



Chapter 11 Trial of Federal Cases

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I. SCOPE OF CHAPTER

A. [11.1] General Introduction

This chapter outlines the nuts and bolts of federal court civil trial procedure for the attorney who is generally familiar with Illinois state court trial practice. The chapter contains tables of key differences between federal and Illinois trial practice and time limits in federal practice and a discussion of jury procedures, trial mechanics, trial and posttrial motions, and judgments.

A must for federal court practice is a personal copy of West's softcover *FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES* or O'Connor's softcover *FEDERAL RULES: CIVIL TRIALS*. They are regularly revised, and both have a 2009 edition available. They contain the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the Federal Rules of Appellate Procedure, Title 28 U.S. Code (Judiciary and Judicial Procedure), and more.

Another resource not to be overlooked is the district courts' websites. Here, practitioners can find the ever-expanding local rules, judges' standing orders, bar admission information, a list of court fees, and various forms (*e.g.*, attorney appearance and admission forms, transcript request forms, motions to appear pro hac vice, and sample final pretrial orders). The website for the Central District of Illinois even contains the Seventh Circuit Pattern Civil Jury Instructions. The district courts' websites are

Northern District of Illinois	www.ilnd.uscourts.gov
Central District of Illinois	www.ilcd.uscourts.gov
Southern District of Illinois	www.ilsd.uscourts.gov

B. [11.2] Principal Differences Between Federal and State Practice

The Illinois practitioner with some court experience who appears in federal court for his or her first trial should be fairly comfortable with federal procedures since many aspects of federal trial practice are similar to state practice. There are, however, important differences between trial practice in the federal district courts and the Illinois state courts, as highlighted in the following table:

Jury selection	Federal	State
Jury demand fee	Not required.	Required by 705 ILCS 105/27.2a(s).
Alternate jurors	No provision for alternate jurors.	Limited to two. 735 ILCS 5/2-1106(b).
Peremptory challenges	Three to each side, but court can allow more. 28 U.S.C. §1870.	Five to each side, but court may allow up to three additional challenges for each side if there is more than one party on any side. 735 ILCS 5/2-1106(a).
Number of jurors	Civil juries must consist of not fewer than six but not more than twelve members. Fed.R.Civ.P 48.	All jury cases in which claim for damages is \$50,000 or less shall be tried by jury of six unless either party demands jury of twelve. 735 ILCS 5/2-1105(b).
Timing	Any party may demand jury at any time after commencement of action but not later than fourteen days after service of last pleading directed to issue about which jury demand is made. Fed.R.Civ.P. 38(b).	Generally, plaintiff must file jury demand with clerk of court at time action is commenced, and defendant must file demand no later than filing of answer; otherwise, right to jury has been waived. 735 ILCS 5/2-1105(a).
Witness subpoenas		
Mail service	Fed.R.Civ.P. 45 governs witness subpoenas and contains no provision for service by mail. Majority rule is that personal service is required. See 8 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE §45.03[4] (3d ed. 2009).	Witness subpoenas may be served by certified or registered mail. S.Ct. Rule 237(a).
Compelling appearance	Subpoena under Fed.R.Civ.P. 45 is only way to compel trial appearance of party or person associated with opposite party.	Trial appearance of officer, director, or employee of party may be compelled by service of notice of appearance. S.Ct. Rule 237(b).

Jury selection	Federal	State
Range	In addition to subpoena power within district, federal courts may compel attendance of anyone served within 100 miles of place of trial. Fed.R.Civ.P. 45(b)(2). (Note broader scope under specific statutes.) Under Rule 45(b)(2), trial subpoena may also be served at any place within state when state statute or court rule permits service of subpoena issued by state court sitting where district court sits.	Subpoenas can be served statewide. S.Ct. Rule 237.
Evidence	Admission of evidence in federal trials is governed by Federal Rules of Evidence.	Illinois evidence rules are contained in published court decisions, certain Supreme Court Rules (<i>e.g.</i> , S.Ct. Rule 236), and Article VIII of Code of Civil Procedure, 735 ILCS 5/8-101, <i>et seq.</i> More and more Federal Rules of Evidence have been adopted by Illinois courts on case-by-case basis.
Special verdicts	Available under Fed.R.Civ.P. 49.	Generally abolished. 735 ILCS 5/2-1108; <i>Crooks v. Sayles</i> , 39 Ill.App.2d 22, 187 N.E.2d 742 (2d Dist. 1963). <i>But see Coleman v. Hermann</i> , 116 Ill.App.3d 448, 452 N.E.2d 620, 72 Ill.Dec. 367 (2d Dist. 1983). Note that special interrogatories are permitted. 735 ILCS 5/2-1108.

Jury selection	Federal	State
Posttrial motions		
Additur	Not allowed. <i>Dimick v. Schiedt</i> , 293 U.S. 474, 79 L.Ed. 603, 55 S.Ct. 296 (1935).	May be allowed under restricted circumstances. <i>Yep Hong v. Williams</i> , 6 Ill.App.2d 456, 128 N.E.2d 655 (1st Dist. 1955); <i>Hladish v. Whitman</i> , 192 Ill.App.3d 561, 549 N.E.2d 5, 139 Ill.Dec. 682 (2d Dist. 1989).
Posttrial motion for judgment as matter of law (formerly judgment notwithstanding the verdict)	Pre-verdict motion for judgment as matter of law (formerly called directed verdict motion) is prerequisite. Fed.R.Civ.P. 50(b).	Directed verdict motion not prerequisite. 735 ILCS 5/2-1202(b).

C. [11.3] Time Limits in Federal Practice

For details on how to compute time, see Fed.R.Civ.P. 6. The following table provides a brief overview of important time limits in federal practice:

Action	Time Limit
Demand for jury trial	Within fourteen days after service of last pleading directed to issue or within fourteen days after demand by opposite party. Fed.R.Civ.P. 38(b), 38(c).
Motion to quash a subpoena	Within fourteen days after subpoena is served or before compliance deadline specified in subpoena if time specified is less than fourteen days. Fed.R.Civ.P. 45(c)(2)(B).
Objection to jury instruction	For party that has been informed of instruction or action on request before jury is instructed and before final jury arguments, objection is timely at opportunity for objection to be given by court pursuant to Fed.R.Civ.P. 51(b)(2). Party that has not been informed of instruction or action on request before time for objection provided in Rule 51(b)(2) may object promptly after learning that instruction will be, or has been, given or refused. Fed.R.Civ.P. 51(c).
Motion to amend the pleadings to conform to the evidence	At any time, even after judgment. Fed.R.Civ.P. 15(b).

Action	Time Limit
Posttrial motion for judgment as a matter of law (formerly judgment notwithstanding the verdict)	Twenty-eight days after entry of judgment. Fed.R.Civ.P. 50(b). If no verdict returned, twenty-eight after jury has been discharged. <i>Id.</i>
Motion for new trial	Twenty-eight days after entry of judgment. Fed.R.Civ.P. 59(b). If posttrial judgment as matter of law (previously judgment notwithstanding the verdict) is granted, opposite party has twenty-eight days after entry of judgment to move for new trial. Fed.R.Civ.P. 50(d).
Motion to amend “findings of fact and conclusions of law” in nonjury cases	No later than twenty-eight days after entry of judgment. Fed.R.Civ.P. 52(b).
Motion to review taxation of costs by clerk	Within seven days after clerk’s action. Fed.R.Civ.P. 54(d)(1).
Motion for claims for attorneys’ fees	No later than fourteen days after entry of judgment, unless otherwise provided by statute or order of court. Fed.R.Civ.P. 54(d)(2)(B)(i).

II. [11.4] NORTHERN DISTRICT TRIAL BAR MEMBERSHIP

The Northern District of Illinois has adopted special requirements for admission to practice in federal court. N.D.Ill. Local Rule 83.10 describes the qualifications for admission to the general bar, which includes payment of a \$150 admission fee. With limited exceptions, an attorney must be admitted to the “trial bar” of the court to appear alone in a “testimonial proceeding.” N.D.Ill. Local Rule 83.11. Other attorneys may appear in testimonial proceedings only “if accompanied by a member of the trial bar who is serving as advisor.” N.D.Ill. Local Rule 83.12(b).

In *Brown v. McGarr*, 583 F.Supp. 734 (N.D.Ill. 1984), the plaintiff, an attorney, challenged the constitutionality of N.D.Ill. Local Rule 3.00 (now N.D.Ill. Local Rule 83.10), contending that it was adopted without proper notice and that the program exceeded the statutory authority of the Judicial Conference and the rule-making authority of the federal district court. In its decision, however, the court held that the Due Process Clause did not require individual notice and a hearing and that the district court rules relating to trial bar membership “rationally” concerned “their . . . objective and, therefore, [were] substantially consistent with the due process clause of the fifth amendment.” 583 F.Supp. at 740. The Seventh Circuit Court of Appeals affirmed the district court’s decision in *Brown v. McGarr*, 774 F.2d 777 (7th Cir. 1985).

In order to be admitted to the trial bar, an attorney “must be a member in good standing of the general bar” of the Northern District of Illinois (N.D.Ill. Local Rule 83.11(b)) and must provide evidence of “not less than 4 qualifying units of trial experience” (N.D.Ill. Local Rules

83.11(a)(8), 83.11(b)). Qualifying units of trial experience include participation units, observation units, simulation units, and training units, and the rule sets forth the number of qualifying units with which a petitioner will be credited. N.D.Ill. Local Rule 83.11(a)(7). Pursuant to N.D.Ill. Local Rule 83.11(g), trial bar membership carries with it an obligation for pro bono service.

The petition for admission, instructions for completing the petition, and Appendix C to the Local Rules (regulations pertaining to Trial Bar admission) are available on the Northern District's website (www.ilnd.uscourts.gov) and also may be obtained from the Office of the Clerk:

Office of the Clerk, United States District Court
Everett McKinley Dirksen Building
219 South Dearborn St.
Chicago, IL 60604
Phone: 312/435-5670

III. JURY PROCEDURES

A. [11.5] Obtaining Jury Trial

The Seventh Amendment to the United States Constitution guarantees the right to a jury trial in “[s]uits at common law, where the value in controversy shall exceed twenty dollars.” See *Kennedy v. Rubin*, 254 F.Supp. 190 (N.D.Ill. 1966). To avail itself of this right, a party must make a timely written demand. If a case is begun in federal district court, the demand must be made within 14 days after service of the last pleading that is directed to the issue on which a jury trial is demanded. Fed.R.Civ.P. 38(b). If the case has been removed from a state court, the demand must be served within 14 days after the petition for removal is filed when the jury trial is sought by the removing party, or within 14 days after service of the notice of filing the petition for removal when sought by the other party. Fed.R.Civ.P. 81(c). Even if a jury demand has been made in state court before removal, caution dictates filing a new demand in federal court. But see 8 MOORE’S FEDERAL PRACTICE §38.50[7][b][i], which states that if a demand is duly made in state court, it will be honored in federal court, even if it would not have satisfied the federal timing requirements if the action had originally been brought in federal court.

Fed.R.Civ.P. 6(d) allows an additional 3 days in which to act after service by mail, leaving of a copy with the clerk of the court (if the person has no known address), or any other means consented to in writing, including electronic. The party then has 13 days from the time the last pleading was sent (not received) to serve a demand for jury trial.

Unless limited, a jury demand goes to all the issues triable by jury. A jury demand, however, may specify issues to be tried by a jury. After a limited issue jury demand, “any other party” can demand a jury trial on other specified issues or on all the issues. Fed.R.Civ.P. 38(c). This demand must be made within 14 days after service of the first demand or within a shorter time as specified by the court. A jury demand directed to a specific issue does not apply to any new issues that later arise. *Lutz v. Glendale Union High School, District No. 205*, 403 F.3d 1061, 1065 (9th Cir. 2005).

In view of this, a general jury demand is the more conservative approach. To avoid confusion, an attorney is generally well-advised to file a general demand for jury trial on all the issues.

It is important that jury demands be served on other parties and filed with the court. Rule 38(b) specifically includes language requiring the filing of a jury demand as provided in Rule 5(d). Note that the jury demand must be *both* filed *and* served to avoid a waiver. Fed.R.Civ.P. 38(d).

A party is entitled to rely on a demand made by another party and need not file its own demand. *California Scents v. Surco Products, Inc.*, 406 F.3d 1102, 1106 (9th Cir. 2005). Jury fees are not required in federal court.

Under Illinois practice, a plaintiff seeking a jury trial must file a jury demand with the clerk at the time the action is commenced. A defendant who desires a jury trial must file a jury demand not later than the filing of the answer. 735 ILCS 5/2-1105(a). Jury fees are required and vary by size of the case, type of charge, and population of the county. 705 ILCS 105/27.1a – 105/27.2a.

B. Juror Qualification

1. [11.6] Challenge to Array

In Illinois practice, the challenge to the array may be an important motion to consider, even though it is difficult to sustain. Its utility in federal trials was reduced by the federal Jury Selection and Service Act of 1968, 28 U.S.C. §1861, *et seq.* The aim of this Act was to ensure an array consisting of a cross section of the community, in line with Supreme Court decisions of the 1960s, by having each district court promulgate an appropriate selection plan. 28 U.S.C. §1863. A challenge to the array is likely to fail unless it is based on a charge that the requirements of the Act were not met.

2. [11.7] Eligibility and Qualification

All juror qualifications and exemptions must be determined based on the information entered on the juror qualification form given to each prospective juror or on the basis of other competent evidence. 28 U.S.C. §1865. Depending on the district court's juror selection plan, the chief judge, a district judge, or a clerk under supervision of the court may make these determinations. The minimal qualifications involve only citizenship, age (18), residency (one year), literacy sufficient to complete the juror qualification form, and absence of a pending felony charge or felony conviction resulting in as-yet-unrestored civil rights. Juror qualifications also include the ability to speak English and mental and physical capacity. *Id.*

3. [11.8] Exemptions

By the same procedure that excludes unqualified persons from jury service, the district courts are required to exempt those persons who are active members in the armed forces, members of fire or police departments, and public officers actively engaged in the performance of official duties. 28 U.S.C. §1863(b)(6).

A judge also may excuse persons from jury service. A district court's jury selection plan must "specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service." 28 U.S.C. §1863(b)(5)(A). Each of the district court clerks for the Illinois district courts maintains a checklist of those groups or occupational classes that may be excused from jury service.

C. Jury Selection

1. Examination

a. [11.9] *Role of Judge*

A federal judge typically exercises considerable control over the selection of a jury. Under Fed.R.Civ.P. 47(a), the judge may conduct the voir dire examination of the jury or may permit the attorneys to do so. When the judge conducts the questioning, counsel should submit topics for examination, in writing, before the voir dire. If the judge considers the inquiry to be proper, the judge then examines the prospective jurors on the suggested subject. *Id.* Check with the judge's clerk in advance to see what procedure the judge follows, especially whether proposed questions must be presented to the judge in writing.

b. [11.10] *Subjects of Inquiry*

The questions put to prospective jurors in federal court are generally similar to voir dire questions in state court. There is a tendency, however, for the questions to be asked of the panel as a whole rather than of each juror individually. Questions also tend to be less detailed than normal state court voir dire. Subjects of inquiry should include (1) the juror's business or profession and those of close family members; (2) acquaintanceship with the parties, attorneys, and possible witnesses; (3) personal knowledge of matters that will be the subject of the testimony; and (4) existing opinion and bias.

2. Challenges

a. [11.11] *Challenges for Cause*

The court determines challenges for cause (based on grounds of absolute disqualification) or favor (based on grounds of bias). 28 U.S.C. §1870; *United States v. Wood*, 299 U.S. 123, 81 L.Ed. 78, 57 S.Ct. 177 (1936); *United States v. Polichemi*, 219 F.3d 698 (7th Cir. 2000); *Kempe v. United States*, 160 F.2d 406 (8th Cir.), *cert. denied*, 67 S.Ct. 1534 (1947). In Illinois courts, each party may challenge jurors for cause. 735 ILCS 5/2-1105.1.

Neither the Seventh Amendment to the United States Constitution nor any statute specifies the means of testing a jury's impartiality, but the court in *Wood*, *supra*, 57 S.Ct. at 182, quoted 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS, p. 363 (Lewis ed. 1898), with general approval. Methods of determining possible bias parallel those used in the state courts.

When the jury is being impaneled, counsel must be certain that the examination of prospective jurors determines if any ground for objection exists. Failing to do this, counsel cannot later raise any objection that might have been “seasonably exercised” during voir dire, absent actual bias or prejudice. *Atlas Roofing Manufacturing Co. v. Parnell*, 409 F.2d 1191, 1193 (5th Cir. 1969). See also *Wade v. Singer Corp.*, 960 F.2d 150 (6th Cir. 1992) (text available in Westlaw) (citing *Atlas Roofing*). However, a verdict may be set aside if a party does not discover prejudicial disqualifying facts until after the trial, despite the exercise of reasonable diligence. See *Morley v. Cranmore Skimobiles, Inc.*, 67 F.Supp. 812 (D.N.H. 1946).

b. [11.12] Peremptory Challenges

In civil cases, each party is entitled to three peremptory challenges. 28 U.S.C. §1870. Multiple parties on one side may be considered a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. *Id.* The United States Supreme Court held that §1870 does not apply to consolidated actions and that defendants in consolidated actions have three peremptory challenges each. *Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 36 L.Ed. 706, 12 S.Ct. 909 (1892). It also has been held to be reversible error for a trial judge to allow three challenges to each of several plaintiffs in actions tried together, while allowing the one defendant a total of only three. *Signal Mountain Portland Cement Co. v. Brown*, 141 F.2d 471 (6th Cir. 1944). Other complications in counting challenges have been removed by the elimination of alternate jurors, which were formerly provided for under Fed.R.Civ.P. 47(b).

The number of challenges in federal court differs from the number in Illinois state courts, which allow five peremptory challenges for each party. 735 ILCS 5/2-1106(a). Illinois requires that each side have an equal number of challenges and specifies procedures for dealing with additional parties and alternate jurors. *Id.* When alternate jurors are called in Illinois courts, only one additional peremptory challenge is allowed, regardless of the number of alternate jurors called. 735 ILCS 5/2-1106(b).

D. Jury Composition

1. [11.13] Six-Member Jury

The Supreme Court has held that local district court rules may provide for a jury of six persons in all civil cases. *Colgrove v. Battin*, 413 U.S. 149, 37 L.Ed.2d 522, 93 S.Ct. 2448 (1973). Pursuant to this holding, the Central District of Illinois adopted a local rule by which a jury may not number any fewer than six persons. C.D.Ill. Local Civ. Rule 48.1.

2. [11.14] Majority Verdict

Fed.R.Civ.P. 48(a) provides that the court shall seat a jury of not more than twelve and not fewer than six jurors. However, a verdict may be taken from a jury reduced in size to fewer than six members if the parties so stipulate. Fed.R.Civ.P. 48(b). Unless the parties stipulate that a majority vote of the jury may be taken as the verdict, the verdict must be unanimous. *Id.* In contrast, unanimous verdicts are required in Illinois. See ILLINOIS CIVIL PRACTICE:

TRYING THE CASE (ICLE 2009) §11.42 (“unanimous verdicts are required in Illinois”), §6.25 (“Since Illinois law still compels a unanimous verdict from the jury.”).

Upon request or on its own initiative, the court may poll the jurors individually and may direct the jury to deliberate further or order a new trial if the polling reveals a lack of unanimity or assent by the number of jurors stipulated to by the parties. Fed.R.Civ.P. 48(c). Illinois law requires jury polling upon request of a party. *Bianchi v. Mikhail*, 266 Ill.App.3d 767, 640 N.E.2d 1370, 204 Ill.Dec. 21 (1st Dist. 1994).

3. [11.15] Alternate Jurors

As a result of the relaxed provisions in the Federal Rules of Civil Procedure concerning the number of jurors and the acceptability of nonunanimous verdicts, Fed.R.Civ.P. 47(b) no longer provides for alternate jurors.

Under Illinois state law, the court may order the impaneling of one or two alternate jurors. Alternate jurors are treated exactly like regular jurors except that an alternate juror does not participate in the verdict unless he or she replaces a regular juror who, after commencement of the trial, becomes unable to serve. 735 ILCS 5/2-1106(b).

E. [11.16] Jury Waiver

A party waives the right to a jury trial by failing to comply with Fed.R.Civ.P. 38(b) or Fed.R.Civ.P. 81(c) by serving and filing a demand for a jury. *See Huff v. Dobbins, Fraker, Tennant, Joy & Perlstein*, 243 F.3d 1086, 1090 (7th Cir. 2001); *Wertz v. Grubbs*, 45 F.3d 428 (4th Cir. 1995) (text available in Westlaw). A coparty’s waiver of a jury trial, however, does not bind another coparty. *See Mortenson v. Pacific Far East Line, Inc.*, 148 F.Supp. 71 (N.D.Cal. 1956). Once a jury demand is filed and served, it may not be withdrawn unless both parties consent (Fed.R.Civ.P. 38(d)), either by filing a written stipulation with the court or by orally stipulating, unless the court, on its own, finds that a right to a jury trial of some or all of the issues does not exist under the Constitution or United States statutes (Fed.R.Civ.P. 39(a)). Even if a party has not demanded a trial by jury, the court may so order upon motion. Fed.R.Civ.P. 39(b).

In Illinois, if a plaintiff files a jury demand and later withdraws it, a defendant shall be granted a “jury trial upon demand” made promptly after notification of the waiver. 735 ILCS 5/2-1105(a).

Counsel should beware when trying cases including both equitable and legal claims. Legal claims must be presented to the jury before any equitable claims may be adjudicated. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 3 L.Ed.2d 988, 79 S.Ct. 948 (1959). *But see Newfound Management Corp. v. Lewis*, 131 F.3d 108 (3d Cir. 1997); *Wechsler v. Hunt Health Systems, Ltd.*, 285 F.Supp.2d 343 (S.D.N.Y. 2003). The jury’s factual findings on common issues are binding on the district court in resolving any equitable claims. *Lebow v. American Trans Air, Inc.*, 86 F.3d 661, 672 (7th Cir. 1996).

F. [11.17] Questioning by the Jury During Trial

Recently, the Honorable James F. Holderman, Chief Judge of the United States District Court for the Northern District of Illinois, began allowing jurors in his courtroom to submit written questions during trial and allotting time for lawyers to speak directly to the jury between individual witnesses. These new procedures are the result of proposals made by the ABA Commission on the American Jury Project.

G. Jury Instructions

1. [11.18] Request for Instructions

Written requests for jury instructions are to be tendered to the court at the close of evidence or at “any earlier reasonable time that the court orders.” Fed.R.Civ.P. 51. Counsel should be prepared to submit instructions when the trial begins, which will avoid an appellate battle over the timeliness of the request. *See Wilson v. Southern Farm Bureau Casualty Co.*, 275 F.2d 819 (5th Cir.), *cert. denied*, 81 S.Ct. 49 (1960).

The mechanics of submitting requests for jury instructions are described in S.D.Ill. Local Rule 51.1 and C.D.Ill. Local Civ. Rule 51.1. In addition, the Central District’s website, www.ilcd.uscourts.gov, contains the Seventh Circuit Pattern Civil Jury Instructions.

There are no overall federal provisions relating to the use of the Illinois Pattern Jury Instructions (I.P.I.), and their use is not mandated by the *Erie* doctrine. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938). Nonetheless, using the I.P.I. is a convenient and persuasive basis for preparing requested instructions, especially in cases applying Illinois law. The I.P.I. must be used in state court trials, when applicable, unless the court determines that the instruction does not accurately reflect state law. S.Ct. Rule 239.

An excellent source of commentary regarding federal court jury practice and forms of instructions is Kevin F. O’Malley et al., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* (6th ed. 2006) (O’Malley). The form instructions are not mandated, nor are they as complete as I.P.I. (except for purely federal areas). Instructions in prior editions of O’Malley have been cited with approval by the Seventh Circuit (although more frequently in criminal cases). There are other texts covering certain limited, purely federal areas as well (*e.g.*, antitrust), but again these form instructions are suggested, not mandated.

In *United States v. Silvern*, 484 F.2d 879 (7th Cir. 1973), the court of appeals suggested that district courts consider publishing to the jury either a written copy or tape recording (along with any necessary equipment) of the complete instructions as given by the court. Most federal judges allow written instructions (sometimes multiple copies) to go into the jury room.

2. [11.19] Objections to Instructions

The federal rules do not specifically require the formal conference among counsel and the judge required in state court by 735 ILCS 5/2-1107(c). However, federal practice requires that a

party make known any objections and the distinct grounds for the objections before the jury retires to consider its verdict. Fed.R.Civ.P. 51(c). The necessity for formal objections has been eliminated by Fed.R.Civ.P. 46; still, counsel must state the matter objected to and the ground of the objection in terms “specific enough that the nature of the error is brought into focus.” *Schobert v. Illinois Department of Transportation*, 304 F.3d 725, 729 (7th Cir. 2002). The purpose of the rule is to inform the court of the claimed error so the judge will have an opportunity to correct it. 304 F.3d at 729 – 730.

In the late 1970s, the Seventh Circuit Court of Appeals overruled a line of cases and withdrew a procedural requirement that a formal statement of objections be made *after* the charge to the jury. In *United States v. Hollinger*, 553 F.2d 535, 543 (7th Cir. 1977), the court held that “specific and distinct objections voiced in an earlier instructions conference held in the presence of a court reporter will be considered timely” under Fed.R.Civ.P. 51. The court went on to suggest that the “better practice” is to renew the objections by incorporating them by reference in comments on the record after the charge to the jury. *Id.* But see *Graham v. Sauk Prairie Police Commission*, 915 F.2d 1085 (7th Cir. 1990) (principles of incorporation set forth in *Hollinger* do not extend to cases in which no record existed in which defendants voiced objection). The Seventh Circuit also held that objections to jury instructions made in a motion for new trial were timely when a judge ad-libbed the instructions and a reasonable opportunity to object was not afforded before the motion. *Joseph v. Brierton*, 739 F.2d 1244 (7th Cir. 1984). To preserve the objection, the party must state the same grounds when objecting to the jury instruction as it does in its motion for a new trial or on appeal. *Schobert, supra*.

Although a seriously deficient instruction should be grounds for reversal even if no objection is made (see *Shimabukuro v. Nagayama*, 140 F.2d 13 (D.C.Cir.), *cert. denied*, 64 S.Ct. 1270 (1944)), counsel should always object to debatable jury instructions, and, as a conservative measure, counsel should detail the substance of all objections before the jury retires. The Seventh Circuit Court of Appeals has held that a plain error doctrine is not available to protect parties from erroneous jury instructions to which no objection was made at trial. *Deppe v. Tripp*, 863 F.2d 1356 (7th Cir. 1988).

3. [11.20] Commenting on Evidence

In *Quercia v. United States*, 289 U.S. 466, 77 L.Ed. 1321, 53 S.Ct. 698 (1933), the Supreme Court affirmed the power of the federal trial judge to comment on the evidence during instructions to the jury as long as resolution of all fact issues is left to the jury and the judge makes clear that the comment is not binding. *Accord Lolie v. Ohio Brass Co.*, 502 F.2d 741 (7th Cir. 1974); *United States v. Nowak*, 448 F.2d 134 (7th Cir. 1971). This power is not affected by *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938). See §11.18 above. Fed.R.Evid. 105 authorizes special comment and instructions on evidence admissible only as to one party or for one purpose.

4. [11.21] Deadlock Jury Instruction

In *United States v. Silvern*, 484 F.2d 879 (7th Cir. 1973), the Seventh Circuit Court of Appeals laid to rest the confusion regarding the manner in which deadlocked juries are to be instructed. The court, under its supervisory power, directed all district courts in the Seventh Circuit as follows:

If a supplemental instruction is deemed necessary and provided that the following instruction has been given prior to the time the jury has retired, it may be repeated:

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges — judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case. [Footnote omitted.] 484 F.2d at 883.

This instruction should be proposed by counsel and given as a general instruction if you wish to have it available as a supplemental instruction in the event of a deadlock.

H. Special Verdicts and Interrogatories

1. [11.22] Benefits of Devices

Contrary to the Illinois state court rule set out in *Crooks v. Sayles*, 39 Ill.App.2d 22, 187 N.E.2d 742 (2d Dist. 1963), and 735 ILCS 5/2-1108, special verdicts (as distinguished from interrogatories to accompany a general verdict, *i.e.*, special interrogatories) are available in federal jury trials. Fed.R.Civ.P. 49(a).

The virtues of the special verdict were set forth by Professor Edson R. Sunderland in *Verdicts, General and Special*, 29 Yale L.J. 253, 258 (1920). He called the general verdict “as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi.” *Id.* Professor Sunderland went on to state:

The special verdict compels detailed consideration. But above all it enables the public, the parties and the court to see what the jury really has done. The general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it. But the special verdict enables errors to be localized so that the sound portions of the verdict may be saved and only the unsound portions be subject to redetermination through a new trial. 29 Yale L.J. at 259.

Fed.R.Civ.P. 49(a) provides for special verdicts and Fed.R.Civ.P. 49(b) for interrogatories to accompany a general verdict. These devices have been the subject of confusion and have been used rarely. A special verdict consists of the answers of a jury to specific factual questions concerning issues raised by the pleadings and the evidence. Special verdicts are designed to prevent the jury's view of a correct result from interfering with its factual findings; the jury's province when answering special verdict questions pursuant to Fed.R.Civ.P. 49(a) is strictly one of fact-finding, without regard to the legal consequences that ensue. *Munafu v. Metropolitan Transportation Authority*, 277 F.Supp.2d 163 (E.D.N.Y. 2003).

A general verdict with interrogatories consists of a jury verdict in its usual form together with answers to certain factual questions. Its purpose is to "test" the jury's verdict by providing a check on the application of the law to the facts. *See, e.g., Abou-Khadra v. Mahshie*, 4 F.3d 1071 (2d Cir. 1993); *Allen Organ Co. v. Kimball International, Inc.*, 839 F.2d 1556 (Fed.Cir.), *cert. denied*, 109 S.Ct. 132 (1988).

The paramount feature of the general verdict is the power that it gives the jury to ignore the charge in deciding the case. While some authorities base their adherence to the jury system on just such extralegal functioning of the jury, others have felt uneasy about a system under which jurors are "not only judges but legislatures as well." *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54, 58 (2d Cir.), *cert. denied*, 69 S.Ct. 34 (1948). The special verdict is a means of curing this supposed weakness in the jury system and the analogous problem of supposed inability of jurors to comprehend the complex charge that ordinarily accompanies the general verdict. *Royal Typewriter Company, Division of Litton Business Systems, Inc. v. Xerographic Supplies Corp.*, 719 F.2d 1092 (11th Cir. 1983).

There are other advantages to special verdicts and special interrogatories of a less speculative nature. Special verdicts shorten and simplify the charge to the jury and thus obviate one of the most prolific sources of error. Answers to special interrogatories often can show that an erroneous charge did not prejudice either party and thus prevent the need for a new trial. *See Stewart & Stevenson Services, Inc. v. Pickard*, 749 F.2d 635 (11th Cir. 1984); *Szajna v. Bessemer & Lake Erie R.R.*, 313 F.Supp. 576 (W.D.Pa. 1970). A trial judge who must charge the jury in an uncertain area of law can reduce the chance of reversal by submitting the various possible legal theories to the jury by way of special interrogatories. *See Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1520 (6th Cir. 1990); *United States v. City of Jacksonville, Arkansas*, 257 F.2d 330 (8th Cir. 1958).

2. [11.23] Scope of Special Verdicts and Interrogatories

The special verdict usually includes jury findings on all disputed factual issues. An illustration of special verdict questions can be found in *Susan Wakeen Doll Co. v. Ashton-Drake Galleries*, 272 F.3d 441, 449 (7th Cir. 2001), in which the jury was asked “‘1) Do you find that Marlene Sirko had access to plaintiff’s copyrighted sculpture?’ and ‘2) Do you find that there exists a substantial similarity between the sculpture that became Ashton Drake Galleries’ ‘Little Drummer Boy’ and plaintiff Susan Wakeen Doll Company’s copyrighted sculpture?’ ”

Special interrogatories, on the other hand, cover only the most strongly disputed factual issues. The principal value of the interrogatory lies in the possibility that the answer might be inconsistent with the general verdict. See generally 8 MOORE’S FEDERAL PRACTICE, Ch. 49. See, e.g., *Abou-Khadra v. Mahshie*, 4 F.3d 1071 (2d Cir. 1993). Special interrogatories involve questions of fact rather than issues of law. So-called mixed questions of law and fact are permissible as long as the jury is correctly charged as to the legal standard they are to apply in determining the issues. *Landy v. Federal Aviation Administration*, 635 F.2d 143 (2d Cir. 1980); *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708 (6th Cir. 1975); *Jackson v. King*, 223 F.2d 714 (5th Cir. 1955). Examples of mixed questions submitted on special interrogatories can be seen in *Harper v. Albert*, 400 F.3d 1052, 1060 (7th Cir. 2005), a case involving jury responses to the following questions:

“Do you find that any of the force used against Plaintiff Harper by any prison employee, while transporting him from his cell in the East Cellhouse to the . . . room or while in the . . . room, constituted cruel and unusual punishment as that term is defined elsewhere in the instructions?”

and

‘Do you find that any of the force used against Padilla by any prison employee, while transporting him from his cell to the East Cellhouse to his final destination in the North Cellhouse, constituted cruel and unusual punishment, as that term is defined elsewhere in the instructions?’”

Special interrogatories may inquire into “ultimate facts,” as distinguished from “evidentiary facts.” In practice this means that the interrogatories should elicit facts “from which a legal proposition may be deduced” by the court. *Carpenter v. Baltimore & O.R. Co.*, 109 F.2d 375, 379 (6th Cir. 1940). See also *Theodor v. Lipsey*, 237 F.2d 190 (7th Cir. 1956). The nature of this requirement will vary with the precise facts in issue, e.g., if an action were defended on the basis of the statute of limitations, it would be proper to ask the jury the date on which the injury occurred. While in other contexts this fact might be considered “evidentiary,” in this illustration, it is a fact from which a legal conclusion may be drawn.

Under Illinois law, the court has the discretion to limit the parties’ right to have only those special interrogatories submitted that concern “material” questions of fact. See *Albaugh v. Cooley*, 87 Ill.2d 241, 429 N.E.2d 837, 841 – 842, 57 Ill.Dec. 720 (1981); 735 ILCS 5/2-1108 (permitting special interrogatories on “material question[s]”).

3. [11.24] Form for Special Interrogatories

The form and the number of interrogatories submitted to the jury are within the court's discretion. *Cruz v. Town of Cicero, Illinois*, 275 F.3d 579, 591 (7th Cir. 2001); *Bills v. Asetline*, 52 F.3d 596, 605 (6th Cir. 1995); *Aetna Casualty Surety Co. v. P & B Autobody*, 43 F.3d 1546, 1555 (1st Cir. 1994). The parties do not have the right to have interrogatories specifically directed to particular facts or phrased in a particular way as long as those actually submitted fairly cover all the contested ultimate facts presented by the pleadings and evidence. *Piper v. Goodwin*, 20 F.3d 216 (6th Cir. 1994); *Hammerquist v. Clarke's Sheet Metal, Inc.*, 658 F.2d 1319 (9th Cir. 1981).

4. [11.25] Choice of Laws

Federal law, including Fed.R.Civ.P. 49 and the caselaw that has developed in interpreting that rule, rather than state law, governs special verdict and special interrogatory practice in diversity cases with regard to the form and number of interrogatories to be submitted (*Cohen v. Travelers Ins. Co.*, 134 F.2d 378 (7th Cir. 1943)), the degree of discretion permitted in deciding whether these devices are to be used at all (*Bartak v. Bell-Galyardt & Wells, Inc.*, 629 F.2d 523, 531 (8th Cir. 1980)), and the issue of inconsistent answers, including the effect of inconsistencies between a general verdict and one or more special interrogatories (*Conte v. General Housewares Corp.*, 215 F.3d 628 (6th Cir. 2000)). State law, however, governs whether a verdict is, in fact, inconsistent. *Id.*

Under federal law, the trial court has absolute discretion in deciding whether to submit a case to the jury by way of special verdict or special interrogatories. *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54 (2d Cir.), *cert. denied*, 69 S.Ct. 34 (1948). Accordingly, counsel should inquire of the court before spending time drafting involved interrogatories.

5. [11.26] Consequences of Informing Jury as to Legal Effect

The jury is not to be instructed as to the legal effect of an answer to an interrogatory. *Theedorf v. Lipsey*, 237 F.2d 190 (7th Cir. 1956). *But see Beul v. ASSE International, Inc.*, 233 F.3d 441 (7th Cir. 2000). It is unclear whether violation of this rule will be deemed reversible error. *Theedorf, supra*; *St. Louis-San Francisco Ry. v. Simons*, 176 F.2d 654 (10th Cir. 1949). In any event, in all but the most complex cases it is almost impossible to stop the jury from answering the interrogatories consistently with its ultimate conclusion on the merits. It seems safe to assume that the legal effect of such staples as negligence and proximate cause are known to the average juror. In addition, since counsel is allowed to urge specific answers on the jury in final argument, the jury is likely to make the obvious assumption. Finally, in the interest of conserving time, many courts will instruct the jury to answer certain interrogatories only in the event that certain others were answered in a particular way. Specifically as to damage interrogatories, this is likely to inform the jury as to the effect of their prior answers.

6. [11.27] Effect of Inconsistent Interrogatory Answers

The court has three options when the answers to special interrogatories, submitted together with a general verdict, are inconsistent with the general verdict: (a) return the jury for further

deliberations; (b) order a new trial; or (c) enter judgment in accordance with the answers, notwithstanding the general verdict. Fed.R.Civ.P. 49(b). The unique value of special interrogatories lies in the possibility of this last alternative. However, every reasonable inference in favor of the general verdict is to be indulged, and the answers to the interrogatories are to be held controlling only “where the conflict on a material question is beyond reconciliation on any reasonable theory consistent with the evidence and its fair inferences.” *Theurer v. Holland Furnace Co.*, 124 F.2d 494, 498 (10th Cir. 1941).

The effect of this rule is to make use of special interrogatories with the general verdict largely of value only to the defendant. An answer to a single interrogatory often is sufficient to be called inconsistent with a general verdict in favor of the plaintiff (*e.g.*, contributory negligence as in *Elston v. Morgan*, 440 F.2d 47 (7th Cir. 1971)). A general verdict for the defendant normally will withstand attack unless interrogatories with regard to each element of the plaintiff’s cause of action are submitted and answered for the plaintiff.

Rule 49 does not specify the procedure to be followed in the event of inconsistent answers to questions on a special verdict. Since such inconsistency should occur only if the questions submitted are repetitious, careful drafting obviates this difficulty. If it should occur, however, the court should make every effort to resolve the conflict and, when resolution is not possible, order a new trial rather than enter judgment. *See Seven Provinces Insurance Co. v. Commerce & Industry Insurance Co.*, 65 F.R.D. 674 (W.D.Mo. 1975); *Miller v. Royal Netherlands Steamship Co.*, 508 F.2d 1103 (5th Cir. 1975); *Chesapeake & Ohio Ry. v. Barnaby*, 414 F.2d 309 (6th Cir. 1969); *Centennial Management Services, Inc. v. Axa Re Vie*, 196 F.R.D. 603 (D.Kan. 2000). In reconciling apparent conflicts between answers from the jury in special verdicts, the court must consider whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted. *Miller, supra*.

When answers to special interrogatories are inconsistent with each other *and* the verdict, judgment must not be entered. Fed.R.Civ.P. 49(b)(4). Rather, the court must either direct the jury to further consider its answers and verdict or order a new trial. *Id.*

7. [11.28] Waiver

On a special verdict, the parties are entitled to the submission of questions that inquire into all relevant facts raised by the pleadings and the evidence. However, if the court omits a necessary issue of fact, each party waives the right to a trial by jury as to that fact unless demand is made for its submission before the jury retires. Fed.R.Civ.P. 49(a). As to issues not submitted, the court may make findings. However, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. *Id.*

In *Cundiff v. Washburn*, 393 F.2d 505 (7th Cir. 1968), decided under Rule 49(b), the Seventh Circuit Court of Appeals held that a party waives an objection to a general verdict on grounds of inconsistency with special interrogatory answers by not requesting submission of the verdict and findings to the jury. *See also Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253 (11th Cir. 1983); *Barnes v. Brown*, 430 F.2d 578 (7th Cir. 1970). However, a split of authority exists over whether failure to raise an inconsistency between special verdicts given under Rule 49(a) waives consideration of that issue on appeal. *Bates v. Jean*, 745 F.2d 1146 (7th Cir. 1984).

IV. TRIAL MECHANICS

A. [11.29] Split Trials

Federal courts may conduct separate trials on any claim or any issue. Fed.R.Civ.P. 42(b). Under Rule 42(b), separate trial procedures apply in diversity actions regardless of state constitutional law or procedures. *O'Donnell v. Watson Bros. Transportation Co.*, 183 F.Supp. 577 (N.D.Ill. 1960).

One common format is to conduct a liability trial before a damages trial. If the first trial results in a finding of liability and if the damages question cannot be settled, the court may delay the trial on damages for further discovery or pretrial conferences. The court may also continue the trial to completion of the damages issue before the same jury. Because of this option, it is important that the order granting a separate trial specify what procedure will be followed so that counsel will be adequately prepared.

B. Witness Subpoenas

1. [11.30] General Comments

The witness subpoena for a hearing or trial, provided by Fed.R.Civ.P. 45, is a particularly important trial tool because the federal court has no procedure to compel the appearance of officers, directors, and employees of parties by written notice.

Federal practice does *not* require a notice to require a party to appear at trial. *Cf.* Ill.S.Ct. Rule 237. Parties may be compelled to attend a hearing or trial by court order such as a pretrial order. 8 MOORE'S FEDERAL PRACTICE, Ch. 45. Issuing such an order is within the court's discretion. Courts have denied motions to compel the attendance of parties who are outside the subpoena power of the court. For example, in *McGill v. Duckworth*, 944 F.2d 344, 354 (7th Cir. 1991), the court found that "[r]elying on 'inherent powers' to compel the attendance of a witness who is outside the court's subpoena power would make the restrictions in Rule 45(e) [now 45(b)] meaningless." *See also Steel, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 41 F.R.D. 337, 339 (D.Kan. 1967).

As officers of the court, attorneys may issue and sign subpoenas in the name of any federal court in which they are authorized to practice. Fed.R.Civ.P. 45(a)(3). Attorneys are authorized to issue subpoenas from distant courts in order to ease the burden of the interdistrict law practice. Thus, any attorney permitted to represent a client in a federal court has the same authority as a clerk to issue a subpoena from any federal court. As in Illinois, no showing of materiality is required to issue a subpoena for appearance at a hearing or trial; this issue is raised by a motion to quash.

Rule 45(a)(1) requires that a subpoena include a statement of the rights and duties of witnesses by setting out in full the text of subdivisions (c) and (d) of Rule 45. The rule imposes on an attorney and/or party the duty to minimize the burden or expense of a subpoena. Fed.R.Civ.P. 45(c)(1). A breach of this duty justifies an award of sanctions, including attorneys' fees and lost earnings. *Id.*

A Rule 45 subpoena must be either obeyed or challenged by a motion to quash. An attorney-issued subpoena is a mandate of the court, and defiance of a subpoena is an act in defiance of a court order, exposing the defiant witness to contempt sanctions. Any person ignoring a subpoena could be held in contempt regardless of whether his or her testimony or documents could be relevant to the trial.

Rule 45(a)(2) was revised effective in 2005 to “close[] a small gap in regard to notifying witnesses of the manner for recording a deposition.” Advisory Committee Notes, 2005 Amendments, Fed.R.Civ.P. 45. Rule 45(a)(2) now states that a subpoena must issue in one of three ways:

(A) for attendance at a trial or hearing, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person’s attendance, from the court for the district where the production or inspection is to be made.

2. [11.31] Form, Service, and Fees

There is only one subpoena form for use in civil cases. This form can be obtained from the clerk’s office or the district court’s website. It is obtained in blank and can be prepared, signed, and issued by attorneys. The 1991 amendment to Fed.R.Civ.P. 45(a) abolished the requirement that a subpoena be issued under seal. Advisory Committee Notes, 1991 Amendment, Subdivision (a), Fed.R.Civ.P. 45. Thus, the only requirement when a subpoena is issued is that it be signed, and an attorney may be the signer. The subpoena, with witness fees, may be served by the marshal, a deputy, or any nonparty over the age of 18. Fed.R.Civ.P. 45(b).

Proof of service of the subpoena is required to be filed only when necessary, presumably when a dispute arises. Fed.R.Civ.P. 45(b)(4). Proof of service is filed in the court in whose name the subpoena is issued. *Id.*

Fees must be tendered with the subpoena unless it is issued on behalf of the United States or an agency thereof. Fed.R.Civ.P. 45(b)(1). Fees are set by 28 U.S.C. §1821 and currently provide for witness compensation at \$40 per day, 50 cents per mile (for privately owned vehicles), and a “subsistence allowance” for required overnight stays computed by reference to the General Services Administration allowances for federal employees. 28 U.S.C. §§1821(b) – 1821(d); 41 C.F.R. §301-10.303. The United States Marshal’s Office can be helpful in computing proper mileage and other fees:

U.S. Marshals Service — Northern District of Illinois
Everett McKinley Dirksen Building
219 S. Dearborn St., Suite 2444
Chicago, IL 60604
Phone: 312-353-5290
Website: www.justice.gov/marshals/district/il-n/index.html

U.S. Marshals Service — Central District of Illinois
600 E. Monroe St., Room 333
Springfield, IL 62701
Phone: 217-492-4430
Fax: 217-492-4718
Website: www.justice.gov/marshals/district/il-c/index.html

U.S. Marshals Service — Southern District of Illinois
U.S. Courthouse
750 Missouri Ave., Room 127
East St. Louis, IL 62201
Phone: 618-482-9336
Website: www.usmarshals.gov/district/il-s/index.html

The question of judicial discretion to tax witness fees as costs is governed by 28 U.S.C. §1920(3) and Fed.R.Civ.P. 54(d)(1). These costs can be significant and may include actual expenses beyond the 100-mile limitation discussed in §11.32 below. *See Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 13 L.Ed.2d 248, 85 S.Ct. 411 (1964).

The Supreme Court has interpreted the discretion granted a federal court by Rule 54(d)(1) as “solely a power to decline to tax, as costs, the items enumerated in §1920.” *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 96 L.Ed.2d 385, 107 S.Ct. 2494, 2498 (1987). The Court explained the interaction between Rule 54(d)(1) and 28 U.S.C. §§1821 and 1920 as follows:

[Section] 1821 specifies the amount of the fee that must be tendered to a witness, §1920 provides that the fee may be taxed as a cost, and Rule 54(d)[(1)] provides that the cost shall be taxed against the losing party unless the court otherwise directs.
107 S.Ct. at 2497.

The Court held that, absent contract or explicit statutory authority to the contrary, a federal court is bound by the limits set by §1821 in awarding a prevailing party reimbursement for fees paid to expert witnesses. Thus, except for court-appointed expert witnesses as provided in §1920(6), a federal court may not exceed the limit for litigants’ expert witnesses’ fees set by §1821 and as enumerated in §1920.

3. [11.32] Territorial Limitations

Pursuant to Fed.R.Civ.P. 45(b)(2), a subpoena for attendance at a hearing or trial may be served at any place within the district or at any place without the district that is not more than 100

miles from the place of the trial or anywhere within the state if state practice would allow service. The territorial limitations of the court's power to serve a subpoena for attendance are the same for service on parties and nonparties.

Rule 45 draws a distinction between the geographic scope of a trial subpoena versus deposition and production subpoenas. If a deposition or production subpoena requires a person who is neither a party nor an officer of a party to come more than 100 miles to the deposition, the court may quash or modify the subpoena on timely motion of the deponent. Fed.R.Civ.P. 45(c)(3)(A). In contrast, the trial subpoena runs statewide, regardless of whether state law would permit it, and cannot be quashed because it requires a witness to travel more than 100 miles. Fed.R.Civ.P. 45(c)(3)(A)(ii). However, it can be quashed if it requires a witness traveling over 100 miles to incur "substantial expense," in which case the court can modify the subpoena to require that the witness be reasonably compensated, provided there is a substantial need for the testimony. Fed.R.Civ.P. 45(c)(3)(B)(iii). A subpoena served beyond these limits is reduced to a mere request to attend. This becomes important not only in securing attendance but also upon the taxing of costs, for only those witness fees and mileages required to be paid are automatically taxable in favor of the prevailing party. If the witness is served outside these territorial limits, the fees still may be taxed at the court's discretion. See Fed.R.Civ.P. 54(d). The 100-mile limit is a factor to be considered along with the necessity of that witness to the case and lack of alternative means of securing the testimony. For example, in *Kaiser Industries Corp. v. McLouth Steel Corp.*, 50 F.R.D. 5 (E.D.Mich. 1970), fees including round-trip airfare from Europe were taxed when the two witnesses were essential to certain of the prevailing party's contentions.

An exception to the 100-mile limit involves subpoenas served pursuant to specific statutes that expressly direct district courts to issue subpoenas effective anywhere in the United States. Examples include 15 U.S.C. §23 (antitrust suits initiated by the Department of Justice) and 38 U.S.C. §1984(c) (suits involving veterans' insurance contracts).

4. [11.33] Subpoena Duces Tecum

Fed.R.Civ.P. 45(a)(1) authorizes issuance of a subpoena to compel a nonparty to produce evidence independent of any deposition. This alleviates the necessity of deposing the custodian of evidentiary material required to be produced. The person from whom the documents are sought is not required to appear at the production. No fees must accompany the subpoena unless the person's attendance is commanded. Fed.R.Civ.P. 45(b). An additional subpoena requiring additional production at the same time and place may be served on a nonparty subject to this type of subpoena. As under 735 ILCS 5/2-1101, no court order is necessary and materiality of the documents sought need not be shown unless the person subpoenaed makes a motion to quash.

The person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or territory within which the subpoena can be served. Fed.R.Civ.P. 45(a)(1); *In re Automotive Refinishing Paint Antitrust Litigation*, 229 F.R.D. 482 (E.D.Pa. 2005). This makes the nonparty witness subject to the same scope of discovery as a party under Fed.R.Civ.P. 34.

According to the rule set out in *Wilson v. United States*, 221 U.S. 361, 55 L.Ed. 771, 31 S.Ct. 538 (1911), it is not necessary to subpoena a corporate officer to obtain corporate documents; the corporation itself, being a legal entity, may be subpoenaed. It is then the responsibility of those officers having knowledge of the subpoena to make a bona fide effort to bring about compliance with the subpoena by the corporation or unincorporated association. *United States v. Fleischman*, 339 U.S. 349, 94 L.Ed. 906, 70 S.Ct. 739 (1950). As to what documents must then be produced, the test is one of control, not location. The subpoena power reaches all documents under the control of the person or corporation ordered to produce, even if a document is outside the territorial jurisdiction of the issuing court. *Automobile Refinishing Paint Antitrust Litigation*, *supra*.

A subpoena cannot be ignored without making the person subpoenaed liable for contempt. A person ordered by a subpoena to produce documents must serve any written objections to the production on the party or attorney designated in the subpoena no later than the time specified for compliance or 14 days after the subpoena is issued. Fed.R.Civ.P. 45(c)(2)(B). The party objecting is not required to produce the documents unless the party seeking them prevails on a motion to compel. As under 735 ILCS 5/2-1101, the court is directed, when compelling production, to protect the nonparty from any significant expense associated with copying and production. Documents produced in response to a subpoena must either be produced as they are kept in the ordinary course of business or be organized and labeled to correspond to the categories requested. Fed.R.Civ.P. 45(d)(1).

Quashing a subpoena as a means of protecting a witness from misuse of the subpoena power is explicitly authorized by Rule 45(c)(3). The federal standard for granting the motion to quash does not differ significantly from that in Illinois. A subpoena may be quashed if it does not allow a reasonable time for compliance, requires disclosure of privileged or other protected matters, or subjects a person to undue burden. If a subpoena requires disclosure of a trade secret or other confidential information or the opinions of a non-retained expert or requires a person to travel more than 100 miles to attend trial, the court may modify or quash the subpoena or require the person to whom the subpoena is addressed to be reasonably compensated. Fed.R.Civ.P. 45(c)(3)(B). If documents are withheld on claims of privilege or work product, the claim must be expressly made and “describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.” Fed.R.Civ.P. 45(d)(2).

Generally, the materials requested must be relevant or reasonably calculated to lead to admissible evidence. *aaiPharma, Inc. v. Kremers Urban Development Co.*, 361 F.Supp.2d 770 (N.D.Ill. 2005); *Bariteau v. Krane*, 206 F.R.D. 129 (W.D.Ky. 2001). In camera inspection may be required. If the motion to quash goes to the issue of admissibility and is made before trial and foundation evidence has been introduced, the motion may be denied. *United States v. 691.81 Acres of Land, More or Less, Situate in Clark County, State of Ohio*, 443 F.2d 461 (6th Cir. 1971). Denial of a motion to quash is not appealable. *Ryan v. Commissioner*, 517 F.2d 13 (7th Cir.), *cert. denied*, 96 S.Ct. 190 (1975).

5. [11.34] Contempt

A person who fails to comply with a subpoena without “adequate excuse” may be deemed to be in contempt of court. Fed.R.Civ.P. 45(e). “Adequate excuse” remains undefined. Some cases say that there is no contempt when the subpoena is defective, as when the materials demanded by a subpoena duces tecum are inadequately described. *Pathe Industries, Inc. v. General Film Distributors, Ltd.*, 14 F.R.D. 464 (S.D.N.Y. 1953). However, “the desire of a subpoenaed individual to work instead of attending the deposition is not an ‘adequate excuse’ that would justify disobeying a subpoena.” *Higginbotham v. KCS International, Inc.*, 202 F.R.D. 444, 455 (D.Md. 2001).

C. [11.35] Deposition Testimony

Fed.R.Civ.P. 32 provides detailed procedures for the use of depositions at trial. In using Rule 32, keep in mind that federal procedure does not distinguish between discovery and evidence depositions. However, Rule 32(d)(3) preserves most objections to the competency of a witness or the admissibility of testimony whether or not objections are made at the deposition, and Rule 32(b) provides that those objections may be made at trial. Former Rule 32(c), which provided that using a deposition did not make the deponent one’s witness, was deleted in 1972 because the Federal Rules of Evidence resolved prior issues relating to impeachment and waiving witness incompetence. Advisory Committee Notes, 1972 Amendment, Subdivision (c), Fed.R.Civ.P. 32. As amended in 1993, Rule 32(a) states that a deposition shall not be used against a party who, having received less than 14 days notice of the deposition, has promptly filed a motion for a protective order that is pending at the time the deposition is held. Rule 32(a) also protects the party from the risks of not attending a deposition held before the motion is ruled on.

Rule 32(c) provides that a party may offer deposition testimony as long as the party provides the court with a transcript of the offered testimony.

Rule 32(a)(4) governs the frequent disputes about use of parts of a deposition that the offering party does not wish to offer. Under Rule 32(a)(4), an adverse party may require the introduction of other parts at the same time when “fairness” dictates and may, in any event, introduce any other parts separately. Although the rule does not so state, many judges will apply the same procedures to the court reporter’s transcript and any significant transcript changes directed by the deponent.

D. [11.36] Evidence

The Federal Rules of Evidence control the admission of evidence and certain other procedural aspects of all federal hearings and trials (with a few exceptions listed in Fed.R.Evid. 1101). The Federal Rules of Evidence codify, clarify, and change the prior federal law concerning judicial notice, relevance, privileges, witness competence and interrogation, opinion and expert testimony, hearsay and its many exceptions, and authentication and identification of writings and other records. In general, the rules expand the discretion of the trial judge to admit evidence.

The Federal Rules of Evidence differ from traditional Illinois practice in several respects, as the following rules illustrate:

1. A character witness may give an opinion as to character, subject to cross-examination about specific conduct. Fed.R.Evid. 405.
2. Witness competence is expanded, eliminating interest and so-called Dead-Man's Act objections (except when state law "supplies the rule of decision"). Fed.R.Evid. 601.
3. A party can impeach its own witness. Fed.R.Evid. 607.
4. Cross-examination outside the scope of direct examination may be allowed if conducted as on direct examination. Fed.R.Evid. 611(b).

While these differences are narrowing, a lawyer familiar with Illinois trial practice should master the Federal Rules of Evidence before undertaking a federal court trial.

In addition to the Federal Rules of Evidence, counsel should be aware of the provisions of and caselaw interpreting the federal statutes on handwriting, business records, and various public records as evidence. 28 U.S.C. §1731, *et seq.*

The Supreme Court has held that the Federal Rules of Evidence provide the standard for admitting expert testimony in a federal trial. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993). Fed.R.Evid. 702 states that a witness may testify as an expert if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue. In *Daubert*, the Court concluded that the earlier *Frye* test, which provided that expert testimony is not admissible unless the expert's methodology is "generally accepted" as reliable in the scientific community, is no longer applicable. 113 S.Ct. at 2794. *See also Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923).

The Supreme Court extended the judge's gate-keeping function under Rule 702 from scientific experts to all types of experts in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999).

The Seventh Circuit has applied *Daubert* to nonscientific expert testimony. In *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183 (7th Cir. 1993), the plaintiffs alleged that an accounting firm had aided and abetted a securities fraud. A financial expert testified that the financial statements misrepresented the worth of certain property. The court held that the testimony was not reliable under *Daubert* since the expert admitted "that he did not employ the methodology that experts in valuation find essential." 2 F.3d at 186. In *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S.Ct. 2711 (1994), an eye doctor testified that he could determine through observation whether the plaintiff's cataracts were caused by radiation. The court held that the testimony was inadmissible under *Daubert* since the methodology was not supported by the cited materials. The doctor's opinion, according to the court, had "no scientific basis." 13 F.3d at 1107.

It is important to note that under Illinois law, the *Frye* test remains "the exclusive test for the admission of expert testimony." *Donaldson v. Central Illinois Public Service Co.*, 199 Ill.2d 63, 767 N.E.2d 314, 323, 262 Ill.Dec. 854 (2002).

E. [11.37] Preserving Record for Appeal

Formal “exception” to the court’s adverse rulings or orders is unnecessary. If counsel makes known to the court the action desired or the objection to the court’s proposed action and gives the grounds, no further statements need be made on the record to preserve the point. Fed.R.Civ.P. 46. Contrast the simplicity of Rule 46 and decisions under it with the extended list of rules and statutes applicable to the preservation of the record in Illinois state courts. See Mitchell L. Marinello and Richard L. Miller II, Ch. 5, *Preserving the Record During Trial*, ILLINOIS CIVIL PRACTICE: TRYING THE CASE (IICLE, 2009).

If the court refuses to admit proposed evidence, the offering party should make an offer of proof to protect the record on appeal. Fed.R.Evid. 103. The offer should be made out of the hearing of the jury. Fed.R.Evid. 103(c). The Seventh Circuit does not require formal offers of proof when evidence is excluded. *United States v. Moore*, 425 F.3d 1061 (7th Cir. 2005). However, “the record must show the equivalent: grounds for admissibility, the proponent must inform the court and opposing counsel what he expects to prove by the excluded evidence, and he must demonstrate the significance of the excluded testimony.” 425 F.3d at 1068. The trial court must give the parties ample opportunity to put in the record a fair statement of what they intend to prove so the appellate court can intelligently pass on the challenged ruling of the trial court. *Pennsylvania Lumbermens Mutual Fire Insurance Co. v. Nicholas*, 253 F.2d 504 (5th Cir. 1958).

F. [11.38] Adverse Witnesses

Federal law as to adverse or hostile witnesses is much broader than Illinois law. 735 ILCS 5/2-1102, 5/2-1103. See Fed.R.Evid. 607 (party calling witness may attack witness’ credibility), 611(c) (“a hostile witness, an adverse party, or a witness identified with an adverse party” may be asked leading questions), 614(a) (witnesses may be called by court at suggestion of party).

G. [11.39] Consolidation

The federal practice as to consolidation and joint trials is quite liberal. Fed.R.Civ.P. 42(a) is broader than Fed.R.Civ.P. 20(a) on permissive joinder of parties and allows joint trials of actions involving a common question of law or fact.

H. [11.40] Offer of Judgment

In the right case, an offer of judgment pursuant to Fed.R.Civ.P. 68 by a defendant may have some tactical value. Under Rule 68, a party defending a claim may offer to allow a judgment in a specified amount at least 14 days before trial. An offer not accepted is deemed withdrawn, but if the judgment is less than the offer, the offeree must pay all costs incurred after the offer was made. Fed.R.Civ.P. 68. The Supreme Court has ruled that Rule 68 does not require payment of costs if the settlement offer is a sham or not realistic in amount and the plaintiff goes to trial and loses. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 67 L.Ed.2d 287, 101 S.Ct. 1146 (1981). “Costs” typically include charges for copying and preparing transcripts and, in some cases, attorneys’ fees. *Fisher v. Kelly*, 105 F.3d 350 (7th Cir. 1997) (term “costs” under Rule 68 includes all costs awardable under relevant substantive statute).

V. TRIAL AND POSTTRIAL MOTIONS

A. [11.41] Motion for Judgment as Matter of Law in Jury Trial (Formerly Motion for Directed Verdict)

The Federal Rules of Civil Procedure covering trial and posttrial motions were significantly revised in 1991, and earlier cases on this important subject may be out of date. Fed.R.Civ.P. 50 abandons the former “direction of verdict” for what is considered the more appropriate “judgment as a matter of law.” Advisory Committee Notes, 1991 Amendment, Subdivision (a), Fed.R.Civ.P. 50. Describing a motion by the old terminology is considered merely a formal error. *Id.* “Judgment as a matter of law” identifies both pre-verdict and post-verdict motions and avoids the incorrect implication given by the old terms that a motion made pursuant to Rule 50 acts as a waiver to the right to jury trial. In 1993, a “technical” amendment was made to Rule 50 to correct ambiguity in the 1991 revision. Advisory Committee Notes, 1993 Amendment, Fed.R.Civ.P. 50. The amendment clarifies “that judgments as a matter of law in jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.” *Id.*

Under the current rule, the court is authorized to enter judgment as a matter of law anytime during the trial as soon as it is apparent that either party is unable to carry a burden of proof on any fact essential to that party’s case. The Advisory Committee Notes caution that before the court enters judgment as a matter of law, a party should be apprised of the materiality of a dispositive fact and be afforded the opportunity to present any evidence bearing on that fact. Advisory Committee Notes, 1991 Amendment, Subdivision (a), Fed.R.Civ.P. 50.

Rule 50(a)(2) imposes the requirement that a moving party articulate the basis on which a judgment as a matter of law might be rendered. This assumes that the opposing party has an opportunity to cure any overlooked deficiency in its proof. *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003). This revision alters the result in cases in which courts used various techniques to avoid the requirement that a motion for directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict. *See, e.g., Benson v. Allphin*, 786 F.2d 268 (7th Cir.), *cert. denied*, 107 S.Ct. 172 (1986).

Fed.R.Civ.P. 16 facilitates the court’s authority under Rule 50 by encouraging the court to schedule first the presentation on an issue identified in the course of pretrial as likely to be dispositive. This can be useful when the court is uncertain whether to grant summary judgment under Fed.R.Civ.P. 56. The court can deny a motion for summary judgment while scheduling a separate trial of an issue under Fed.R.Civ.P. 42(b) or while scheduling a trial to begin with presentation on the essential fact that a party seems unlikely to be able to maintain.

Rule 16(b) was amended in 1993 with significant changes “to provide a more appropriate deadline for the initial scheduling order required by the rule.” Advisory Committee Notes, 1993 Amendment, Subdivision (b), Fed.R.Civ.P. 16. Rule 16(b) states that the order is to be entered within 90 days after the defendant first appears or within 120 days after service of the complaint. This addition of time is aimed at reducing problems in multi-defendant cases so that all defendants initially named in a lawsuit may participate.

Rule 16(c) was amended in 1993 to stress the opportunities for structuring trials under Rules 42, 50, and 52 and to erase any questions about the court's authority to make appropriate orders to promote settlement or to advance an efficient trial. Advisory Committee Notes, 1993 Amendment, Subdivision (c), Fed.R.Civ.P. 16.

The trial court is not bound to hear oral argument before reaching its decision on a pre-verdict motion for judgment as a matter of law. *Weir v. Chicago Plastering Institute*, 272 F.2d 883 (7th Cir. 1959). In addition, making a motion for judgment as a matter of law at the close of the opponent's case does not waive the right to present evidence to the jury if the motion is not granted. If the motion is granted, the court's order is effective without the formality of a submission to the jury. Fed.R.Civ.P. 50(a).

A timely Rule 50(b) motion is a jurisdictional prerequisite to appeal based on insufficiency of evidence. See *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 163 L.Ed.2d 974, 126 S.Ct. 980 (2006). In requesting a judgment as a matter of law, a party should present its grounds with sufficient particularity so that the court is fairly apprised of its position and, if a ruling is reserved, the opponent may enter proof on the specified grounds. Judgment as a matter of law is improper when the evidence is conflicting or is insufficient to support only one certain verdict. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); *Panter v. Marshall Field & Co.*, 486 F.Supp. 1168 (N.D.Ill. 1980), *aff'd*, 646 F.2d 271 (7th Cir. 1981).

There is a difference as to the result of a successful motion between a motion for judgment as a matter of law in a jury trial under Rule 50 and a motion for involuntary dismissal in a bench trial under Fed.R.Civ.P. 41(b). When a motion for judgment as a matter of law is granted, the result is always a judgment on the merits, but a dismissal under Rule 41(b) may be without prejudice if the court so specifies.

Is the sufficiency of the evidence to be weighed according to federal or state law? The Supreme Court in *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959), noted the issue and specifically refused to decide it. While some other circuits apply a federal standard in all cases, the Seventh Circuit procedure of reference to state law in diversity cases was adopted in *Wieloch v. Rogers Cartage Co.*, 290 F.2d 235 (7th Cir. 1961), and reaffirmed in *Illinois State Trust Co. v. Terminal Railroad Association of St. Louis*, 440 F.2d 497, 500 (7th Cir.), *cert. denied*, 92 S.Ct. 100 (1971):

[I]t is settled that in this circuit the applicable state standard applies. . . . It is undisputed that Illinois law governs this cause of action, and the Illinois standard for direction of verdicts has recently been clarified. As the Illinois Supreme Court stated in *Pedrick v. Peoria & E.R.R.*, 37 Ill.2d 494, 510, 229 N.E.2d 504, 513 – 514 (1967):

In our judgment verdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.

Our inquiry thus is directed to a determination of whether a verdict for plaintiffs based on the evidence stated above “viewed in its aspect most favorable to (plaintiffs) . . . could ever stand.” *Id.* [Citation omitted.]

See also Kuziw v. Lake Engineering Company, Division of Arlo Manufacturing Corp., 586 F.2d 33 (7th Cir. 1978).

A motion for judgment as a matter of law may be renewed no later than 28 days after entry of judgment or after the jury has been discharged if the motion addresses a jury issue not decided by the verdict. Fed.R.Civ.P. 50(b).

B. [11.42] Motion To Dismiss in Bench Trial

Fed.R.Civ.P. 52(c) parallels Fed.R.Civ.P. 50(a) but is applicable to nonjury trials. It authorizes the court to enter judgment at any time it can appropriately make a dispositive finding of fact on the evidence. As under former Fed.R.Civ.P. 41(b), the court retains discretion to not decide the motion and enter no judgment prior to the close of the evidence. Rule 52(c) allows the court to decline to render judgment until the close of all of the evidence.

As with Rule 50(a) motions in jury trials, making the motion does not waive the right to present evidence if the motion is denied. However, proceeding to present evidence does waive the right to argue on appeal that the motion was improperly denied. In effect, the appeal takes the case as it stands at the conclusion of the trial.

Rule 52(c) authorizes entry of judgment against the defendant as well as the plaintiff earlier than the close of the case of the party against whom judgment is rendered. A 1991 amendment deleted language in Rule 41(b) that had authorized its use as a means of terminating a bench trial on the merits when a plaintiff had failed to carry a burden of proof in presenting the case. Advisory Committee Notes, 1991 Amendment, Fed.R.Civ.P. 41. A motion to dismiss previously brought under Rule 41 on the ground that a plaintiff’s evidence is legally insufficient should now be treated as a motion for judgment on partial findings under Rule 52(c).

The standard for consideration of a motion to dismiss is not weighted for the opponent of the motion, and the rule set out in *Pedrick v. Peoria & Eastern R.R.*, 37 Ill.2d 494, 229 N.E.2d 504 (1967), discussed in §11.41 above, does not apply. Instead, the judge may decide the motion on an objective analysis of the evidence. *Patterson v. General Motors Corp.*, 631 F.2d 476 (7th Cir. 1980); *Allred v. Sasser*, 170 F.2d 233 (7th Cir. 1948). This approach in federal court is the same as that set out for Illinois courts in 735 ILCS 5/2-1110. Thus, unlike the *Pedrick* standard in a jury trial, when a defendant moves for a pre-verdict judgment as a matter of law in a bench trial, the court must consider all the evidence, including any favorable to the defendant. *Kokinis v. Kotrich*, 81 Ill.2d 151, 407 N.E.2d 43, 40 Ill.Dec. 812 (1980), as interpreted in *Weldon v. Hawkins*, 183 Ill.App.3d 525, 539 N.E.2d 229, 131 Ill.Dec. 876 (1st Dist. 1989).

Any judgment that is entered under Rule 52(c) must be accompanied by findings of fact and conclusions of law, as provided in Rule 52(a). If the losing party objects to the contents of the findings, he or she has 28 days to file a motion to amend, which may be joined with a motion for

a new trial under Fed.R.Civ.P. 59. For counsel preparing proposed findings in the Northern District of Illinois, former N.D.Ill. Civil Rule 13 has been replaced by “Guidelines for Proposed Findings of Fact and Conclusions of Law,” found in the Forms and Guidelines section of the local rules and available at www.ilnd.uscourts.gov.

A finding of fact made under Rule 52 cannot be set aside on appeal unless it is “clearly erroneous.” Fed.R.Civ.P. 52(a). For the Supreme Court’s view of the rule, see *United States v. United States Gypsum Co.*, 333 U.S. 364, 92 L.Ed. 746, 68 S.Ct. 525 (1948). Of course, the appellate court is perfectly free to revise the trial court’s conclusion of law. This has led to a rule that the appellate court may indeed reverse a finding of fact when it is based on an erroneous interpretation of the law. *Harris v Birmingham Board of Education*, 712 F.2d 1377 (11th Cir. 1983); *Cleo Syrup Corp. v. Coca-Cola Co.*, 139 F.2d 416 (8th Cir. 1943), *cert. denied*, 64 S.Ct. 638 (1944). In addition, mixed questions of law and fact are freely reviewable on appeal. *Muller v. Committee on Special Education of East Islip Union Free School District*, 145 F.3d 95 (2d Cir. 1998). Still, a major issue on appeal will be distinguishing between a finding of fact and a conclusion of law because mere fact-finding is sustained on appeal. For a discussion of those items treated as “findings of fact,” see 9 MOORE’S FEDERAL PRACTICE §52.31. The best tactic may be to denominate specific holdings as “findings of fact” or “conclusions of law” and hope that the appellate court will be duly impressed.

C. Posttrial Motions

1. [11.43] Time for Filing

The posttrial motion is the last opportunity for counsel to obtain additional relief to which the client may be entitled, ameliorate adverse action by the court, or at least prepare the record for appeal. The posttrial motion is now termed a “renewed motion for judgment as a matter of law” rather than a “motion for judgment notwithstanding the verdict.” Fed.R.Civ.P. 50(b).

There are two major differences between the federal and Illinois procedures for posttrial motions:

First, as the new term implies, the concept of the former Rule 50(b) is retained in that the post-verdict motion is a renewal of an earlier motion. Advisory Committee Notes, 1991 Amendment, Subdivision (b), Fed.R.Civ.P. 50. A posttrial motion for judgment can be granted only on grounds advanced in a pre-verdict motion. See *Freund v. Nycomed Amersham*, 347 F.3d 752 (9th Cir. 2003). See also Advisory Committee Notes, 2006 Amendment, Fed.R.Civ.P. 50.

Second, renewal of motion for judgment after trial or motion for a new trial may be made *only within 28 days* after entry of judgment (not 28 days after the jury verdict) or, if there was no verdict, within 28 days after the jury was discharged. Fed.R.Civ.P. 50(b). This 28-day period may not be extended by the court or by stipulation of the parties. Advisory Committee Notes, 2009 Amendments, Fed.R.Civ.P. 50. Fed.R.Civ.P. 59(e) provides that the 28-day time limit also applies to a motion to alter or amend the judgment.

Generally, when a party fails to make a post-verdict motion for a judgment as a matter of law, the party is barred from appealing the issue of the sufficiency of the evidence. In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 163 L.Ed.2d 974, 126 S.Ct. 980 (2006), the United States Supreme Court reversed a Tenth Circuit judgment granting a patentee a new trial. Although the patentee had made a motion for judgment as a matter of law under Rule 50(a) at the close of its rival's case, which was denied, it failed to renew the motion or seek a new trial under Rule 50(b) after the jury's verdict. The United States Supreme Court's decision reaffirms the rule that a party must file a post-verdict motion under Rule 50(b) prior to seeking appellate review of the sufficiency of the evidence presented at trial.

For contrast and details of Illinois posttrial motions, see Stephen C. Carlson and Elizabeth C. Curtin, Ch. 14, *Posttrial Motions*, ILLINOIS CIVIL PRACTICE: TRYING THE CASE (IICLE, 2009).

2. Grounds

a. [11.44] Judgment After Trial (Formerly Judgment Notwithstanding the Verdict)

Standards for granting a judgment as a matter of law are the same in both pre-verdict and post-verdict situations. *Kolb v. Chrysler Corp.*, 661 F.2d 1137 (7th Cir. 1981). In the Seventh Circuit, the state standard is followed in the federal court in diversity cases. *Wieloch v. Rogers Cartage Co.*, 290 F.2d 235 (7th Cir. 1961), and reaffirmed in *Illinois State Trust Co. v. Terminal Railroad Association of St. Louis*, 440 F.2d 497, 500 (7th Cir.), cert. denied, 92 S.Ct. 100 (1971). In Illinois, that standard is stated in *Pedrick v. Peoria & Eastern R.R.*, 37 Ill.2d 494, 229 N.E.2d 504 (1967).

Under the terms of Fed.R.Civ.P. 50(b), a motion may be granted for judgment after trial even if the judge has previously denied a motion for judgment as a matter of law without reserving judgment on it. If the trial judge decides that the evidence is insufficient to support the jury's verdict, Rule 50(b) leaves to the judge's discretion whether to enter judgment as a matter of law or to order a new trial.

b. [11.45] New Trial

Grounds for granting a motion for a new trial under Fed.R.Civ.P. 59 exist if the judge considers the verdict to be against the weight of the evidence, if the damages are excessive, or if prejudicial error has occurred. See *Shick v. Illinois Department of Human Services*, 307 F.3d 605, 611 (7th Cir. 2002); *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir. 2004). "Prejudicial error" includes every reason that the trial was not fair to the moving party. Some possible grounds include

1. irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which the losing party was prevented from having a fair trial (*Compare Crowe v. Di Manno*, 225 F.2d 652 (1st Cir. 1955) (vacating judgment for misconduct by trial judge), with *McClyman v. Hamilton*, 180 F.2d 965 (9th Cir. 1950)

- (holding that appellant received fair trial despite friction between court and counsel). An order preventing fair trial within the meaning of Rule 59 may include prejudicial and erroneous instruction, prejudicial and improper exclusion or admission of evidence, or improper denial of a jury trial.);
2. misconduct of the jury (*See Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 959 (1985) (holding that court will not grant new trial because of irregularities unattended by intentional wrong if complaining party sustains no injury from actions committed).);
 3. accident or surprise that ordinary prudence could not have prevented (However, surprise is not a legal ground for setting aside a jury verdict unless the party alleging surprise shows that its effect was to deprive him or her of a fair trial. *Jones v. Meat Packers Equipment Co.*, 723 F.2d 370 (4th Cir. 1983). Frequently, the court will find that a party's "surprise" could have been prevented by thorough preparation or by more extensive use of the available discovery procedures. In addition, a party may waive objection by not asking for recess or continuance at the time the surprise occurs. *See Exxon Corp. v. Exxene Corp.*, 696 F.2d 544 (7th Cir. 1982) (indicating that once conditions changed, counsel should have asked to reopen case for purpose of calling witnesses counsel did not originally expect to use).);
 4. newly discovered evidence, material for the party making the application, that could not with reasonable diligence have been discovered and produced at the trial (*See Contempo Metal Furniture Co. of California v. East Texas Motor Freight Lines, Inc.*, 661 F.2d 761 (9th Cir. 1981). Except for a clear abuse of discretion in granting or denying a motion for new trial on this ground, the trial court's order is not a ground for reversal. *County of Trinity v. Andrus*, 438 F.Supp. 1368 (E.D.Cal. 1977).);
 5. excessive or inadequate damages suggesting passion or prejudice (*See Otero v. Housing Authority of City of Bridgeport*, 263 F.Supp.2d 440 (D.Conn. 2003).);
 6. insufficiency of evidence, when the verdict is contrary to the clear weight of the evidence (*City Solutions Inc. v. Clear Channel Communications, Inc.*, 365 F.3d 835 (9th Cir. 2004).);
 7. error in law occurring at the trial (On proper motion or of its own volition, the trial court may set aside its judgment and grant a new trial because of newly discovered law. The court thus has an opportunity to correct error in its proceedings without subjecting parties to the expense of an appeal. *Henderson v. S.C. Loveland Co.*, 396 F.Supp. 658 (N.D.Fla. 1975).); or
 8. improper jury instructions (*Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888 (4th Cir. 1980).).

The motion for a new trial is not a substitute for active objections about adverse developments during a trial. The Seventh Circuit Court of Appeals has held that the plain error

doctrine is not available when a party has failed to object to opposing counsel's allegedly prejudicial closing arguments, when purported conflict of interest of counsel is in issue, or when a party has not objected to erroneous jury instructions. *Deppe v. Tripp*, 863 F.2d 1356 (7th Cir. 1988).

3. [11.46] Motion To Amend

A motion to amend the court's findings of fact in a nonjury case is not a prerequisite to a challenge to the sufficiency of the evidence on appeal. This motion may be made along with a motion for a new trial within 28 days of entry of judgment. Note, however, that clerical mistakes can be corrected even while the case is on appeal whether the case is jury or nonjury. Fed.R.Civ.P. 60(a). In addition, when a motion to alter or amend a judgment under Fed.R.Civ.P. 59(e) is filed more than 28 days after entry of judgment, it automatically becomes a Rule 60(b) motion. *See Talano v. Northwestern Medical Faculty Foundation, Inc.*, 273 F.3d 757, 762 (7th Cir. 2001).

A motion to amend the pleadings to conform to the evidence and raise such issues may be made by any party at any time, even after judgment. Fed.R.Civ.P. 15(b)(2). However, failure to so amend does not affect the result of the trial of these issues. If parties impliedly or expressly consent to the trial of issues not raised by the pleadings, the issues will be treated in all respects as if they had been raised in the pleadings. *Id.*

A party may move to amend the pleadings to conform to the evidence when the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings. Fed.R.Civ.P. 15(b)(1). The rule directs that this motion be granted freely, as long as there is no prejudice. However, "the liberality of the rule is no longer applicable once judgment has been entered. At that stage, it is Rules 59 and 60 that govern the opening of final judgments." *Ahmed v. Dragovich*, 297 F.3d 201, 207 – 208 (3d Cir. 2002). *See also Sparrow v. Heller*, 116 F.3d 204 (7th Cir. 1997).

Rule 15(c) makes amendment of pleadings effective as of the time of the original pleading. Rule 15(c)(1) makes clear that it does not preclude any relation back permitted under applicable state or federal limitations law. Thus, if the controlling limitations law affords a more lenient principle of relation back than provided in Rule 15(c), it should be available under Rule 15(c)(1) to save the claim. The rule is intended to produce results contrary to those reached in such cases as *Martin's Food & Liquor, Inc. v. United States Department of Agriculture*, 702 F.Supp. 215 (N.D.Ill. 1988). In that case, the court held that an amendment to the complaint could not relate back to the date of filing the original action when the complaint was served two days after the thirty-day period prescribed by the applicable statute had expired. The Advisory Committee considered use of Rule 15(c) to time bar a complaint in this manner "inconsistent with the liberal pleading practices secured by Rule 8" and further indicated that the 1991 amendment overruled the restrictive reading of Rule 15 that the Supreme Court earlier articulated in *Schiavone v. Fortune*, 477 U.S. 21, 91 L.Ed.2d 18, 106 S.Ct. 2379 (1986). Advisory Committee Notes, 1991 Amendment, Paragraph (c)(3), Fed.R.Civ.P. 15.

4. [11.47] Additur and Remittitur

Additur is unconstitutional in the federal system as a violation of the right to jury trial. *Dimick v. Schiedt*, 293 U.S. 474, 79 L.Ed. 603, 55 S.Ct. 296 (1935). Illinois law may allow additur in restricted circumstances. See *Yep Hong v. Williams*, 6 Ill.App.2d 456, 128 N.E.2d 655 (1st Dist. 1955); *Hladish v. Whitman*, 192 Ill.App.3d 561, 549 N.E.2d 5, 139 Ill.Dec. 682 (2d Dist. 1989).

Remittitur in the federal courts is governed by the common law, unlike in Illinois, which has a statutory provision, 735 ILCS 5/2-1205. In the Seventh Circuit, a plaintiff consenting to remittitur waives the right to appeal the reduced judgment and cannot, upon appeal by the opposite party, assert the validity of the original judgment and seek its reinstatement. *Ehret Co. v. Eaton, Yale & Towne, Inc.*, 523 F.2d 280 (7th Cir. 1975), *overruled on other grounds by Sunstream Jet Express, Inc. v. International Air Service Co.*, 734 F.2d 1258 (7th Cir. 1984); *Collum v. Butler*, 421 F.2d 1257 (7th Cir. 1970); *Rothschild v. Drake Hotel, Inc.*, 397 F.2d 419 (7th Cir. 1968). This restriction offers a successful plaintiff the less-than-satisfactory options of accepting remittitur with no appeal or facing a new trial, also with no appeal.

VI. JUDGMENT

A. [11.48] Entry

Entry of judgment is governed by Fed.R.Civ.P. 49, 54, 58, and 79(b), which should be read and applied together.

The court clerk shall prepare, sign, and enter a judgment “promptly” and without directions by the court when there has been a general jury verdict or a decision by the court awarding only costs or a sum certain or denying all relief. Fed.R.Civ.P. 58(b)(1). If the court grants other relief or there is a special verdict or a general jury verdict with special interrogatories, the court must approve the form of judgment before entry by the clerk. Fed.R.Civ.P. 58(a)(2). In cases involving multiple claims and parties, Rule 54(b) governs and provides for revision of orders on limited issues and parties before a complete final judgment, unless those orders contain “magic language” for immediate entry of a judgment. Rule 58(e) provides that a motion for attorneys’ fees will be considered timely if made in accordance with Rule 54(d)(2). See also N.D.Ill. Local Rule 54.3.

The judgment is entered when a notation is made in the civil docket as provided by Rule 79(a). After a general jury verdict in open court, the clerk usually enters the judgment without requiring any form from the prevailing attorney. Rule 54(a) forbids entry of a recital of the pleadings as entry of judgment.

Note the necessity of having a separate judgment entered pursuant to Rule 58. The general result of a court’s failure to enter judgment on a separate document is that the time for making motions under Fed.R.Civ.P. 50, 52, 54(d)(2)(B), and 59 and some motions under Fed.R.Civ.P. 60, as well as the time to appeal under Federal Rule of Appellate Procedure 4(a), does not begin to

run. The Seventh Circuit has ruled that entry of a minute order alone did not satisfy the requirements of Rule 58 even though it expressly granted the defendant's motion for summary judgment. *Rappaport v. United States*, 557 F.2d 605 (7th Cir. 1977).

In an effort to put a limit on the problem of when a judgment is entered and becomes final, Rule 58 was amended in 2002 to replace the definition of when a judgment is "effective" with a new provision, Rule 58(c), that defines the time when a judgment is entered. Advisory Committee Notes, 2002 Amendments, Fed.R.Civ.P. 58. In the cases in which a court and clerk fail to comply with Rule 58(a), the motion periods set by Rules 50, 52, 54(d)(2)(B), 59, and 60 now begin to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a). A companion amendment of Fed.R.App.P. 4(a)(7) integrates these changes with the time to appeal.

Rule 58(a) was also amended in 2002 to preserve the separate document requirement while exempting an order disposing of a motion. This does not excuse the obligation to set forth the judgment itself on a separate document, but it alleviates the problem of courts that treat orders, such as those that deny a motion for new trial, as a "judgment."

When a judgment in an action for the recovery of money or property has been entered in a district court and has become final by appeal or the expiration of time for appeal, the judgment may be registered in any other district by filing a certified copy. A judgment so registered has the same effect as a judgment of the district court of the district in which it is registered and may be enforced in the same manner. 28 U.S.C. §1963.

B. [11.49] Findings in Nonjury Cases

Note the necessity of findings in nonjury cases under Fed.R.Civ.P. 52, which is discussed in a different context in §11.42 above.

C. [11.50] Finality

"Judgment," as defined in Fed.R.Civ.P. 54(a), "includes a decree and any order from which an appeal lies." Generally, an appeal lies only from those orders and judgments that are "final." 28 U.S.C. §1291. A "final decision," according to the United States Supreme Court, is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 89 L.Ed. 911, 65 S.Ct. 631, 633 (1945).

There has, however, been some flexibility in applying the principle of "finality," which controls the meaning of "judgment." In *Forgay v. Conrad*, 47 U.S. (42 How.) 201, 12 L.Ed. 404 (1848), and similar cases, the Supreme Court has held that an order directing immediate delivery of physical property is final and thus reviewable even though a provision for a subsequent accounting is contained in the same order. See *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 89 L.Ed. 569, 65 S.Ct. 1475 (1945). The Supreme Court has held final those orders that are "collateral" in the sense that they constitute a "final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L.Ed. 1528, 69 S.Ct. 1221, 1226 (1949) (order denying

motion to compel plaintiff to post security for costs and expenses unanimously held appealable). The Seventh Circuit Court of Appeals has recognized a different interpretation of the requirement of “collateralness,” stating that the *Cohen* test was incomplete because of its failure to compare the irreparable harm of the denial of an immediate appeal with the irreparable harm if the appeal were allowed. *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 2180 (1987).

Some orders are appealable, although they are not final within the meaning of 28 U.S.C. §1291. *See Thomson McKinnon Securities, Inc. v. Salter*, 873 F.2d 1397 (11th Cir. 1989). For example, the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, provides that some orders concerning requests to compel arbitration are appealable. *See also Gilliland v. Lyons*, 278 F.2d 56 (9th Cir. 1960), on the circumstances under which an order granting a new trial is final and appealable.

Perhaps the most significant exception to the traditional concept of finality is contained in Rule 54(b). Under this provision, when more than one claim for relief is presented in an action or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties after an express determination that there is no reason for delay. Fed.R.Civ.P. 54(b). In *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 100 L.Ed. 1297, 76 S.Ct. 895, 899 (1956), the Supreme Court made a comprehensive analysis of Rule 54(b) and upheld its validity as providing “a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on *all* the claims in the case.” [Emphasis added.] A comparable provision is made applicable to state practice by S.Ct. Rule 304.

D. [11.51] Staying Enforcement of Judgment

Enforcement of the judgment is stayed during the pendency of motions made pursuant to Fed.R.Civ.P. 50 and 59. In addition, the timely filing of a Fed.R.Civ.P. 52(b) motion after judgment will stay enforcement of the judgment and toll the time for appeal until the motion is ruled upon. *See* Fed.R.Civ.P. 62(b), 62(f); Fed.R.App.P. 4(a)(4)(ii). Rule 62(b) permits the court to require security.



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