

FEDERAL CIVIL RULES HANDBOOK

2011

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FEDERAL CIVIL RULES HANDBOOK

2011

By

STEVEN BAICKER-McKEE

Babst, Calland, Clements & Zomnir, P.C.

WILLIAM M. JANSSEN

Assistant Professor of Law

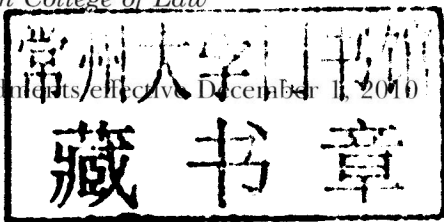
Charleston School of Law

JOHN B. CORR

Professor of Law, American University

Washington College of Law

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PREFACE TO THE 2011 HANDBOOK

Another season of substantial federal civil procedural change is upon us. Arriving this December 1, 2010 are the significant Rule 26 changes to disclosure and discovery of expert witnesses, the top-to-bottom retooling of federal summary judgment practice under Rule 56, and the tracking of the continuing interpretation and application of (a) the electronic discovery amendments from 2006, (b) the e-government amendments from 2007, (c) the “restyling” of the Federal Rules of Civil Procedure from 2009, (d) the recasting of all federal time periods with the Time Computation Amendments from 2010, and (e) the “plausibility” pleading regime announced by the Supreme Court in its 2007 *Bell Atlantic Corp. v. Twombly* decision and in its 2009 *Ashcroft v. Iqbal* decision. A mighty era of tumult and change, by any measure.

Once again, this edition of the *Federal Civil Rules Handbook* is designed to keep you current on each of these fundamental revisions to federal civil practice in a simple, easy-to-find.

What’s New in the 2011 Edition:

● **New Expert Disclosure and Discovery Rules** — New Rule 26(b)(4)(B) now protects draft expert reports from disclosure as trial preparation material. New Rule 26(b)(4)(C) broadens the trial-preparation-material protection for communications between counsel and expert witnesses unless the communications pertain to expert compensation, or to facts, data, or assumptions provided by counsel which the experts considered in forming their opinions. Revised Rule 26(a)(2)(C) requires that, for testifying experts who are not specially retained, parties must now disclose the subject matter of their expected testimony and a summary of the facts and opinions on which they are expected to testify.

● **New Federal Summary Judgment Rule** — Nearly every portion of Rule 56 has been rebuilt. Practitioners will find familiar procedures in unfamiliar places, some former procedures omitted entirely, and several new procedures added. Although the summary judgment standard remains essentially unchanged (*i.e.*, no genuine dispute as to any material fact and entitled to judgment as a matter of law), the revised Rule 56 now: (a) strikes the verb “should” and restores the verb “shall” to the summary judgment command, (b) verifies that parties moving for or opposing summary judgment have a duty of “factual support” and then sets out the manner in which that duty may be discharged, (c) approves summary judgment declarations, as well as affidavits, in introducing that support, (d) permits objections to improper support, (e) elaborates on the district judge’s discretion when positions lack the required support, (f) verifies that motions can be filed immediately, without waiting for discovery, (g) deletes last year’s national “default” time periods for summary judgment opposition and reply briefs, (h) confirms that district judges need only consider the formal summary judgment record in their rulings, (i)

explicitly allows “partial” summary judgments, (j) codifies the court’s right to enter judgment in favor of the *non-moving* party, on grounds not requested by the moving party, and *sua sponte*, (k) emphasizes the trial judge’s discretion in treating facts as established for purposes of trial, (l) requires trial courts to explain the reasons for their Rule 56 rulings, and (m) expands the available sanctions for bad faith summary judgment affidavits and declarations, and confirms that such sanctions are discretionary, not mandatory.

● **Time Computation Project (2009)** —The popular “Time Computation Project” summary remains in Part III-A, and new commentary tracking those amendments is included.

● **“Restyling” (2007)**—Updated case opinions discussing the impact of “restyling” is included.

● **E-Discovery (2006) and E-Government Privacy (2007)** —New commentary and case opinions discusses these two major additions to the Rules.

● **“Plausibility” Pleading after *Twombly* and *Iqbal***— The continuing judicial efforts to understand and apply the new “plausibility” test to federal pleading is tracked in commentary in Rules 8, 9, and 12.

● **Nearly 1,400 New Citations:**— The size of significant new citations continues at peak levels. This edition contains nearly 1,400 *new citations*, most to interpretative decisions from the Nation’s federal courts decided between Fall 2009 and late Summer 2010.

Though the cyclone of change may encircle federal civil procedure at the moment, our *Handbook’s* format remains unchanged. Each Rule discussion begins with the Rule text (current as of December 1, 2010), followed immediately by our *Authors’ Commentary* to the Rule and its subparts. Our Commentary distills each Rule’s “Purpose and Scope”, summarizes the “Core Concept” of each Rule’s subsections, and follows with discussion of the Rule in application, including citations to case authorities from the Supreme Court, the Courts of Appeals, and District Courts. The *Handbook* includes a complete set of all of the Advisory Committee Notes to the Rules, from the first Notes to the original 1937 Rules through the Notes accompanying the 2010 amendments. Our introduction to the Advisory Committee Notes explains the legal authority of this quasi “legislative history”. The *Handbook* includes an introduction to general concepts in federal practice, and as well as an authors’ introduction to federal multidistrict litigation (MDL) and appellate practice. Often-consulted sections of the federal Judiciary Code, Title 28, are also supplied. Other handy tools, including Civil Rule and Appellate Rule forms, the Federal Rules of Evidence, the addresses and telephone numbers for all the federal courts, a schedule of all federal judges, a Circuit map, and a perpetual calendar, also appear in this *Handbook*.

We thank you, again, for your continued patronage of the *Federal Civil Rules Handbook*, and we warmly encourage your comments and suggestions. Each edition has been improved by recommendations offered by our readers, and we welcome them enthusiastically.

PREFACE

Your vigilance helps us keep the *Handbook* a current, useful, and responsive resource for the Bench and Bar. Thank you!

THE AUTHORS

November, 2010

THE AUTHORS

STEVEN BAICKER-MCKEE is a litigation shareholder and member of the Board of Directors at Babst, Calland, Clements and Zomnir in Pittsburgh, Pennsylvania. His practice includes a wide variety of commercial litigation, with an emphasis on environmental and toxic torts, and complex commercial disputes. He has been recognized as one of the Outstanding Lawyers of America. He has also taught as a Visiting Professor at the University of Toledo and as an Adjunct Professor at the University of Pittsburgh.

Mr. Baicker-McKee received his B.A. from Yale University, then spent the next several years building fine furniture and custom cabinets in Charlottesville, Virginia before attending law school. Mr. Baicker-McKee received his J.D. from Marshall-Wythe School of Law, College of William and Mary, where he was on the Board of Editors of the *William and Mary Law Review*. He served a two-year clerkship with the Honorable Glenn E. Mencer of the United States District Court for the Western District of Pennsylvania, to whom he is forever indebted. Mr. Baicker-McKee's tenure as Judge Mencer's law clerk provided the inspiration for this book.

Mr. Baicker-McKee resides in Pittsburgh, Pennsylvania with his wife, Carol, and their three children, Kyle, Eric, and Sara. Their love and support were instrumental in the development of this book. Mr. Baicker-McKee is also grateful for the support of his parents, Joe and Macky Baicker.

JOHN B. CORR is a Professor of Law at the American University, Washington College of Law, in Washington, D.C. As a specialist in civil procedure, conflict of laws, and bankruptcy, he has advised and consulted with private practitioners in a variety of litigation matters. The author of articles dealing with civil procedure and/or conflicts in a number of journals, Mr. Corr has also received numerous "outstanding professor" awards, based on student ballots.

As a member of the New York and District of Columbia Bars, Mr. Corr practiced in the litigation department of the Washington office of Fried, Frank, Harris, Shriver & Kampelman before he began a career in legal education.

Mr. Corr graduated from the Georgetown University Law Center, where he was an editor of the Georgetown Law Journal. Before receiving his J.D. degree, Mr. Corr earned M.A. and Ph.D. degrees in history. He also served for two years in the U.S. Army as a captain in military intelligence.

WILLIAM M. JANSSEN is an Assistant Professor of Law at the Charleston School of Law in Charleston, South Carolina. Mr. Janssen teaches courses in civil procedure, products liability, and first amendment law. He has twice been honored by the students of the law school as "Professor of the Year." Before his appointment to the faculty in

Charleston, Mr. Janssen was a litigation partner, the Chair of Life Sciences Practices, and a member of the Executive Committee at the Midatlantic law firm of Saul Ewing LLP, with whom he practiced for almost seventeen years. Mr. Janssen helped design and implement Saul Ewing's nationally recognized "We're All In!" pro bono initiative. He focused his private practice in pharmaceutical and medical device risk management and litigation. Mr. Janssen is a member of the International Association of Defense Counsel and its Drug, Device, & Biotech committee, and the Food and Drug Law Institute. He is admitted to practice law in the federal and State courts of Pennsylvania, the Federal Circuit, the Third Circuit, the Fourth Circuit, and the United States Supreme Court, and has practiced pro hac vice in various other jurisdictions. For five academic terms, Mr. Janssen served as an Adjunct Instructor at the Temple University School of Law.

Mr. Janssen graduated from Saint Joseph's University in Philadelphia and The American University, Washington College of Law, in Washington, D.C. He served as Executive Editor of the American University Law Review and as a member of the Moot Court Board. After law school, Mr. Janssen clerked for the Honorable James McGirr Kelly, on the United States District Court for the Eastern District of Pennsylvania, and for the Honorable Joseph F. Weis, Jr., on the United States Court of Appeals for the Third Circuit.

Mr. Janssen thanks his family and friends for teaching him that you have not truly lived until you've answered, for the thousandth time: "No, we're still not done with that book yet." Mr. Janssen dedicates this effort to his parents, Bill and Catherine, and to TMcP.

The authors welcome any comments, suggestions, or constructive criticisms of this book. Their telephone and telefax numbers and email addresses are provided below.

Steven Baicker-McKee
(412) 394-5499
(412) 394-6576 (fax)
sbaicker@bccz.com (email)

John B. Corr
(202) 274-4208
(202) 274-4130 (fax)
jbcorr@cox.net (email)

William M. Janssen
(843) 377-2442
(843) 853-2519 (fax)
wjanssen@charlestonlaw.edu (email)

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