"HOW TO WIN A CASE FROM A JUDGE'S PERSPECTIVE"

THE WAGSTAFFE GROUP

& FEDERAL BAR ASSOCIATION

1. INTRODUCTORY OBSERVATIONS

- Federal practice can be idiosyncratic – single-judge assignments, the arcane nature of federal rules and local, local rules, highly accountable case management, and supervised discovery. ***The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*** **now provides expert insights and step-by-step guidance to help you practice confidently and efficiently before your federal judge.**

- Federal judges develop individual practices, publish prior case decisions, jealously guard subject matter jurisdiction, maintain options to coordinate or transfer cases within a national court system, and have the benefit of bright law clerks and staff.

- There is a perception – justified or not – that federal judges are more amenable to "home run" motions that can dispose or strongly direct the resolution of a case. With individual assignment (as compare with master calendars utilized in many state courts), the judge may be more motivated to "move the case along" or "hit the case out of the park" by granting or seriously considering such motions.

- Our program today will address "home run" motions such as:

    - Jurisdictional motions to dismiss or remand (TWG Ch. 5-8),

    - *Twombly/Iqbal* pleadings attacks (TWG Ch. 23-24),

    - Case-affecting rulings on discovery and work product (TWG Ch. 34),

    - Class certification rulings and concepts of ascertainability (TWG 32), and

    - The base-clearing rulings on summary judgment (TWG Ch. 43).

- We will do our best to keep you apprised of the most-recent case and statutory law on these topics, while providing the perspectives of multiple federal judges.

- The mantra for our "be the judge" program perspective is a simple A-B-C: audience before content. Great lawyers learn to tailor their cases to the individual

judge and to present their cases in a way they can win from the Judge's perspective.

2. RESOURCES FOR LEARNING ABOUT YOUR JUDGE

- ***Utilize Online and Other Judicial Profiling Resources***

- ***Review and Analyze Prior Decisions***

- ***Talk to People Who Know***

- ***Check Judge's Standing Orders and "Local, Local" Rules***

- ***Other reference matters***: The Wagstaffe Group is making available for this program the following additional written materials:

    - ***A sample questionnaire to learn all about your assigned Judge's individual practices and procedures***

    - ***A sample questionnaire posing questions to learn a Judge's practices and procedures for handling TROs and Preliminary Injunctions.***

- *A practical guide to Twombly/Iqabal issues and their application as revealed in the most up-to-date case law.*

3. IMPORTANT PRELIMINARY STEPS UPON FILING TO ENSURE CASE IS WELL POSITIONED FOR SUCCESS IN FEDERAL COURT

- **Familiarize yourself with the local rules and standing orders.**

- ***Local Rules and General Orders.***

- ***Court Forms and Website Information.***

- **Requirements for admission to the district court bar. [***Frazier v. Heebe*, 482 U.S. 641, 645 (1987); TWG 1.40]

- **Research the function of magistrate judges in your court and determine whether to consent to magistrate judge assignment.** [28 U.S.C. § 636; see Fed. R. Civ. P. 73; TWG 1.9-11]

- **Get to know chambers staff and communicate with staff when appropriate.** [TWG 1.18-20]

4. **GENERAL MOTION TIPS:** [TWG Chapter 39]

   - ***Pre-Motion Conferences.*** [TWG 39.2]

   - ***Compliance with local rules.*****[** TWG 39.26; *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1131 (9th Cir. 2012); *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983); *Laboy v. Ontario Cty., N.Y.*, 56 F. Supp. 3d 255, 259 (W.D. N.Y. 2014)]

   - ***Notice of motion must specify relief sought.*** **[**TWG 39.46; Fed. R. Civ. P. 7(b)(1)(C); *Monforton v.United States*, 1995 U.S. App. LEXIS 14656, at *2–*3 (9th Cir. 1995)]

   - ***Supporting declarations and affidavits.*** **[**TWG 39.62]

   - ***Reply.*** [TWG 39.123; Fed. R. Civ. P. 78]

   - ***Oral argument.*** [TWG 39.131; Fed. R. Civ. P. 78]

5. HYPOTHETICAL - HOME RUN MOTIONS – JURISDICTION & VENUE

In 2014, Johnny Fontana was called as the prosecution's star witness in the New York federal racketeering prosecution of alleged crime boss Greeny Gambino. Fontana, who had been given immunity by the prosecution, testified extensively as a former insider about Gambino's underworld activities and irregular bookkeeping. As an inducement to testify, the prosecutors promised Fontana and his wife new identities under the Federal Witness Protection Program. The trial was a media circus and resulted in Gambino's conviction on all counts.

After the trial, the Fontanas were relocated, at least for the time being, to Roanoke, Virginia and given new identities as Peter and Mary Normale. They started working as temps for small Roanoke accounting firms. They have two children in local public schools.

Lucy Blotter is a local newspaper reporter for the *New York Daily News* covering the police beat. She also writes a monthly local police neighborhood watch blog called "Blotter's Blotter" (with a link to it on the newspaper's website). She attended the Gambino trial and has always had an abiding interest in what became of Fontana.

One day early in 2017, Blotter receives a confidential call from a long-time NYPD source, Michael Ness, who tells her he learned from an FBI friend that Peter had plastic surgery and that he "is pretty sure the Fontanas are presently located in Roanoke, Virginia under a more 'normal' name." Taking the hint, Blotter goes online to check the names of employees of accounting firms in Roanoke with the "Normal" name and finds that Peter and Mary Normale are Roanoke-based accountants who moved there a few years ago from New York City.

On February 14, 2017, Blotter posts the following on her blog: "It's been quite the mystery. What became of Johnny Fontana? It's no longer a mystery because based on confidential information from a local police source, I have deduced that Fontana and his wife are living quietly in Roanoke, Virginia as Peter and Mary Normale. I guess their Virginia neighbors and their kids at the local junior high will be surprised to learn they are not so normal after all."

A few days later, one of the Fontana's neighbors tells Mary about the blog and expresses shock at such a revelation. After consulting attorneys, the Normales decide to bring a lawsuit in the Virginia state court for invasion of privacy against Blotter, the *New York Daily News* and Does I-X., seeking damages "in an unspecified amount to be proved at trial."

The *New York Daily News* is owned by Daily News, L.P., with its headquarters in New York City and with member owners from the State of New York. After service on the defendants, they remove the action to the United States District Court for the Western District of Virginia.

[Compare *Capra v. Thoroughbred Racing Ass'n ,* 787 F.2d 463 (9th Cir. 1986); *Bergmann v. United States,* 689 F.2d 789 (8th Cir. 1982); *Miller v. United States,* 561 F.Supp. 1129 (E.D. Penn. 1983)]

A. Does diversity of citizenship exist to support removal of the action to federal court to the Western District of Virginia under the court's diversity jurisdiction?

[28 USC §1332; TWG 7-III; TWG 8.229; *Central West Virginia Energy Co. v. Mountain State Carbon, LLC*, 636 F.3d 101 (4th Cir. 2011); *CostCommand, LLC v. WH Administrators,* 830 F.3d 19 (D.C. Cir. 2016); *Lopes v. JetsetDC, LLC,* 994 F.Supp.2d 135 (D. D.C. 2014); *Carolina Cas. Ins. Co. v. Team Equipment, Inc.,* 741 F3d 1082 (9th Cir. 2014); *Aponte-Davila v. Municipality of Caguas,* 828 F.3d 40, 48 (1st Cir. 2016); *Liu v. 88 Harborview Realty, LLC,* 5 F.Supp.2d 443 (S.D. N.Y. 2014); *Middleton v. Stephenson* (10th Cir. 2014) 749 F.3d 1197; *Siloam Springs Hotel, LLC v. Century Sur. Co.,* 781 F.3d 1233(10th Cir. 2015); *D.B. Swirn Special Opportunities Fund, L.P.,* 661 F3d 1 (1st Cir. 2011); *Americold Realty Trust v. ConAgra Foods, Inc.,*136 S.Ct. 1012 (2016); *RTP LLC v. ORIX Real Estate Capital,* 827 F.3d 689 (7th Cir. 2016); *Dart Cherokee Basin Operating Co., LLC v. Owens,*134 S.Ct. 1788 (2014)]

ANSWER:

B. Can the action be removed on diversity grounds even though the state court complaint does not set forth the amount in controversy?

[28 USC § 1446(c)(2); TWG 8.323]

ANSWER:

C. Change the facts: The defendants choose not to remove and wait to remove until Plaintiffs answer an interrogatory in the state court action regarding damages and disclose they are seeking in excess of $75,000.00. Can defendants remove the action within thirty days of receiving the discovery response?

[28 USC § 1446(c)(3)(A); TWG 8.501; *Harris v. Bankers Life & Cas. Co.,* 425 F.3d 689 (9th Cir. 2005); *Graiser v. Visionworks,* 819 F.3d 277, 283 (6th Cir. 2016)]

ANSWER:

D. Are there any practice tips for attorneys addressing these removal issues?

ANSWER:

E. Change the facts: Assuming there is no diversity jurisdiction, but the complaint contains a federal civil rights claim against Phoenix Officer Michael Ness for disclosing Edward Normale's private medical information and joins with it the state law invasion of privacy claim against the reporter and newspaper for disclosure of his identity. Would removal of the entire action be allowed?

[28 USC §§ 1367, 1441(c); *Moore v. Kansas City Pub. Schs.,* 828 F.3d 687, 692 (8th Cir. 2016); *NeuroRepair, Inc. v. Nath Law Grp.,* 781 F.3d 1340, 1342 (Fed Cir. 2015); *State of New York ex rel Jacobson v. Wells Fargo,* 824 F.3d 308 (2nd Cir. 2016); *Evergreen Square of Cudahy v. Wisconsin Housing,* 776 F.3d 463, 467 (7th Cir. 2015); *Federal Home Loan Bank of Boston,* 821 F.3d 102, 109 (1st Cir. 2016); *Lightfoot v. Cendant Mortg. Co.,*137 S.Ct. 553, 561 (2017)]

ANSWER:

F. <u>Change the facts:</u> Assume diversity jurisdiction, can the defendants move to dismiss the federal action for lack of personal jurisdiction in Virginia pursuant to FRCP 12(b)(2).

[Fed. R. Civ. P. 12(b)(2); TWG 10.141, 10.244; *Walden v. Fiore,* 134 S.Ct. 1115 (2014); *Calder v. Jones,* 465 U.S. 783 (1984); *Schutte Bagclosures Inc. v. Kwik Lok Corp.,* 48 F.Supp.3d 675 (S.D. N.Y. 2014); *Picot v. Weston,* 780 F.3d 1206 (9th Cir. 2015); *Clemens v. McNamee,* 615 F.3d 374 (5th Cir. 2010); *Washington Shoe Co .v. A-Z Sporting Goods, Inc.,* 704 F.3d 668 (9th Cir. 2012)]

ANSWER:

G. Are there any pointers and comments concerning current practices on motions attacking personal jurisdiction?

[TWG 10.306, 10.473; *Durukan America, LLC v. Rain Traiding, Inc.,*787 F.3d 1181 (7th Cir. 2015); *Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.,* 751 F.3d 796 (7th Cir. 2014); *Zippo v. Zippo Dot.Com,* 952 F.Supp. 1119 (WD PA 1997); *Louis Vuitton Malletier, S.A. v. Mosseri,* 736 F.3d 1339 (11th Cir. 2013)]

ANSWER:

H. **<u>Add to the facts:</u> After removal, the defendants, in the alternative, seek to transfer venue to the Southern District of New York, asserting that the operative facts occurred there and that the witnesses relating to the alleged misconduct are located in that district. How should the court rule on the motion?**

[28 U.S.C. §§ 1390, 1391, 1404, 1441; TWG 12.98, 12.151, 12.207]

ANSWER:

I. What "dispositive" issue should the Court decide first?

[TWG 5.139; *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83 (1998); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999); *Sinochem Intern. Co. Ltd. v. Malaysia Int'l Ship. Corp.*, 549 U.S. 574 (1999); *Hoffman v. Nordic Naturals, Inc.,* 837 F.3d 272 (3rd Cir. 2016)]

ANSWER:

6. HYPOTHETICAL - WINNING OR SUCCESSFULLY OPPOSING MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM: Twombly & Iqbal

Gripe Inc. provides an online forum on which its users express opinions as to services ranging from dog walkers to taco trucks. Lili Lopez, a wedding planner, alleges in a complaint filed in federal court that Gripe extorted or attempted to extort advertising payments from her by manipulating user reviews and penning negative reviews of her business.

Gripe provides an online directory that allows registered users to post reviews and rank businesses on a scale of one to five stars. Based on these user rankings, Gripe then assigns businesses an overall "star" rating. Businesses cannot opt out of being listed on Gripe. Not all user reviews submitted appear on a business's Gripe Time page or remain there after initially appearing. Reviews can be removed by the reviewer or removed by Gripe. Gripe also offers businesses advertising opportunities on its website for $300 to $1200 per month.

Lopez contacted Gripe to request removal of the first negative review, posted by Gripe user "Rob R.," because the review referred to a visit that occurred outside of Gripe's twelve-month policy. That review was subsequently removed, but another negative review from a different user, "Kay K.," showed up soon afterwards on Lopez's Gripe page.

Lopez alleges that "soon after the appearance of these negative reviews, she began receiving frequent, high-pressure calls from Gripe sales representatives, who promised to manipulate Lopez's listing page in exchange for her purchasing advertising. Lopez alleged she received a call from a Gripe sales representative who stated that Gripe would hide negative reviews or place them lower on Lopez's listing page if Lopez purchased advertising. Lopez declined.

According to Lopez, a week after she rejected the explicit advertising pitch, the Rob R. review reappeared, followed by a second negative review from "Kay K." Lopez alleged that Gripe manufactured the "Rob R" and two "Kay K" reviews to instill fear in Lopez to advertise. Lopez alleged that she had no records of doing the work cited in the reviews, or having customers with the names of the users indicated in the reviews. Lopez further alleged that approximately 200 Gripe employees or individuals acting on behalf of Gripe have written reviews of business on Gripe, and that Gripe's CEO admitted in a New York Times blog post that Gripe has paid users to write reviews.

Lopez filed a diversity suit against Gripe for alleged violations of state unfair competition laws, civil extortion, and attempted civil extortion. Lopez further alleged that as a result of Gripe's conduct, Lopez's business revenues and reputation were injured.

Gripe brings a Rule 12(b)(6) motion to dismiss Lopez's the complaint for failure to state a claim, asserting that the complaint is conclusory and did not allege facts that "plausibly raise an inference" that its conduct was actionable. In opposition, Lopez's counsel (1) responds that the complaint is sufficient under notice pleading rules, and (2) asserts that discovery is the proper procedure for disclosure of specific facts.

A. How Should the Court Rule on the Motion to Dismiss?

[TWG 23.78-106; *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007); *Iqbal v. Ashcroft,* 556 U.S. 662 (2009)*; Swierkiewicz v. Sorema,* 534 U.S. 506 (2002); *Levitt v. Yelp! Inc.,* 765 F.3d 1123 *(9th Cir. 2014); see also Wasatch Equal. v. Alta Ski Lifts Co.,* 820 F.3d 381 (10th Cir. 2016); *McCauley v. City of Chi.,* 671 F.3d 611, 613 (7th Cir. 2011); *Saldivar v. Racine,* 818 F.3d 14, 16 (1st Cir. 2016)]

ANSWER:

B. Does plaintiff's need for discovery to allege a plausible claim alter the analysis?

[TWG 23.101-106; *Mujica v. AirScan Inc.*, 771 F.3d 580, 593 (9th Cir. 2014); *Zink v. Lombardi*, 783 F.3d 1089, 1106 (8th Cir. 2015); *Vega v. Davis*, 572 Fed. Appx. 611, 616 (10th Cir. 2014); *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011); *Santiago v. Warminster Twp.*, 629 F.3d 121, 134 n.10 (3d Cir. 2010)]

ANSWER:

C. Are there any practice tips for attorneys representing plaintiffs and defendants in this area?

ANSWER:

7. Mini-Hypotheticals - Discovery—Base Hits and Home Runs

A. Work Product: Prepared in Anticipation of Litigation?

[TWG 34.171-372; *In re Sealed Case*, 146 F.3d 881 (D.C. Cir. 1998); *Wadelton v. Dep't of State*, 106 F. Supp. 3d 139, 152-153 (D.D.C. 2015); *FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142 (D.C. Cir. 2015); *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998);*Wultz v. Bank of China Ltd.*, 304 F.R.D. 384 (S.D.N.Y. 2015); *Schaeffler v. United States*, 806 F.3d 34 (2d Cir. 2015); *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010); *United States v. Richey*, 632 F.3d 559 (9th Cir. 2011); *In re Raytheon Sec. Litig.*, 218 F.R.D. 354 (D. Mass. 2003)]]

ANSWER:

B. Requests for Admissions and Fees

[TWG Ch. 34; FRCP 37(c)(2); *McCarthy v. Ameritech Pub., Inc.,* 763 F.3d 488 (6th Cir. 2014)]

ANSWER:

C. **Discovery of Social Media**

[*Palma v. Metro PCS Wireless, Inc.* (MD FL 2014) 18 F. Supp. 3d 1346]

ANSWER:

D. **Rule 30(b)(6) Tricks of the Trade:**

[TWG Ch. 34; *W Holding Co v. Chartis Ins. Co. of Puerto Rico* (D PR 2014) 300 FRD 43; FRCP 30(b)(6); *Sciaretta v. Lincoln Nat'l Life Ins. Co.* (11th Cir. 2015) 778 F3d 1205]

8. HYPOTHETICAL -ASCERTAINABILITY AND CLASS ACTIONS:

"HOW DO WE FIND THE CLASS?"

Plaintiff and Named-Representatives brought a putative class action against AgraCon Foods on behalf of consumers in 11 states who purchased Smesson-brand cooking oil products that were labeled "100% Natural" during a four-year period.

Plaintiffs argued that the "100% Natural" label was false and/or misleading because Smesson oils are made from bio-engineered ingredients that plaintiffs contend are "not natural." AgraCon manufactures, markets, distributes, and sells Smesson products.

Defendants filed a pre-answer motion to strike class allegations because there was no "administratively feasible" way to identify members of the proposed classes. AgraCon argues that, in addition to satisfying the Rule 23 enumerated criteria, class proponents must also demonstrate that there is an administratively feasible way to determine who is in the class.

ConAgra claimed that Plaintiffs did not propose any way to identify class members and cannot prove that an administratively feasible method exists because consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil.

A. Is a Motion to Strike the Class Allegations a recognized motion?

[TWG Ch. 32; *Vinole v. Countryside Home Loans, Inc*., 571 F.3d 935, 941 (9th Cir. 2009); *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1245 (C.D. Cal. 2011); *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 320 (3d Cir. 2009); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); *Busby v. JRHBW Realty, Inc*., 513 F.3d 1314, 1322 (11th Cir. 2008)]

ANSWER:

B. Is there a Rule 23 requirement that there be an "administratively feasible" way to identify the would be class members (ascertainability)?

[TWG Ch. 34; *Carrera v. Bayer Corp.,* 727 F.3d 300, 303–05 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015). *Rikos v. Procter & Gamble Co*., 799 F.3d 497, 524–526 (6th Cir. 2015); *Carrera v. Bayer Corp*., 727 F.3d 300, 303–05 (3d Cir. 2013); *Marcus v. BMW of N. Am*., LLC, 687 F.3d 583, 593 (3d Cir. 2012); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015); *Briseno v. ConAgra Foods, Inc*., 844 F.3d 1121 (9th Cir. 2017)]

ANSWER:

9. HYPOTHETICALS - SUMMARY JUDGMENT JEOPARDY

A. SUMMARY JUDGMENT FOR 200

ANSWER:

Parties should frame and file motions for summary judgment as soon as possible and certainly before the close of discovery.

[TWG 43.37; 43.200-206; Fed. R. Civ. P. 56(d); TWG 43.90]

QUESTION:

B. SUMMARY JUDGMENT FOR 400

ANSWER:

The motion for summary judgment is denied as procedurally improper.

[TWG Ch. 43]

QUESTION:

C. SUMMARY JUDGMENT FOR 600:

ANSWER:

Asked at deposition, plaintiff testified that he cannot recall any specific racially discriminatory comments made to him during his employment, but later identifies several such comments when submitting a declaration in opposition to defendant's summary judgment motion.

[TWG 43.167-170; Fed. R. Civ. P. 56(e); *Yeager v. Bowlin* (9th Cir. 2012) 693 F.3d 1076; *Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1055–1056 (7th Cir. 2000); *Gates v. Caterpillar, Inc.* (7th Cir. 2008) 513 F.3d 680; *Hambleton Bros. Lumber Co. v. Balkin Enters.* (9th Cir. 2005) 397 F.3d 1217; *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 213 (2d Cir. 2014); *In re Fosamax Products Liability Litig.* (2nd Cir. 2013) 707 F.3d 189; *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 213 (2d Cir. 2014); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999)]

QUESTION:

D. SUMMARY JUDGMENT FOR 800:

ANSWER:

Hearsay in declaration, expert declaration beyond scope of Rule 26 report, a sham affidavit and new evidence on reply.

[TWG 43.240; Fed. R. Civ. P. 56(e); see also *EEOC v. Kaplan Higher Educ. Corp.* (6th Cir. 2014) 748 F.3d 749]

QUESTION:

E. SUMMARY JUDGMENT FOR 1000

ANSWER:

"On summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be dawn in his or her favor."

[TWG 43.78; FRCP 56(c); *Tolan v. Cotton* (2104) 134 S.Ct. 1861; *Plumhoff v. Rickard* (2014) 134 S.Ct. 2012]

QUESTION: