

Federal Court – You Need Not Be Afraid of the Big Bad Wolf

By Rose Gutierrez

For many years, just hearing the words, “federal court” immediately conjured images in my mind of the Big, Bad Wolf, from the popular children’s tales, The Three Little Pigs and Little Red Riding Hood. I imagined it to have *big* sharp teeth, *long* claws, *big* scary eyes and ears and I was certain that it would huff and puff and blow my house down right before it ate me alive in one gulp.

The truth is that federal court and federal procedure are quite different from state court and civil procedure and it can eat you alive, if you let it. Let’s be honest, federal court is a scary place if you aren’t familiar with it. Federal judges are procedure and rule heavy, whereas state court judges tend to be a bit more relaxed. Managing cases in federal court means familiarizing yourself with the Federal Rules of Civil Procedure (F.R.C.P.) in addition to any Local District Rules (you can think of these as County rules in State Court) and any “Local, Local” Department Rules that supplement or modify each. I cannot emphasize enough how critical it is that you familiarize yourself with each judge’s specific department

rules to see if they have any standing orders or document templates that they require and to get a general sense of your judge’s procedures. Depending on your defendant, trials are either by jury or by bench and can occur without any live direct testimony, you may need to do direct examination via declaration. Another huge and frightening difference between state and federal court is that there is no challenging your appointed judge, i.e., there is no CCP 170.6 equivalent in federal court. Once your case is filed, you will be assigned a district judge and a magistrate judge in charge of hearing any discovery disputes, period.

Are you scared yet? This is only the tip of the iceberg. But don’t be alarmed, if you take the time to build your house of brick you will find that federal court is more of a snuggly puppy than a wolf. So let’s start building by first looking at how federal court operates, followed by the lawsuit initiating process and then looking at few tips for management of the matter once there.

Federal Court System and Its Jurisdiction

The United States Courts consist of the Supreme Court, Court of Appeals, District Court and Bankruptcy Court. For this article, we are going to focus our attention on the District Courts.

There are 94 district or trial courts and at least one district court in each state. In California we have four district courts:

1. Central District which includes Los Angeles (Western Division), Santa Ana (Southern Division), and Riverside (Eastern Division) (www.cacd.uscourts.gov);

2. Eastern District which includes Sacramento and Fresno (www.caed.uscourts.gov);
3. Northern District which includes San Francisco, Oakland, San Jose and Eureka (www.cand.uscourts.gov); and
4. Southern District which includes San Diego (www.casd.uscourts.gov).

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Cases heard in federal court arise from either a federal question involving the United States Government, the U.S. Constitution, or other federal laws or they involve diversity of citizenship (disputes between two parties not from the same state or country, and where the claim meets a set dollar threshold for damages). Because my office specializes in medical malpractice, we most often end up in federal court because we are suing a federally funded clinic or hospital, thus suing the US Government or United States of America. In addition to civil cases, the federal court also hears criminal cases involving violations of federal law and it hears all matters dealing with bankruptcy.

Because district courts operate nationwide, they all have an identical case management/filing system (CM/ECF) and once you familiarize yourself with one, you will be able to figure out another with very little trouble.



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CM/ECF and PACER Are NOT the Same

CM/ECF and PACER are not the same though they are related. CM/ECF is the Court Management/Electronic Court Filing system used nationwide to file documents in the district courts. It is available 24 hours a day, 7 days a week. Most commonly, documents are deemed filed on any day so long as they are uploaded to CM/ECF by 11:59 pm. Some judges have earlier filing deadlines so again, it is crucial that you check your department's rules. PACER is the Public Access to Court Electronic Records docket system used to maintain *all* files making them available to anyone with an account. Through PACER, you can search and locate appellate, district, and bankruptcy court case and docket information.

Now here is where it can get a little tricky, the wolf bears its teeth a little, in order to file documents in the CM/ECF system users are required to have a PACER account but you do not need a CM/ECF account to access PACER. If you think about the purpose that each system serves, it makes sense. Suppose you want to locate a particular case within the court system, you aren't sure where it's venued and all you want to do is find it and look at the docket. In that instance, I would access my PACER account to locate the case. You don't need a

CM/ECF if you are not filing documents into a case.

Additional Requirements to Use CM/ECF

In addition to having a PACER account which is linked to your CM/ECF account, your attorney must be granted permission (referred to as Admission to the Bar) by each district court to file documents within that district, and of course, each court has its own requirements to do so. I should emphasize at this point that each attorney who plans on filing documents via CM/ECF is required to have their own PACER/CM/ECF account. As legal staff, you do not create your own account as you would in state court through your electronic service provider. Instead, when you file documents, you will log in to the system using your attorney's credentials.

No doubt by now you've already begun to see more differences between state and federal courts, beginning with jurisdiction down to filing documents. Let's now turn our attention to the steps involved in initiating an action, specifically against the US Government.

Federal Tort Claims Act (FTCA)

The Federal Tort Claims Act, is a 1946 federal law that allows private parties to sue the United States and obtain monetary

compensation for injuries/death caused by federal employees acting within the scope of their employment. In the same way that you must submit a claim prior to filing a complaint against a state or county governmental entity in state court, you *must* submit an administrative claim to the appropriate federal agency before filing your complaint. This claim must be filed within two years of the incident. It is imperative that you exhaust your administrative remedies before filing your complaint in court or you risk dismissal of your action. Another key factor

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to consider is that there is no vehicle in federal court for the filing of a late claim like there is in state court. An FTCA claim generally accrues when the incident occurs whether or not the full extent of the injury is appreciated. State/county claims tend to start the accrual clock when the injury is discovered or when the responsible party is known. This is an important detail to consider and continuously bring to your attorney's attention when deciding the statute of limitations of a case involving a federal entity.

SF-95

The SF-95 is the claim form used to submit a claim against the US Government. Completed claims must be sent to the proper federal department or agency. It is imperative that you do your research to locate the proper location to file your claim. A claim against a federally funded clinic for example (which again is what my office does most often) would be sent to the US Department of Health & Human Service-Office General Counsel, General Law Division-Claims and Employment Law Branch, 330 C Street, SW, Switzer Building, Suite 2600, Washington, DC 20201. A claim against a Naval Hospital, however, would require service on the Navy.

Once your claim is received by the proper department or agency, it has six months from the date of receipt of the claim to deny it. The agency must advise you (the claimant) of its denial in writing and send that denial via certified or registered mail within that six-month period. If there is no denial within that time frame, the claimant may consider the claim denied and may file the complaint any time thereafter. (28 U.S.C. §2675).

If the claim is denied in writing and sent via certified or registered mail, the claimant has six months from the date of rejection in which to file the complaint. (28 U.S.C. § 2401(b)). It's worth mentioning that if there is no written denial, there is no outside limit of time for filing the Complaint, "any time thereafter" really means any time thereafter. (*Parker v. USA*, 935 F.2d 176.)

If, however, the federal agency sends a denial letter after six months (say, in the eighth month), the plaintiff has six months to file suit. In other words, just because the claim was "deemed" denied does not mean the SOL is open indefinitely. The agency can close the door, even after six months, by sending an actual denial. (*Lehman v. United States*, 154 F.3d 1010, 1015 (9th Cir. 1998).)

Filing the Complaint

Each district will have its own rules and requirements for filing, so you need to be sure to check the district rules in advance. In general, however, your complaint should include statements describing the

grounds for the court's jurisdiction (unless the court already has jurisdiction); the claim(s); and the demand for the relief sought [FRCP Rule 8]. Remember that if your plaintiff is a minor, you should identify them using only their initials [FRCP 5.2]. As in any typical state court filing, the filing of a complaint in federal court requires the concurrent filing of several court forms, namely:

1. Notice of Interested Parties [Form CV-30] or Corporate disclosure statement, if required [FRCP, Rule 7.1];
2. Civil cover sheet, if required by the court's local rules. [Form CV-71 (Central District)];
3. Summons in a Civil Action [Form AO 440]
4. Guardian Ad Litem Application and Proposed Order (for a minor or incompetent person). Note that there is no standard form for the Guardian ad Litem Application like there is in state court. You will need to prepare a pleading, making sure to redact any sensitive information including dates of birth. Once filed and in the future, you will need to submit your proposed order to the department in a word processing format and there is actually a tab in the CM/ECF for submission of proposed orders.

The filing fee for the complaint will be automatically billed through your attorney's PACER account.

One of the advantages of filing through the CM/ECF is that you will immediately receive a conformed copy of your document along with a Notice of Electronic Filing emailed to you. Through your attorney's account, you can list as many emails as you would like to receive notice thus ensuring that all members of your team are aware of the filing.

Soon after the court receives and processes your filing, it will issue your summons, assuming there are no deficiencies, and it will send notice of the District Judge as well as the Magistrate Judge assigned to your case. Depending on your judge, you may also receive a copy of their standing order. I would suggest at that point you access your district and magistrate judges' webpages and download any additional rules/orders they may have available online. The district webpage as well as your particular judges' webpages are chalk full of information that will make managing

your case much easier including calendar, detailed law and motion procedures, document templates and clerk contact information.

Service of the Complaint on USA

Serving the complaint on the United States of America while not hard is tricky and some things to keep in mind are as follows:

1. A plaintiff may not request the United States to waive service of process. (FRCP 4(d)(1); *Tuke v. United States* (7th Cir. 1996) 76 F.3d 155, 156; see 15:92.)
2. Proper service requires personal delivery to the U.S. Attorney for the district where the action is brought (or to an Assistant U.S. Attorney or clerical employee designated by the U.S. Attorney in a writing filed with the court clerk; or by registered or certified mail addressed to the civil process clerk at the U.S. Attorney's office) as well as registered or certified mail to the Attorney General of the United States in Washington, D.C.;
3. In actions attacking an order made by an officer or agency of the U.S. who is not a party to the action, service is effectuated by registered or certified mail to that officer or agency. (FRCP 4(i)(1); *Prisco v. Frank* (11th Cir. 1991) 929 F.2d 603, 604; (*Lepone-Dempsey v. Carroll County Commr.* (11th Cir. 2007) 476 F.3d 1277, 1281); see *Whale v. United States* (9th Cir. 1986) 792 F.2d 951, 953-954.)

In general, whether you are serving the US Government or another defendant, you have 90 days from the date of filing to serve and file your proof of service with the court. (FRCP 4(m).) If you cannot meet this deadline, the court may dismiss the case unless you can show "good cause" for the delay, in which case the court can grant an extension.

Next Steps

Once your complaint has been served, depending on your defendant, you can expect to receive a responsive pleading within 60 days after service when serving the United States or a United States agency, or an officer or employee of the United States described in FRCP 12 (a)(2)

or (3) or within 21 days after service on a non-USA defendant.

While it would be impossible to go over every subsequent step following service of your complaint, I do want to highlight several:

1. Initial Scheduling Conference – Your assigned judge will set your matter for an Initial Scheduling Conference. The court must issue a Scheduling Order within 90 days after defendant was served or 60 days after any defendant has appeared. (FRCP 16(b)(2).)

2. Parties must participate in an Early Meeting of Counsel to discuss a discovery plan and pre-trial deadlines 21 days before the Initial Scheduling Conference (FRCP 26(f)(1).)

3. Parties must jointly file a Rule 26(f) Report outlining the discovery plan and proposed pre-trial deadlines 14 days after the early meeting of counsel. (FRCP 26(f)(2).) I like to take a proactive approach when scheduling the Early Meeting of Counsel and will always prepare a draft of the Rule 26(f)

report to circulate to opposing counsel prior to the meeting so that it can be finalized during the meeting.

4. Discovery requests may only be served *after* the Early Meeting of Counsel under Rule 26(f). (FRCP 26(d)(1).) Be sure to bring this to your attorney's attention, especially if you are working with an attorney who is new to federal procedure.

5. Initial Disclosures are *mandatory* and unlike state court, you have an ongoing duty to disclose. Typically, a party must make the initial disclosures at or within 14 days after the early meeting of counsel unless a different time is set by stipulation or court order. Get used to the idea that you *must* supplement your disclosure statement with any new information involving witnesses, documents, or computation of damages. Be sure to review and familiarize yourself with FRC 26(a)(1)(C).

6. In most instances, your judge will likely vacate your Initial Scheduling Conference and will issue a Rule 16 (FRCP) Scheduling Order based on the joint report of early meeting filed. This order will include (1) Fact Discovery cut-off, (2) expert witness deadlines, (3) motion deadlines, (4) pretrial disclosure deadlines and (5) trial date. Note that this is quite different from state court where your deadlines are set by court rule or statute and are based on your trial date.

Closing Thoughts

Federal court can be a bit daunting at first, especially if you do not take the time to research the rules. What I have found is that the more you practice and the more you familiarize yourself with the process and the rules, federal court cases are sometimes easier to manage than state court cases. There is no “hiding the ball” or “gamesmanship” like that which is unfortunately quite prevalent in state court. I will add that I was in my 22nd year of my career before I ever handled my first federal court case, so trust me when I say, you need not be afraid of the Big, Bad, Wolf.

Suggested Reading:

www.uscourts.gov/file/understanding-federal-court.pdf

FRCP 4, 5, 8, 16, 26