixty (60) days specified, the Clerk shall destroy them or make such disposition of them as to him may seem best.

2. Criminal Case: All exhibits, models or diagrams, documentary or physical, introduced in the trial of a criminal case or lodged with the Court in anticipation of their introduction into evidence in the trial of a criminal case shall be retained by the Clerk to be disposed of at the time and in the manner directed by Order of this Court."

This amendment to Rule 18 shall be effective as of January 1, 1970.

December 3, 1969.
To All Attorneys in the Norfolk and Newport News Divisions.

Gentlemen:

With an excess of 750 civil and admiralty cases pending on the dockets in Norfolk and Newport News, it is apparent that there must be a drastic change in procedure relating to the preparation of cases for trial in order to effect a saving in court time, jury expense, last minute settlements, expenses of expert witnesses, and many other factors too numerous to mention.

While visiting judges have been of great assistance in removing the congestion, it is certainly no permanent solution. Throughout the United States District Courts the nationwide per-judge annual average for civil and admiralty cases is 173. The annual average for Norfolk and Newport News is 513. The answer would be an additional judge but it is highly unlikely that Congress will consider such action for many years to come.

I am convinced that if the attorneys will cooperate and adequately prepare their cases in advance of trial, it will then be possible to set a more realistic docket. The new Rules A and B will require some additional time and effort on the part of the attorneys but, in the final analysis, it
will merely mean that trial preparation must be advanced and it should result in the earlier settlement of cases which would be terminated in this manner in any event.

The changes are not the product of hasty action. For the past several years I have been accorded the privilege of discussing these matters with many judges throughout the nation. Similar procedures are in effect in New York, Atlanta, Dallas, the Middle District of North Carolina, and many other places. Initially the attorneys have not been inclined to welcome the change but, upon becoming accustomed to the procedure, now find that they save time and money for both attorneys and litigants.

I urge that you carefully study the attached Rules A and B. If you will cooperate with the court, it is my belief that we will be successful in reducing the backlog of pending cases. At the expiration of two years we should be able to see the results and, if changes are then necessary, they may be made.

Faithfully yours,

[Signature]

United States District Judge
Re: Amendment of Rules - Civil and Admiralty - Norfolk and Newport News Divisions.

ORDER

Effective August 1, 1962, and applicable at present only in the Norfolk and Newport News Divisions of the Eastern District of Virginia, the Local Rules are ORDERED amended to include:

Rule A - "Pre-Trial Conferences"

Rule B - "Motions and Interrogatories"

Copies of said Rules are attached hereto and made a part of this order.

Such portions of the Local Rules for the Eastern District of Virginia adopted June 17, 1954, as amended, which may be in conflict with Rule A and Rule B aforesaid are hereby declared to be ineffective in the Norfolk and Newport News Divisions.

Rule A and Rule B shall be operative to all cases now or hereafter scheduled for pre-trial conferences and, upon special order of the court, to cases already scheduled for trial.

This order shall not be operative in the Alexandria and Richmond Divisions of this court.

John D. Butzner, Jr.  
United States District Judge

Oren R. Lewis  
United States District Judge

Walter E. Hoffman  
United States District Judge

July 30, 1962
RULE A

Pre-trial Conferences

1. There shall be at least one pre-trial conference in every civil and admiralty case where issue is joined, unless counsel for the parties stipulate in writing to the contrary and the court approves the stipulation.

2. The court may, in its discretion, direct that an initial pre-trial conference be held at the earliest practicable date following the joinder of issue. The initial pre-trial conference shall be attended by an attorney who is a member or associate of the firm representing the party or parties to the litigation. At the initial pre-trial conference the attorney appearing shall be prepared to give information with respect to the subjects referred to in Appendix A made a part hereof.

3. Attorneys are expected to make full use of all discovery procedures provided by the Rules, rather than to seek information or admissions at the meeting of attorneys or at the final pre-trial conference. No attorney may disregard the time limitations fixed by the Federal Rules of Civil Procedure or Admiralty Rules merely because of a scheduled meeting of attorneys or scheduled final pre-trial conference.

4. Reasonable extensions of time to answer the complaint or libel, or to answer interrogatories or produce documents, will be granted but the party seeking such extension must obtain court approval of same within the time permitted by the Rules, unless for good cause shown it has been impracticable to obtain an order extending the time
within the period specified by the Rules.

5. At least 15 days prior to the final pre-trial conference or, if no final pre-trial conference is scheduled, at least 15 days prior to the date of trial, and after discovery procedures have been completed, the attorneys who will participate in the trial shall meet and confer for the following purposes:

(a) Preparing and signing written stipulations with respect to all undisputed facts;
(b) Exchanging and preparing written stipulations with respect to all exhibits that will be offered at the trial;
(c) Exchanging a final list of witnesses each party will offer at the trial, together with a brief statement of the purpose of the testimony of each witness, i.e., (1) eye witness, (2) medical, (3) expert, etc.;
(d) Agreeing upon the triable issues and whether special interrogatories to the jury are appropriate;
(e) Consideration of objections to depositions and preparation of list of objections to court for determination at final pre-trial conference;
(f) Discussing settlement possibilities;
(g) Whether pre-trial briefs are to be submitted and, if so, the date of presentation.

For the foregoing purposes the attorneys are requested to examine Appendix B.
6. At any **final** pre-trial conference, or at any **initial** pre-trial conference if the parties are prepared, the attorneys actually participating in the trial of the case shall present to the court an order incorporating the following:

(a) All stipulations with respect to undisputed facts.

(b) All stipulations with respect to exhibits. If the parties do not agree as to the admissibility of one or more exhibits, an order shall be prepared stating the exhibit to be offered and its purpose, the objection of the party who opposes the introduction and the reasons for said objection.

(c) The names and addresses of witnesses who shall testify at the trial and the purpose of the testimony of each witness. Parties are expected to obtain the names and addresses of the witnesses in advance of the final pre-trial conference by the use of interrogatories. If the name and address of a witness is not submitted at the time of, or prior to, the final pre-trial conference, the witness shall not be permitted to testify, but this restriction shall not apply to rebuttal witnesses, the necessity of whose testimony cannot reasonably be anticipated prior to trial. Counsel may designate whether a witness will be called, or whether there is only a possibility that the witness may be called.

(d) A brief statement of fact setting forth the factual contentions of the parties.

(e) A brief statement of the triable issues
as contended by the parties. (See Appendix C for suggested form of order.)

7. At any final pre-trial conference, or at any initial pre-trial conference if the parties are prepared, the court may, in addition to the matters to be incorporated in a formal order, consider and discuss with counsel and, if appropriate, enter an order with respect to:

(a) The prospects of settlement, but in non-jury matters the amount of any settlement generally should not be the subject of discussion.

(b) The objections to any depositions to be presented as evidence.

(c) The matter of presentation of written requests for any charge to the jury.

(d) The formulation of any special interrogatories for submission to the jury.

(e) The necessity for any pre-trial brief on triable issues.

(f) If a trial date has not been previously assigned, a date will be selected.

8. Should a party or his attorney fail to appear at any pre-trial conference (either initial or final) or should otherwise fail to meet and confer in good faith with opposing counsel as provided herein, an ex parte hearing may, in the discretion of the court, be held and judgment of dismissal or default or other appropriate judgment or sanctions imposed, including, but not limited to, sanctions by way of imposition of attorney's fees against the attorney and/or his client.
APPENDIX A

Initial Pre-trial Conference

At the initial pre-trial conference the attorneys shall advise with respect to the following:

1. The name of the principal attorney who will participate in the trial and attend any final pre-trial conference.

2. When will discovery procedures be commenced?

3. The time necessary to complete discovery procedures provided for by the Rules.

4. Whether it is likely that depositions de bene esse will be required. Are there any military personnel involved as parties or witnesses? If so, arrangements should be made to take de bene esse depositions.

5. Is it contemplated that any third-party complaint or impleading petition will be filed?

6. Are there any questions of jurisdiction to be considered?

7. Are there other actions pending or contemplated which involve the same general subject matter?

8. Are the names of the parties correctly stated in the pleadings? Is there any question of misjoinder or nonjoinder? Are any of the parties infants or otherwise incompetent?

9. Are there any pending motions and, if so, have the attorneys discussed the possibility of disposing of such motions without the necessity of a formal hearing?

10. Is it likely that there will be non-local witnesses or parties whose presence will be required at the trial?
11. Depending upon the nature of the case and the condition of the court docket, a trial date may be set. For this purpose the attorney attending the initial pre-trial conference shall have available the list of available dates of the attorney or attorneys who will actually participate in the trial.

12. Should a definite time and place be fixed for the purpose of holding the meeting preliminary to the final pre-trial conference? In the absence of agreement the meeting of attorneys preliminary to the final pre-trial conference will be held in the office of the attorney for the plaintiff or libellant, if said office is located in the city wherein the district court for the division is situated; otherwise it shall be held in the office of the attorney located in the city nearest the division of the district court in which the case is pending.

13. Has a jury trial been demanded in writing? If not, it must be demanded in writing at the time of the initial pre-trial conference, unless time for demanding same is otherwise extended by order of court at the time of, or prior to, the initial pre-trial conference. If no written demand is filed within the time provided herein, the case will be heard by the court without a jury, irrespective of any subsequent amendment of pleadings. The right of any party joined subsequent to the initial pre-trial conference to file a written demand for jury trial is reserved. If no written demand for jury is filed, and if all parties thereafter agree upon a trial by jury, the court
may, in its discretion, order a trial by jury at any reasonable time in advance of trial.

14. Are any amendments to the pleadings contemplated and, if so, when will they be presented?
A. Negligence Actions:

1. Specific statutes, ordinances and regulations alleged to have been violated.

2. If res ipsa loquitor is relied upon, what is the basis for such reliance?

3. A detailed list of personal injuries claimed and, if claimed to be permanent, the nature and extent thereof.

4. The age of the plaintiff or libellant.

5. The life and work expectancy of the plaintiff or libellant, if permanent injury is claimed.

6. An itemized list of all special damages, such as medical, hospital, nursing, drugs, and other expenses, with the amount and to whom paid or owed. If claim is made for the reasonable value of such services actually paid or provided by a third party, such reasonable value shall be considered.


8. A detailed list of any property damage.

9. The acts of contributory negligence claimed, and any other defenses to be interposed.

10. Possible agreement as to use of medical reports of physicians, hospital records, etc.

11. Will a plat or survey of the scene of the accident be submitted in evidence? If so, will the parties agree upon same without the formality of proof by an engineer?

12. Will photographs demonstrating the scene of the
accident, the extent of the injuries, or of objects or vehicles, be submitted in evidence? If so, will the parties agree upon same without the formality of proof?

B. Death Actions:

1. Comply with the provisions respecting negligence actions where applicable.

2. In proceedings under Virginia statute, state:
   (a) Decedent's date of birth, marital status, life and work expectancy, general physical and mental condition immediately prior to accident resulting in death.
   (b) Names, ages and addresses of eligible beneficiaries under Virginia statute.
   (c) Decedent's employment and rate of earnings for three years prior to death.

3. In proceedings under the Jones Act, F. E. L. A., and other statutes where recovery is predicated upon dependency, in addition to 2 (a) and (c) above, state:
   (a) Names, ages, addresses and relationship of decedent's dependents.
   (b) The amounts of monetary contributions or their equivalents made to each dependent by the decedent for a three year period prior to death.
   (c) A statement of decedent's personal expenses during his lifetime and a fair allocation of the customary family expenses for decedent's living for a period of three years prior to death. The amount claimed for care, advice, nurture, guidance, training, etc., by the deceased, if a parent, during the minority of any dependent.
4. Is the death conceded to be the result of the accident? Will a death certificate be required?

C. Contract Actions:

1. Whether the contract relied upon was oral or in writing.

2. The date thereof and the parties thereto.

3. The terms of the contract which are relied upon by the party.

4. Any collateral oral agreement, if claimed, and the terms thereof.

5. Any specific breach of contract claimed.

6. Any misrepresentation of fact alleged.

7. Does the party rely upon a contract implied by law?

8. Is any party claiming as a third-party beneficiary of a contract?

9. Whether modification of the contract or waiver of covenant is claimed and, if so, what modification or waiver and how accomplished.

10. An itemized statement of damages claimed to have resulted from any alleged breach; the source of such information; how computed; and any books and records available to sustain such damage claim.

11. If the case does not fall within the foregoing enumerated categories, the attorneys shall set forth their positions with as much detail as possible.

D. Motor Vehicle Acts:

1. Refer to negligence actions or death actions, if applicable.
2. Ownership, type and make of vehicles, and agency of driver.

3. Place and time of accident -- daylight or dark.

4. Condition of weather.

5. Character and width of street or highway; shoulders; nature of terrain as to level, uphill or downhill.

6. Traffic controls, if any; traffic regulations; location of signs and significant landmarks.

7. Any claimed obstructions to view; and presence of other vehicles where significant.
APPENDIX C

Suggested Form of Order for Final Pre-trial Conference

(Caption of Action has been Omitted)

ORDER ON FINAL PRE-TRIAL CONFERENCE

In conformity with the Local Rules for the United States District Court for the Eastern District of Virginia relating to pre-trial procedure, it is ORDERED THAT:

1. The parties hereto agree upon a stipulation with respect to certain undisputed facts as follows:
   
   (Here set forth all factual stipulations)

2.(a) The parties hereto agree that the following exhibits, identified by the initials of counsel, may be introduced in evidence without the necessity of further proof:

   P/T Ex. #
   P/T Ex. #

2.(b) The plaintiff (or libellant) desires to introduce in evidence P/T Ex. #, identified by the initials of counsel, and states that the purpose of said exhibit is (state purpose), but defendant (or respondent or third-party defendant or respondent impleaded) objects to said exhibit and, as grounds for said objection, states:

   (Give objections)

2.(c) The defendant (or respondent) desires to introduce in evidence P/T Ex. #, identified by the initials of counsel, and states that the purpose of said exhibit is (state purpose) but plaintiff (or libellant or third-party defendant or impleaded respondent) objects to
said exhibit and, as grounds for said objection, states:

(Give objections)

2.(d) The third-party defendant (or respondent impleaded) desires to introduce in evidence P/T Ex. #___, identified by the initials of counsel, and states that the purpose of said exhibit is (state purpose), but the third-party plaintiff (or impleading petitioner or plaintiff or libellant) objects to said exhibit and, as grounds for said objections, states:

(Give objections)

3.(a) The names and addresses of the witnesses who will (or may) testify at the instance of the plaintiff (or libellant) (in addition to any witnesses testifying by deposition), and the purposes of such testimony, are:

John Doe - 1002 Main Street, Richmond, Virginia - eye witness

Dr. Richard Roe - Medical Tower, Norfolk, Virginia - medical

Sam Smith - 500 Main Street, Alexandria, Virginia - expert

3.(b) The names and addresses of the witnesses who will (or may) testify at the instance of the defendant (or respondent, third-party plaintiff, or impleading petitioner) (in addition to any testifying by deposition), and the purposes of such testimony, are:

(Same form as 3.(a))

3.(c) The names and addresses of the witnesses who will (or may) testify at the instance of the third-party defendant (or respondent impleaded) (in addition to any testifying by deposition), and the purposes of such testimony,
4.(a) The factual contentions of the plaintiff (or libellant) are:

4.(b) The factual contentions of the defendant (or respondent, third-party plaintiff, or impleading petitioner) are:

4.(c) The factual contentions of the third-party defendant (or respondent impleaded) are:

5.(a) The triable issues as contended by the plaintiff (or libellant) are:

5.(b) The triable issues as contended by the defendant (respondent, third-party plaintiff, or impleading petitioner) are:

5.(c) The triable issues as contended by the third-party defendant (respondent impleaded) are:

Note: The Court may incorporate into any formal order, or counsel may agree, that other matters may be set forth in the pre-trial order including, but not limited to:

(a) A settlement deadline after which there will be no further negotiations.

(b) Rulings on objections to depositions.

(c) Time for presentation of written requests for charge.

(d) Special interrogatories for jury.

(e) Time for filing any pre-trial brief on triable issues.

(f) Assignment of trial date if not already selected.

United States District Judge

Date (month, day, year)
RULE B

Motions and Interrogatories

1. In civil and admiralty cases all motions, including objections to interrogatories and requests for admission, shall be in writing, unless made during a hearing or trial. If time does not permit the filing of a written motion, the court may, in its discretion, waive this requirement.

2. All motions shall state with particularity the grounds therefor and shall set forth the relief or order sought.

3. Every motion shall be signed by at least one resident attorney of record in his individual name, and shall state the office address of said attorney. The signature of an attorney constitutes a certificate by him that he has read the motion; that to the best of his knowledge, information and belief there are good grounds to support it; and that it is not interposed for delay.

4. Motions and interrogatories on printed forms, multigraphed, mimeographed, or in any manner reproduced by machine process, other than a typewriter, shall not be permitted unless the attorney filing same has deleted all extraneous matter and certifies that he has carefully reviewed the remaining portions and in good faith believes that the contents are pertinent to the case.

5. Unless otherwise provided by the Rules, all motions shall be made returnable to Mondays at 10 A. M., but counsel need not appear at that time. If arrangements are made for a hearing by the court, the motions shall be
made returnable to a particular date at the specified hour. Before endeavoring to secure an appointment for a hearing on any motion, or on objections relating to discovery, it shall be incumbent upon the party desiring such hearing to meet and confer with his adversary in a good faith effort to narrow the areas of disagreement. In the absence of any agreement such conference shall be held in the office of the attorney nearest the court in the division in which the action is pending.

6. Motions, other than such motions hereinafter enumerated, shall be accompanied by a brief which shall contain a concise factual statement of reasons in support thereof, together with a citation of authorities upon which the movant relies. No brief or citation of authorities need be filed, unless otherwise directed by the court, respecting motions for a more definite statement, motions to quash the service of process or to quash a subpoena, motions for an extension of time unless the time fixed by the Rules or by order of court has already expired, motions for the production of documents, specific objections to interrogatories, motions to compel answers or further answers to interrogatories, motions for default, or any other motions relating solely to the processes of discovery.

7. If a movant files a brief, accompanied by a citation of authorities, the opposing party shall file his response, including a like brief and such supporting documents as are then available, within ten days thereafter. For good cause the responding party may be given additional
time, or may be required to file his response, brief and supporting documents within such shorter period of time as the court may specify.

8. A party desiring to file a motion for summary judgment must act with reasonable dispatch. No motion for summary judgment will be considered unless filed within a reasonable time prior to the date of trial, allowing sufficient time for the opposing party to file counter-affidavits and brief in response thereto, and permitting a reasonable time for the court to hear arguments and consider the merits of any such motion.

9. Motions for a continuance of a trial date shall not be granted by the mere agreement of counsel. Any such motion, verbal or written, must be considered by the court in the presence of all counsel and no continuance will be granted other than for good cause and upon such terms as the court may impose.

10. Motions for the production of documents and for a physical or mental examination of a party must be supported by an affidavit showing good cause for same.

11. All objections to interrogatories or other processes of discovery shall be specific and the filing of any specific objection shall not extend the time within which the objecting party must otherwise answer or respond to requests for discovery with respect to such interrogatories or items to which no objection has been filed. The party seeking discovery is charged with the duty of endeavoring to narrow the areas of disagreement and, if
necessary, to arrange for a hearing before the court. As to all other proceedings, the movant shall be charged with a like responsibility. Depending upon the facts of the particular case, parties called upon to respond to discovery will be allowed a reasonable period, in excess of the time provided by the Federal Rules of Civil Procedure or Admiralty Rules, within which to make discovery but any agreement between counsel relating to any extension of time should be confirmed in writing or specified by order of court.

12. Should any party or his attorney fail to comply with the provisions of this rule relating to "Motions and Interrogatories", or otherwise fail or refuse to meet and confer in good faith in an effort to narrow the areas of disagreement, an ex parte hearing may, in the discretion of the court, be held and judgment of dismissal or default or other appropriate judgment or sanctions imposed, including, but not limited to, sanctions by way of imposition of attorney's fees against the attorney and/or his client.