

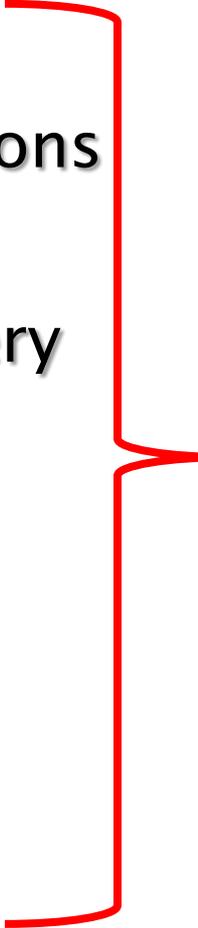
# Introduction to Federal Civil Practice in Rhode Island

February 3, 2015



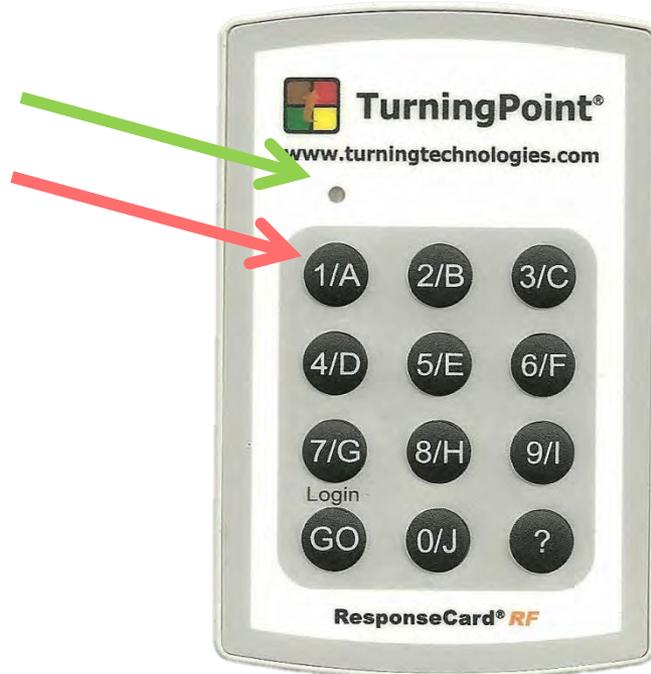
# Roadmap

- 1) Investigation and Complaint
- 2) Answers and Pre-Answer Motions
- 3) Rule 16 Conference
- 4) Initial Disclosures and Discovery
- 5) Amendments to Pleadings
- 6) Summary Judgment
- 7) Pretrial Preparation
- 8) Trial
- 9) Post-trial and Appeal



Steps in  
Federal  
Civil  
Litigation

# Clickers

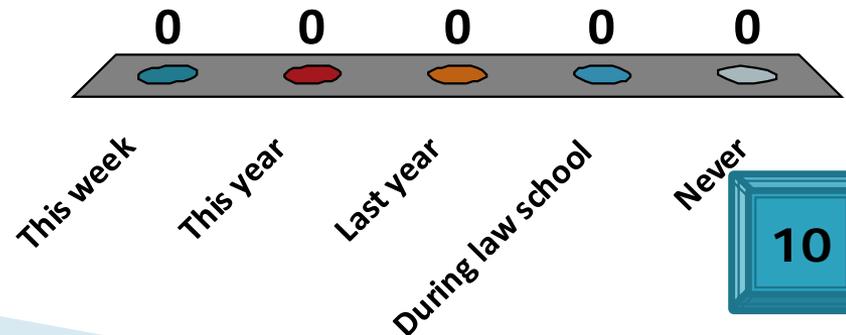


# Clicker Test Question:

## When did you last read the Court's Local Rules?



- ✓ A. This week
- B. This year
- C. Last year
- D. During law school
- E. Never





## LOCAL RULES

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

Effective January 1, 2006  
As Amended through December 15, 2014

- ✓ *Supplement the Federal Rules*
- ✓ *Explain judges' expectations for lawyers in this Court*
- ✓ *Key reading for lawyers (new and experienced)*

# Investigation and Complaint

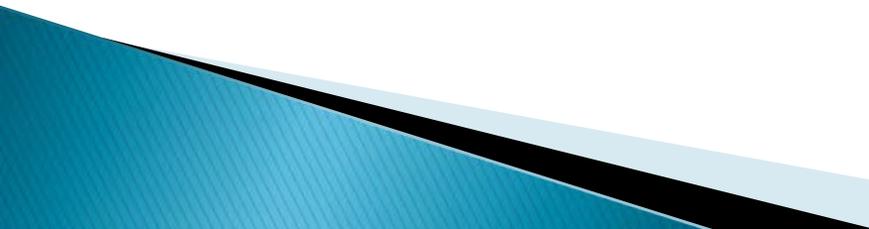


# Before Filing Suit: Some Basics

Information-gathering before suit:

- ✓ Jurisdictional questions
- ✓ Fact questions
- ✓ Legal basis for claims

Satisfy your ethical obligations



# Rule 11



Makes it *each* lawyer's "personal and professional obligation to 'stop and think' before he submits a pleading to the court."

*Young v. City of Providence,*  
*301 F. Supp. 187, 198 (D.R.I. 2004)*

# Keys to the Courthouse Preparing the Complaint



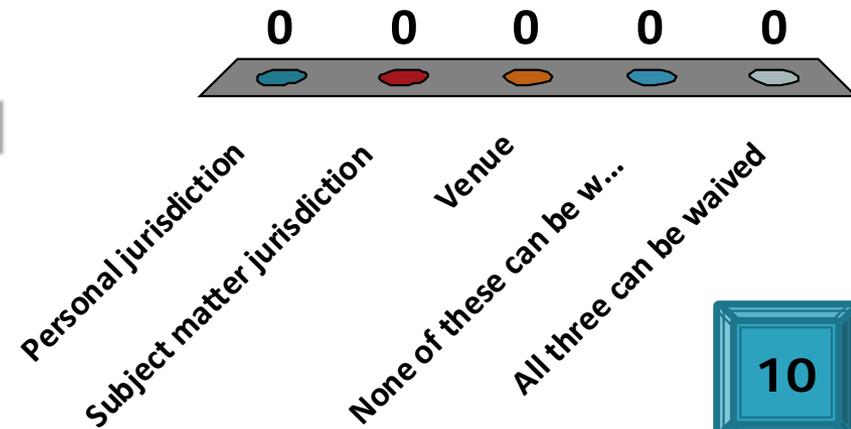
# Must Haves:

- ✓ Subject Matter Jurisdiction
- ✓ Personal Jurisdiction
- ✓ Venue
- ✓ *And* a properly pleaded Complaint

United States District Court for the District of Rhode Island	
Peters	)
v.	) Civ. Action No.
Dodge	) 14-01-123
<u>COMPLAINT</u>	
<u>Jurisdiction</u>	
1.	This court has jurisdiction pursuant to 28 U.S.C. Section 1332(a)(1), in that the suit is between parties of diverse citizenship and the amount in controversy is over \$75,000.
2.	.....

# Which, if any, of these jurisdictional requirements *cannot* be waived by the parties?

- A. Personal jurisdiction
- ✓ B. Subject matter jurisdiction ← *Can be challenged any time - by the court or parties*
- C. Venue
- D. None of these can be waived
- E. All three can be waived



# Federal Subject Matter Jurisdiction: Some Examples

- **Federal question**: civil actions arising under the Constitution, laws or treaties of the United States (28 U.S.C. § 1331)
- **Diversity of citizenship** with an amount in controversy more than \$75,000 (28 U.S.C. § 1332)
- **Bankruptcy** (28 U.S.C. § 1334)
- **Admiralty**, maritime and prize cases (28 U.S.C. § 1333)
- **Actions against foreign states** (28 U.S.C. § 1330)

# Basic Question: Can you combine multiple claims to reach the \$75,000 amount in controversy threshold?

- A. No
- B. Yes, only among multiple plaintiffs
- C. Yes, among multiple plaintiffs or with a single plaintiff
- ✓ D. Yes, only with a single plaintiff



# Answer and Reasoning:

- Yes, but only with a single plaintiff's claims (the "anti-aggregation" rule).

*CE Design, Ltd. v. Am Econ Ins. Co.*,  
755 F.3d 39 (1<sup>st</sup> Cir. 2014)

- The purpose is to limit caseload of the federal courts, especially federal courts' diversity jurisdiction.

*Snyder v. Harris*,  
394 U.S. 332 (U.S. 1969)

# Focus on: Diversity Jurisdiction

- Diversity jurisdiction requires “complete diversity of citizenship” between all plaintiffs and all defendants.

*E.g., Connectu LLC v. Zuckerberg,*  
522 F.3d 82, 91 (1st Cir. 2008)

- Diversity jurisdiction does not exist where any plaintiff is a citizen of the same state as any defendant.

*Díaz-Rodríguez v. Pep Boys Corp.,*  
410 F.3d 56, 58 (1st Cir. 2005)

# Citizenship of an entity:

Complaint  
Plaintiff (RI)

v.

Corporation (?)

Corporation is a citizen of (1) state of incorporation *and* (2) principal place of business  
(§1332(c)(1))

Complaint  
Plaintiff (RI)

v.

Partnership (?)

Partnership has the citizenship of *all* of its partners

*Pramco LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51 (1<sup>st</sup> Cir. 2006)

# Challenge Question:

## Citizenship of an LLC?

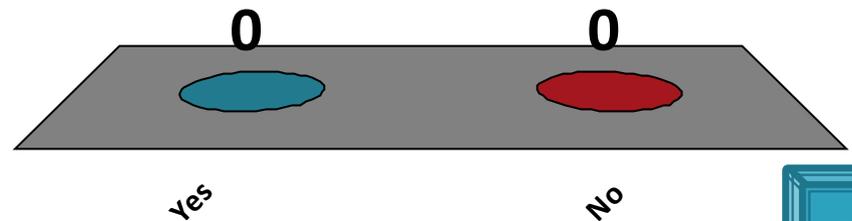
Complaint  
Plaintiff (RI)  
v.  
Limited Liability  
Company (LLC) (?)

Corporation?

Partnership?

# Will an LLC be treated in the same manner as a corporation for diversity jurisdiction purposes?

- A. Yes
- B. No



# Answer and Rationale:

- **No. LLCs are unincorporated entities.**

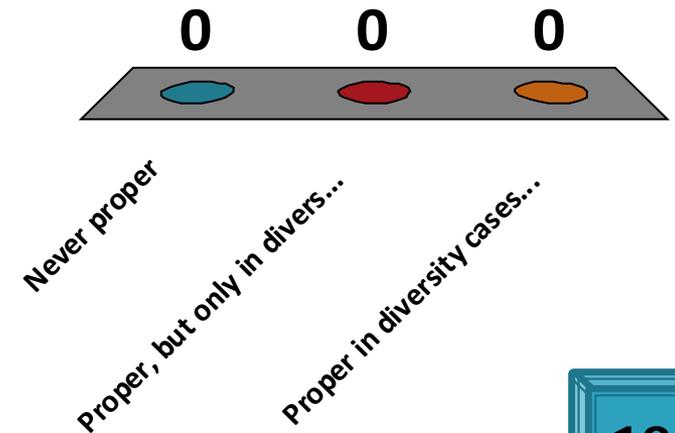
*Pramco LLC v. San Juan Bay Marina, Inc.*,  
435 F.3d 51 (1<sup>st</sup> Cir. 2006)

- **So the citizenship of an unincorporated entity, such as an LLC or a partnership, is determined by the citizenship of all of its members.**

*Id.* at 54 (citing *Carden v. Arkoma Assoc.*,  
494 U.S. 185, 195–96 (1990))

# Basic Question: When is it proper, if ever, to assert a *state law* claim in federal court?

- A. Never proper
- B. Proper, but only in diversity cases
- ✓ C. Proper in diversity cases and sometimes in other cases



# Focus on: Supplemental Jurisdiction

## 28 U.S.C. § 1367(a):

Once original jurisdiction is established, courts “shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.”

# Limits of Supplemental Jurisdiction

- 28 U.S.C. § 1367(b):  
Courts lack supplemental jurisdiction over claims by *plaintiffs* that would destroy diversity
- 28 U.S.C. § 1367(c):  
Courts may *decline* to exercise supplemental jurisdiction

# Focus on: Personal Jurisdiction

## State Courts:

Due process limits state courts' power to adjudicate to those persons who may properly be sued in that State ("minimum contacts" analysis)

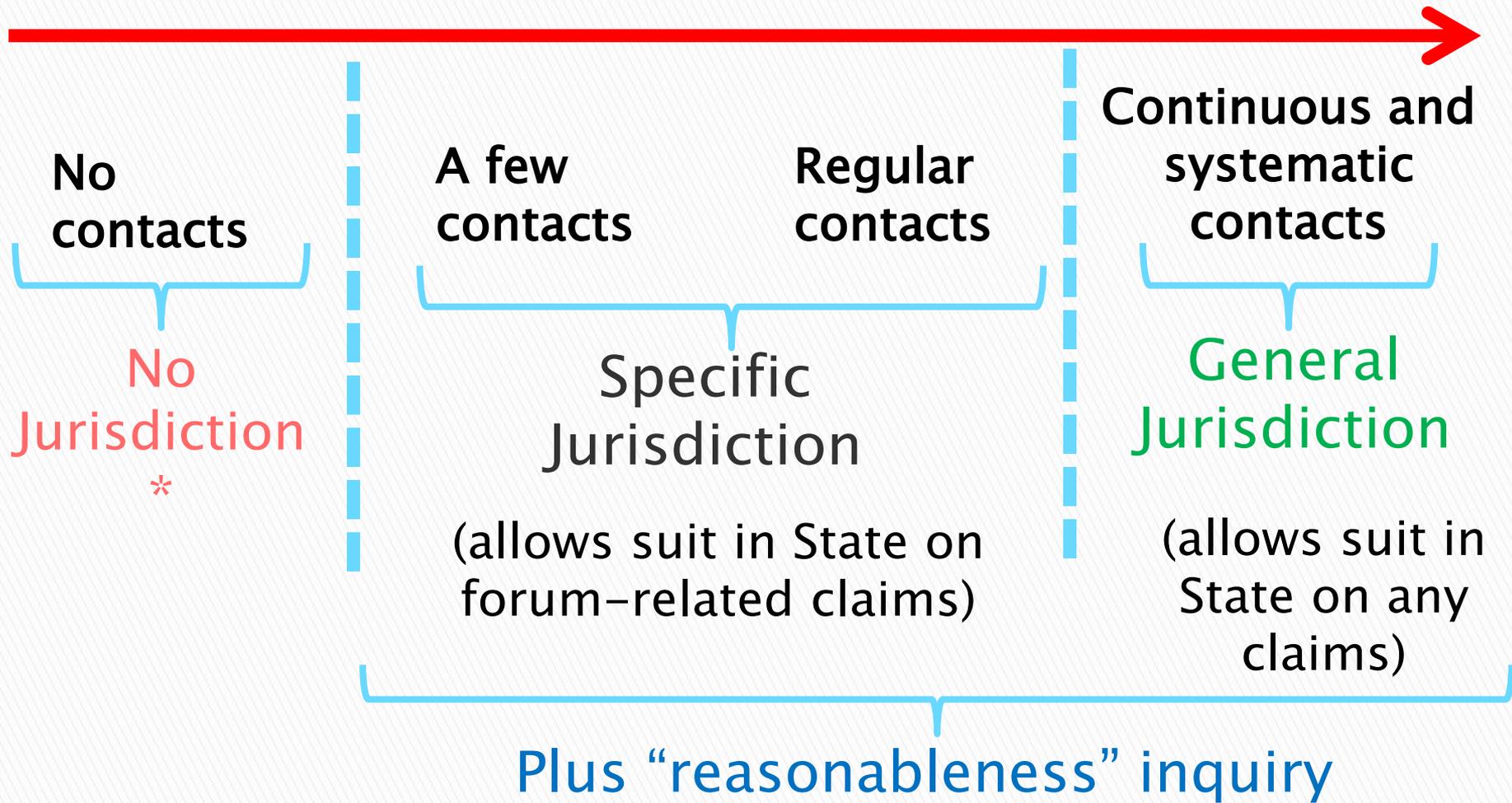
*International Shoe*  
(plus State "long-arm" statutes)

## Federal Courts:

Generally follow the personal jurisdiction rules of the State in which they sit

Fed. R. Civ. P. 4(k)(1)

# Personal Jurisdiction “Spectrum”



# Recommended Reading



# Basics: Venue

Controlled by statute: 28 U.S.C. § 1391

Other provisions:

- Patents and copyrights: § 1400
- United States as Defendant: § 1402

Transfer of Venue

- § 1404 (convenience of parties)
- § 1406 (to cure jurisdictional defects)
- § 1407 (Multidistrict litigation)

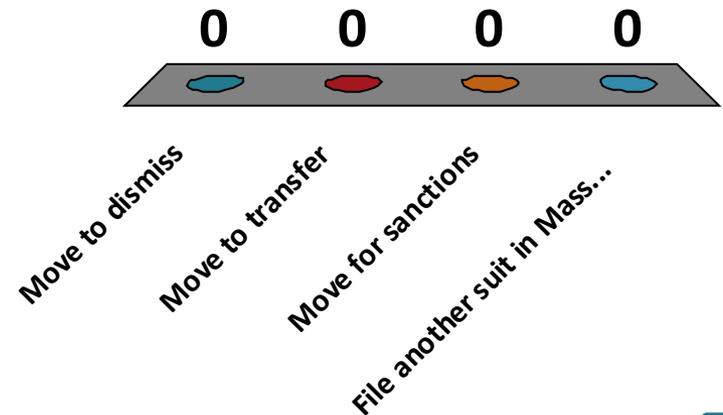
# Focus on Venue

- ▶ Plaintiff filed a breach of contract suit in Rhode Island federal district court against your client.
- ▶ The contract signed by the parties says any litigation will take place in Massachusetts federal district court.
- ▶ Defendant (your client) prefers Massachusetts as a forum.
- ▶ Venue, subject matter jurisdiction and personal jurisdiction are proper in Rhode Island.

What, if anything, can you do?

# Armed with that forum selection clause in the contract, the defendant can:

- A. Move to dismiss
- ✓ B. Move to transfer
- C. Move for sanctions
- D. File another suit in Massachusetts



# More Recommended Reading



# Basics: Preparing Claims for Filing

What's the point?

- ✓ Tell a story
- ✓ Leave your options open
- ✓ Avoid waiver
- ✓ Avoid having to amend
- ✓ Proper jury demand (LR 5(a)(4))

District of Rhode Island  
Peters )  
v. ) Civ. Action No.  
Dodge ) 14-01-123

COMPLAINT

Jurisdiction

1. This court has jurisdiction pursuant to 28 U.S.C. Section 1332(a)(1), in that the suit is between parties of diverse citizenship and the amount in controversy is over \$75,000.
2. . . . .

# Basics: Preparing Claims for Filing

Where is the tension?

- ✓ Rule 11
- ✓ Judicial estoppel
- ✓ Opening your client up to discovery
- ✓ Be careful of timing – statute of limitations

District of  
Rhode Island

Peters )  
v. ) Civ. Action No.  
Dodge ) 14-01-123

COMPLAINT

Jurisdiction

1. This court has jurisdiction pursuant to 28 U.S.C. Section 1332(a)(1), in that the suit is between parties of diverse citizenship and the amount in controversy is over \$75,000.

2. . . . .

*Sanchez v. United States,*  
740 F.3d 47 (1<sup>st</sup> Cir. 2014)

- ▶ Wife dies April 24, 2009
- ▶ Plaintiff, her widower, hires attorneys by February 2010
- ▶ Attorneys file suit in Massachusetts on April 11, 2012, i.e., within the Massachusetts three-year statute of limitations period for medical malpractice claims
- ▶ BUT Plaintiff's attorneys did no investigation of the doctors
- ▶ As it turned out, those doctors were federal employees, against whom claims are forever barred unless brought within the **two-year** limitations period allowed under the Federal Tort Claims Act

# Recall Rule 11



- Rule 11(b) – applies when signing, filing, submitting or advocating to the court in a written paper, other than discovery materials (*see Rule 11(d); but see Rule 26(g)*)
- Sanctions – Rule 11(c) – absent extraordinary circumstances, the law firm must be held jointly responsible
- Local Rules implement disciplinary proceedings (*LR Cv 11 and Gen 208 et seq.*)

# The “*Twiqbal*” Legacy

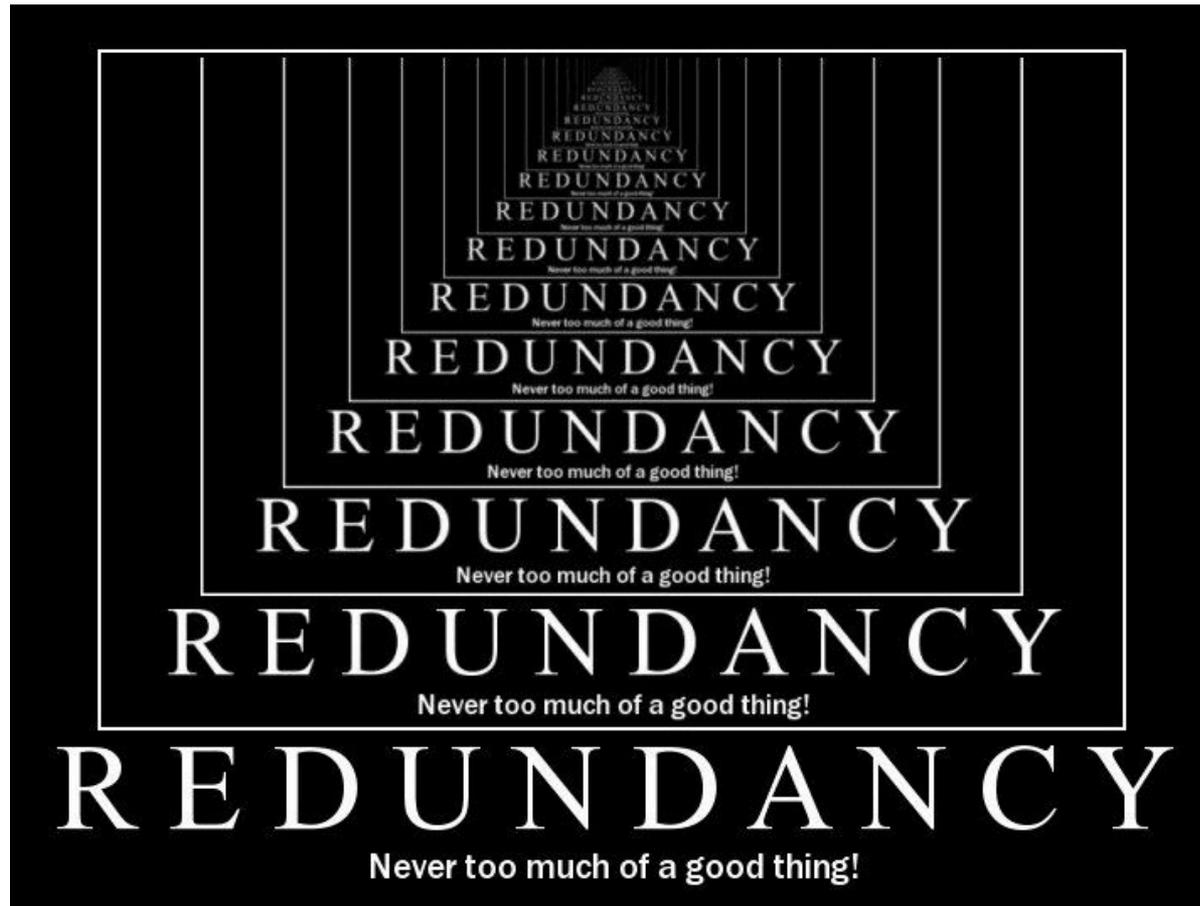
Complaint’s allegations must contain enough facts to make the claim “plausible”

The court may not credit “conclusory” allegations (mere restatements of law) in ruling on a motion to dismiss

*See Bell Atlantic v. Twombly, Iqbal v. Ashcroft*



# Have you *overpled* your complaint? What's the risk there?



# Risks in Pleading

Complaint is  
too sparse



Just  
right



Complaint is  
too detailed



Dismissal?  
*(See Twombly  
and Iqbal)*



Amendment may be needed  
Potential for judicial estoppel  
Facts not all known  
Rule 11 risks?

# Basics: Special Matters and Injunctive Relief

## Rule 9

- Fraud – must be pled with particularity
- Specificity varies – know your caselaw
- Special damages – including punitive damages – must be pled with particularity

## Injunctions and Restraining Orders (Rule 65)

# Service Issues

- ▶ Service of process is governed by Fed. R. Civ. P. 4.
- ▶ LR 5.01: Unless service is waived, proof of service of a summons must be filed with the Court within 14 days after service is made.
- ▶ *Vàzquez-Robles v. CommoLoCo, Inc.*, 757 F.3d 1 (1<sup>st</sup> Cir. 2014): who is the registered agent for service of process, and what law governs?

# Answers and Pre- Answer Motions



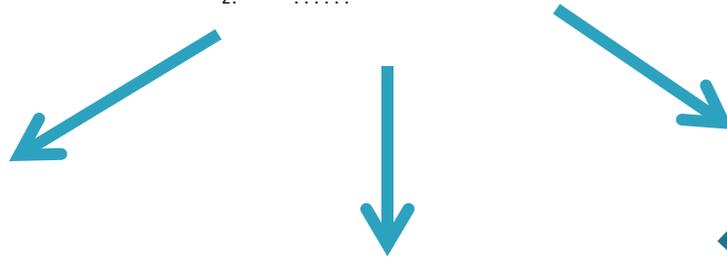
# Responding to the Complaint

District of Rhode Island  
Peters )  
v. ) Civ. Action No.  
Dodge ) 14-01-123

## COMPLAINT

### Jurisdiction

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2. ....



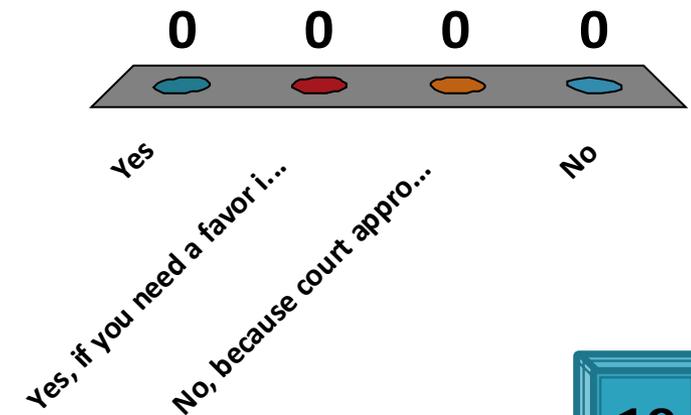
~~Answer  
(Rule 8)~~

**DEFAULT**  
(Rule 55)

~~Pre-  
Answer  
Motion  
(Rule 12)~~

**Preliminary Question:** The opposing attorney was just engaged, and asked for a three-week extension of time to file his client's answer. Should you agree?

- ✓ A. Yes
- B. Yes, if you need a favor in return
- C. No, because court approval is needed
- D. No



# Basics: Time to Answer or Respond

- One extension is generally a matter of professional courtesy (*see* LR Cv 29(b))
- An extension up to thirty days total to respond to a Complaint may be granted by counsel without approval of court (*id.*)
- Timing of Answer is found in Rule 12(a)

# Basics: Defenses and Objections

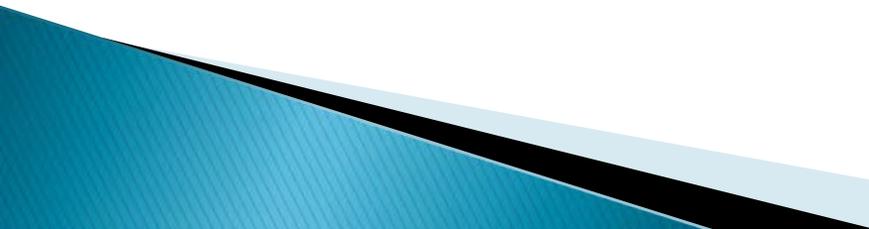
Rule 12(b): Limited defenses that “may” be raised by motion

Rule 8(c): Affirmative defenses that *must* be stated in the answer

Other functions of Answer:

- Admissions and denials (Rule 8(b))
- Counterclaims and cross-claims (Rule 13)

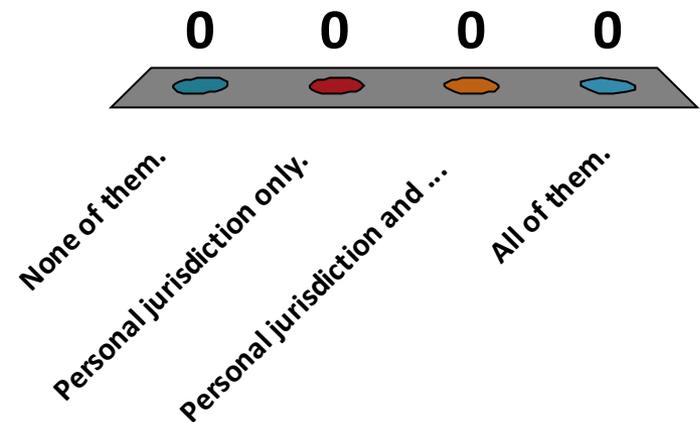
# Raising Defenses

- ▶ Defendant was served with the complaint in a negligence case.
  - ▶ Defendant responded by filing a Rule 12(f) motion to strike the plaintiff's demand for punitive damages (granted by the court).
  - ▶ Thereafter, the Defendant answered.
  - ▶ In his answer, Defendant asserted as defenses lack of personal jurisdiction, improper venue, and flaws in service.
- 

Which, if any, of the defenses in his answer (personal jurisdiction, venue, and service), did Defendant waive?

- A. None of them.
- B. Personal jurisdiction only.
- C. Personal jurisdiction and service, but not venue.
- ✓ D. All of them.

*See Rule 12(h)*

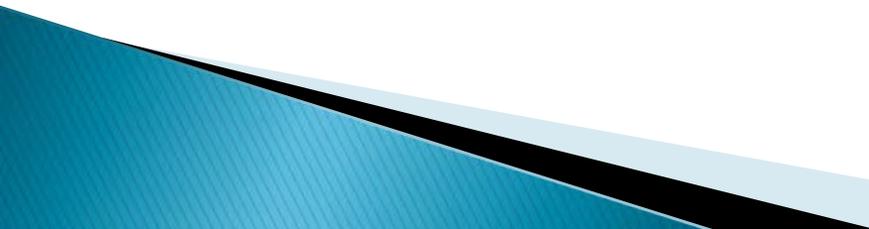


# Basics: Counterclaims and Third Party Practice

- Compulsory and permissive counterclaims (13(a) and 13(b))
- Timing – maturity of the counterclaim and efforts to amend to add it
- Defending parties may bring in a Third Party or the Plaintiff may bring in a Third Party (be careful of timing) (Rule 14)

# Rule 16 Conference

# Basics: Rule 16 Scheduling and Case Management

- Initial Rule 16 Scheduling Conference: *trial counsel* must attend
  - Purpose of the Pretrial Conference
  - Issuance of Scheduling Order
  - Negotiation of protective orders to facilitate discovery
- 

# Challenge Question:

- What additional preparation, *not* specified in Federal Rule 16, is required of lawyers in this Court in preparing for an initial pretrial conference?

See [LR Cv 16\(b\)](#) (requiring short statement of the elements of each claim and supporting facts)

# Initial Disclosures and Discovery



# Pre-Discovery Steps

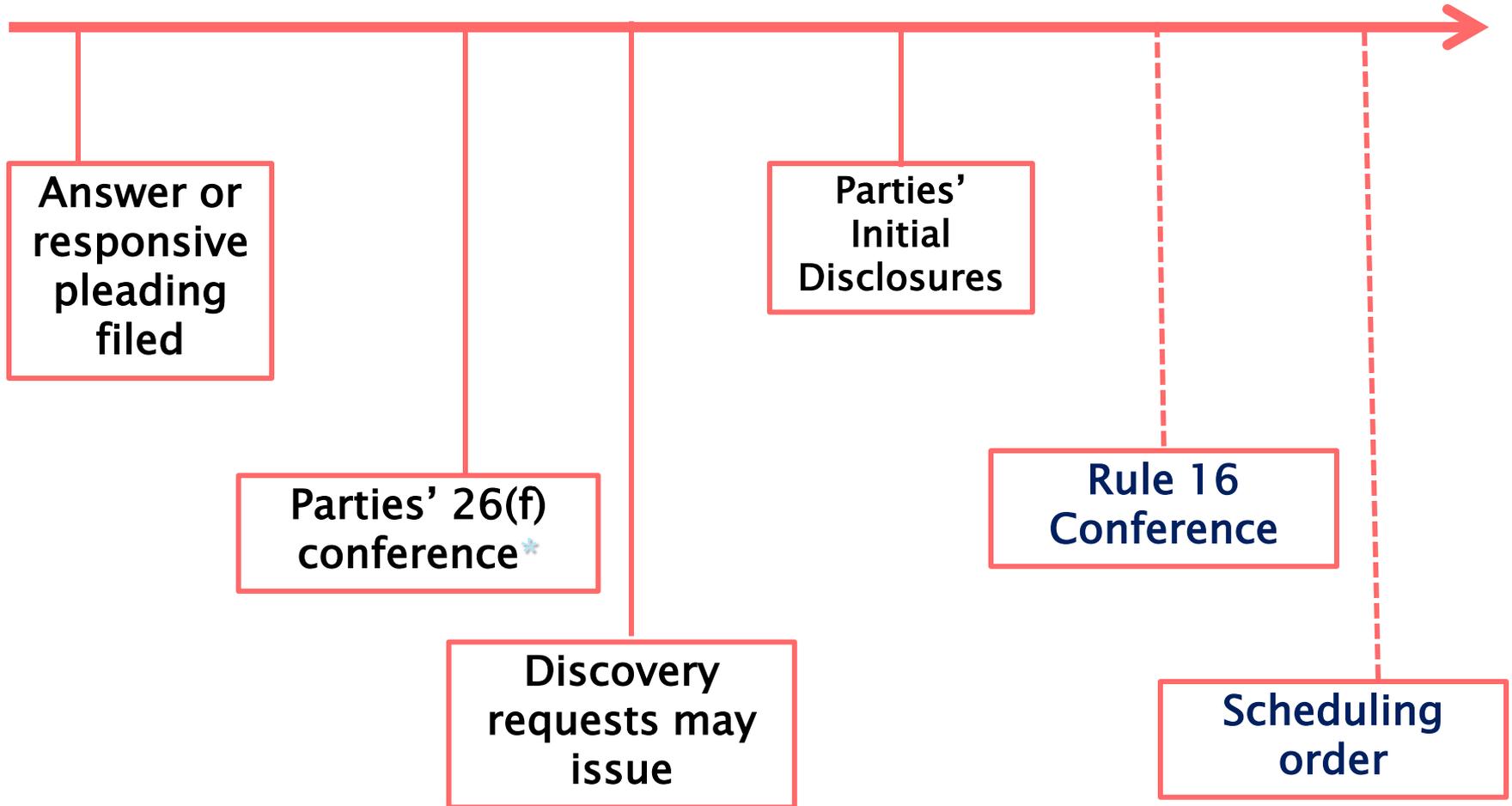
- On learning of a lawsuit (or a claim), what are lawyers required to do with respect to potentially discoverable evidence in her client's possession?
- What are the potential consequences for failure to do so?

# “Litigation Holds”

“The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”

*Zubulake v. UBS Warburg LLP*, 220 F.R.D. 212  
(S.D.N.Y. 2003)

# Discovery Timeline



*\*Unless there is a pending motion to dispose of the entire case (LR Cv 26(a))*

# Basics: Scope and Forms of Discovery

- Limitations on Scope, Frequency and Extent (Rule 26(b))
- Discovery methods:
  - Depositions (Rules 27, 30 and 31)
  - Interrogatories (Rule 33, LR Cv 33)
  - Requests for Production (Rule 34)
  - Physical and Mental Examinations (Rule 35)
  - Requests for Admission (Rule 36)
- NOTE Timing of RFAs – Local Rule (LR Cv 26(d))
- Subpoenas (recently **AMENDED** Rule 45) – tactical tips
- Discovery is served but not filed with the Court (LR Cv 5(d))

# Focus on: Privilege and Work Product

- Objection to discovery that is not timely stated with specificity is waived unless the Court, for good cause, excuses the failure (Rule 33(b)(4), LR Cv 34(c), 36(c))
- Privilege Logs required where privilege or work product is asserted (Rule 26(b)(5))
- *Challenge: How to prepare a proper privilege log?*

## Consider this privilege log:

Doc. No.	Date	Doc. Type	Objection
P12-55	1/31/12	Memo	W/P, A/C privilege
P89-91	2/5/12	Letter	W/P, A/C privilege

*Does this satisfy the rules?*

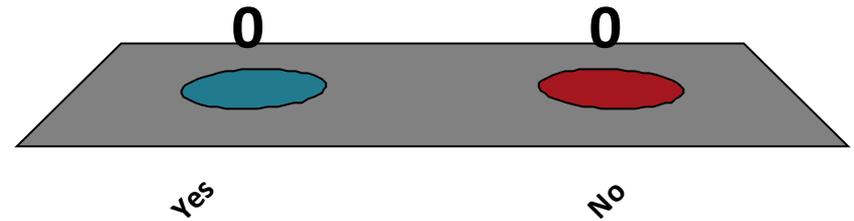
# Does this privilege log satisfy the rules?

Doc. No.	Date	Doc. Type	Objection
P12-55	1/31/12	Memo	W/P, A/C privilege
P89-91	2/5/12	Letter	W/P, A/C privilege

A. Yes



B. No



# Rule 26(b)(5):

When a party withholds discoverable material on grounds of work product or privilege, the party must “expressly make the claim” and describe the nature of the documents “in a manner that . . . will enable other parties to assess the claim.”

## Now, consider this amended privilege log:

Doc. No.	Date	Doc. Type	To, From	Subject Matter	Objection
P12-55	1/3/12	Memo	Lawyer Brown to File	Age Discrimination Research re Potential Claims by Employee Miller	W/P, A/C
P89-91	2/5/12	Letter	Lawyer Brown to Client Jones	Need to Find Non-Age-Related Reason for Terminating Employee Miller	W/P, A/C

*Does this cure the problem of specificity?  
If Miller were fired thereafter, does this  
raise a different problem?*

# Basics: Some Other Privilege Issues

- Inadvertent production of privileged materials (Rule 26(b)(5)(B))
- Fed. R. Evid. 502 – waiver
- Protective Orders – negotiated and otherwise (Rule 26(c))
- Filings containing confidential information (LR Gen 102)

## Basics: What law applies?

- In a diversity case, what law controls with respect to the attorney–client privilege analysis: state law or federal?

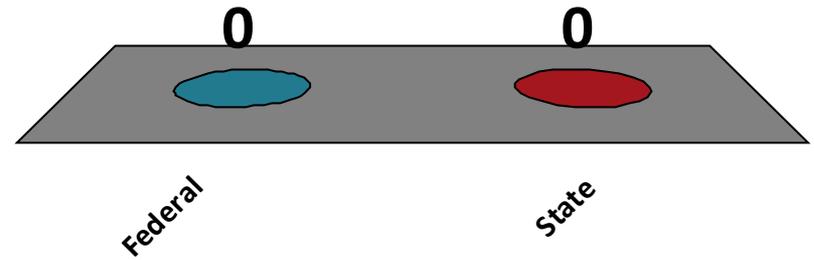
# Applicable law



A. Federal



B. State



# Basics: Expert Discovery

- ▶ Usually conducted at same time as fact discovery
- ▶ Expert disclosures (Rule 26(a)(2)):
  - **Written report** required if witness is retained or specially employed to provide expert testimony
  - **Statement of opinions** required for other experts
- ▶ Depositions only after service of the expert report (Rule 26(b)(4))
- ▶ Amended rules – communications and drafts now more protected (Rule 26(b)(4))

# Failure to Cooperate

- Tactical tips – Judges and discovery disputes
- Rule-based sanctions: **Rule 37**
- Discovery Motions (**LR Cv 37**)
- Attorneys' fees
- Failure to comply with a Court Order – sanctions within the broad discretion of the Court, and can include striking pleadings, dismissal/default, treating facts as admitted

# Disclosure and Response Supplementation

- Governed by Rule 26(e) – Rule 26(a) disclosure and discovery responses must be supplemented “in a timely manner” if the party learns that in some material response the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during discovery or in writing
- Expert witnesses have a duty to supplement reports and information provided at deposition BEFORE pretrial disclosures

# Challenge Question

**Assume a forklift operator brought a products liability action after he was injured when the forklift tipped over.**

# Challenge Question, cont.

- ▶ Accident in June 1999;
- ▶ Plaintiff sued in March 2002;
- ▶ The Court set a schedule that, with an extension, required plaintiff to disclose his experts by April 30, 2004;
- ▶ In late March 2004 the plaintiff had three experts: (1) ready to give his opinion by mid-April; (2) because of a fire at his residence overseas, had faced delay in receiving and responding to plaintiff's e-mail; and (3) had to wait until testing could be done at a specially outfitted test center;
- ▶ Plaintiff made no attempt to notify the Court and request a further extension;

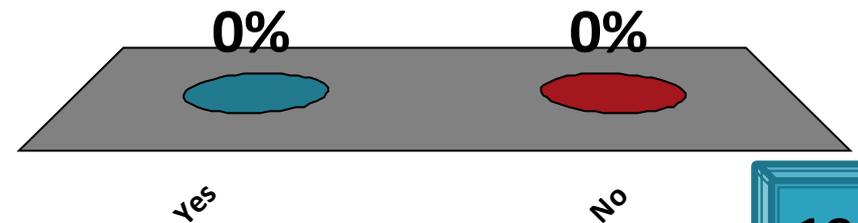
# Challenge Question, cont.

- ▶ On April 28th, plaintiff emailed defendants asking for a six-week extension of time to disclose expert testimony;
- ▶ Having accommodated defendants by extending a discovery deadline and agreeing to several additional depositions, plaintiff expected defendants to consent
- ▶ Keep in mind that this was before the close of discovery, and no trial date was set

# Did the defendants agree to the six week extension?

A. Yes

✓ B. No



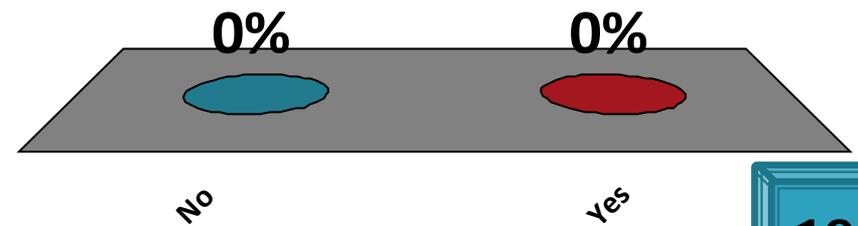
# Challenge Question, cont.

So what happened next?

- ▶ Plaintiff sought a six-week extension from the Court.
- ▶ Defendants opposed the motion, arguing that there was no reason why plaintiff's experts could not have tested the lift in the more than four years since the accident.

# Did the Judge allow the six week extension

- ✓ A. No
- B. Yes



# Moving On

- ▶ The Court denied the Motion;
- ▶ Plaintiff's counsel twice moved for reconsideration – both denied – with the Court's patience growing thin, noting: “[z]ealous advocacy’ had reached its limits on the issue.”

# But not really

- ▶ Nevertheless, the plaintiff served the expert disclosures(s);
- ▶ Defendant moved to strike – GRANTED;
- ▶ The Court then granted the defendants' Motion for Summary Judgment: “[w]ithout experts, the plaintiff cannot establish his claim of negligence or breach of warranty....”

# Challenge Question, cont.

Plaintiff appealed, arguing that the District Court abused its discretion in precluding plaintiff's witnesses.

Vacated and remanded.

The mandate from the First Circuit is docket entry no. 100.

# At the end of the day

- ▶ That case has 320 docket entries.
- ▶ It involved *Daubert* hearings, a 15 day trial and, ultimately, a defense verdict.
- ▶ After another appeal to the First Circuit, the mandate issued, and defendants filed a Motion for Costs.
- ▶ Judge Young awarded defendants about \$10k in costs.

# Why does all this matter?

If they had it all to do again, don't you think the clients might have benefitted if the attorneys had acted differently?

- Stay on top of discovery and experts;
- Allow reasonable courtesies;
- Seek Court assistance before the deadline passes

# Amendments



# Amended and Supplemental Pleading

- Timing of amendments– Rule 15(a)
- Deadlines in the Pretrial Order could result in a higher standard of proof
- Relation back of the proposed amendment – “same transaction or occurrence”
- Supplemental pleadings – Rule 15(d)
- LR Cv 15– requires a “prompt” motion to amend explaining why the amendment is necessary

# Summary Judgment



# Summary Judgment

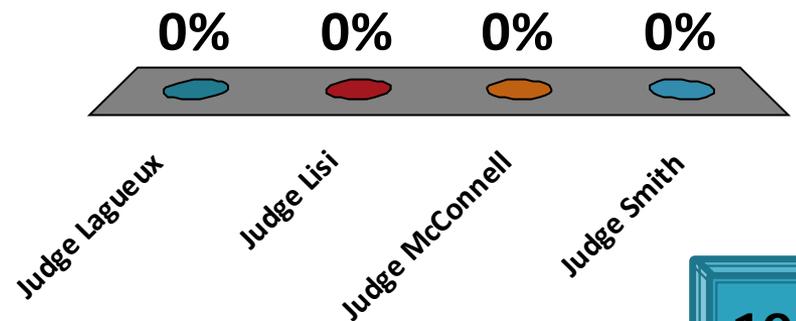
- LR Cv 56 and Rule 56 (full or partial summary judgment)
- Local Rules require properly supported Statement of Undisputed Facts with numbered paragraphs.
- Respond using properly supported Statement of Disputed Fact and – if appropriate – a separate Statement of Undisputed Facts
- Rule 56(f)
- Affidavits – Rule 56(h)

# Magistrate Judges

- Hear and decide Motions for Summary Judgment, as well as other dispositive and non-dispositive motions
- Per Rule 72(b)(3), the standard of review on a Report and Recommendation is *de novo*.

# Which Judge requires a conference before you can file for Summary Judgment

- A. Judge Lagueux
- B. Judge Lisi
- C. Judge McConnell
- ✓ D. Judge Smith



# Settlement Efforts

- Our Court has a robust ADR program (LR Cv 53)
- Critical role of the Magistrate Judges
- The Local Rules include an ADR plan
- If the case settles, notify the Court as soon as possible (LR Cv 39.4)
- File the Dismissal Stipulation (Rule 41)

# Pretrial Disclosures



# Trial – the ramp up

- Demand a jury or risk waiver (Rule 38, LR Cv 5(a)(4))
- Scheduling cases for trial (Rule 40) and continuances (LR Cv 39.2)
- Offer of Judgment (Rule 68)
- Pretrial filings and requirements: Rule 26; Scheduling Order; Final Pretrial Conference: witnesses, exhibits, timing, evidentiary issues (Motions in limine (LR Cv 39.3), use of recorded testimony (Rule 32, LR Cv 39), proof of official or certified records (Rule 44, LR Cv 44))

**Trial**

# Trial – the actual event

- Jury Selection/Voir Dire (Rules 47, 48; LR Cv 47)
- Opening Statements (LR Cv 39)
- Plaintiff's case (direct and cross examination)– Rule 43, LR Cv 103
- Requests for Special Verdicts and Interrogatories (Rule 49, LR Cv 49)
- Motions testing the sufficiency of plaintiff's case (Rule 50 (jury), Rule 52 (non-jury))
- Defendant's case (direct and cross examination)
- Motions testing the sufficiency of defendant's case
- Closing Arguments
- Jury instructions (Rule 51, LR Cv 51)
- Deliberations (LR Cv 47(d))
- Verdict

# Post-Trial Motions and Appeal



# After Trial

- Renewed Rule 50 Motion after trial (Rule 50(b))
- Motion for a New Trial (Rule 59)
- Relief from Judgment or Order (Rule 60)
- Costs and Attorney's Fees (Rule 54, LR Cv 54, 54.1)
- Writs of Execution (Rule 69)
- Stay of Proceedings Pending Appeal (Rule 62, LR Cv 62)
- Rulings Pending Appeal (Rule 62.1)

# Appellate Procedure

**READ THE RULES** – the United States Court of Appeals for the First Circuit has its own Local Rules in addition to the Federal Rules of Appellate Procedure



# Read the Rules

- Judges expect you to know the rules
- The Court system can be an unfamiliar place – clients expect you to use the rules and guide them through it
- Use the rules strategically, i.e. offensively and defensively
- Be alert to periodic changes

Questions?