# Procedural Differences Between Tennessee State and Federal Court

Nov 18, 2010

**Categories:**

Publications

Many litigators today find themselves in state court one day and federal court the next. While many of the Rules of Civil Procedure mirror each other, there are some very important differences ranging from the opening of a case to pretrial disclosures. This article will provide a general outline of those differences.

## I. The Complaint is Filed

When a Complaint is filed in federal court, attorneys should be aware of four differences from Tennessee state court:

- Corporate Disclosure Statements must be filed.
- The court will issue a Notice of Setting initial Case Management Conference.
- Written discovery is not permitted yet.
- The attorneys must have a Rule 26(f) conference.

First, Rule 7.1 of the Federal Rules of Civil Procedure requires two copies of a "Disclosure Statement" to be filed by a nongovernmental corporate party that:

- identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or
- states that there is no such corporation.

Fed. R. Civ. P. 7.1(a). This statement is due with the first appearance, pleading, petition, motion, response, or other request addressed to the court. Fed. R. Civ. P. 7.1(b)(1). If any information changes, it is the party's responsibility to update the court accordingly. Fed. R. Civ. P. 7.1(b)(2). No such statement is required in state court.

Second, the court usually issues via ECF a Notice of Setting of Initial Case Management Conference. The contents can vary from court to court and judge to judge, but generally, the Notice of Setting Initial Case Management Conference includes the following features:


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- It is entered the same day the Complaint is filed.
- The plaintiff must serve a copy of it on each defendant with the Complaint and summons.
- It sets the Initial Case management Conference 45-60 days out.
- It requires the parties to confer about discovery pursuant to Rule 26(f).
- It requires that an agreed proposed case management order be filed three business days before the Initial Case Management Conference.

Third, under Rule 26(d) of the Federal Rules of Civil Procedure, parties may not serve written discovery until they have conferred about discovery pursuant to Rule 26(f). *See* Fed. R. Civ. P. 26(d)(1). Under the Tennessee Rules of Civil Procedure, plaintiffs can and often do serve written discovery simultaneously with the Complaint and Summons. *See* Tenn. R. Civ. P. 33.01; Tenn. R. Civ. P. 34.02.

Fourth, the Rule 26(f) conference must be had "as soon as practicable – and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 26(b)." Fed. R. Civ. P. 26(f)(1). All parties are required to participate and discuss the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case, make or arrange for the Required Initial Disclosures (discussed below), and develop a proposed discovery plan. Fed. R. Civ. P. 26(f)(2). The discovery plan must state the parties' views and proposals on:

- what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
- the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
- any issues about disclosure or discovery or electronically stored information, including the form or forms in which it


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should be produced;

- any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order;
- what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
- any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

Fed. R. Civ. P. 26(f)(3).

## II. The Initial Case Management Conference and The Scheduling Order

Under Rule 16(a) of the Federal Rules of Civil Procedure, federal courts may order the parties to appear for a case management conference. Although the Tennessee Rules of Civil Procedure contain a similar provision, in practice, federal courts almost always have case management conferences, and state courts rarely do. Furthermore, even when the Tennessee state courts do have case management conferences, they tend to be much later in the proceedings.

Federal courts usually have an Initial Case Management Conference early in the proceedings. Attorneys should be prepared to discuss their discovery plan at the Initial Case Management Conference. If the case may have unusual discovery issues, attorneys should use the Initial Case Management Conference as an opportunity to address or preview them.

The result of the Initial Case Management Conference will be the issuance of a scheduling order. Under Rule 16(b), the issuance of a scheduling order is, unlike under the Tennessee Rules of Civil Procedure, mandatory. Specifically, Rule 16(b) states that the district court "must issue a scheduling order" after receiving the Rule 26(f) report or after consulting with the parties' attorneys. The rule continues:


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The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

Fed. R. Civ. P. 16(b)(2).

There are required and permissible contents of the scheduling order as well. The scheduling order must include deadlines for the following:

- To join other parties;
- To amend the pleadings;
- To file motions; and
- To complete discovery.

Fed. R. Civ. P. 16(b)(3)(A). The order can also modify the times for Required Initial Disclosures and expert disclosures, modify the extent of discovery, provide for disclosure or discovery of electronically stored information, include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, set dates for pretrial conferences and for trial, and "include other appropriate matters." Fed. R. Civ. P. 16(b)(3)(B).

## III. Required Initial Disclosures

Perhaps the most distinguishing feature of pre-trial litigation in federal court is the Required Initial Disclosures. Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, litigants must disclose, without awaiting a discovery request, the following information:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy – or a description by category and location – of all documents, electronically stored information, and tangible things


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that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Fed. R. Civ. P. 26(a)(1)(A).

## IV. Required Expert Disclosures

In Tennessee state courts, expert discovery takes place solely by interrogatories and depositions. Rule 26.02(4) of the Tennessee Rules of Civil Procedure states as follows:

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
(ii) A party may also depose any other party's expert witness expected to testify at trial.

Tenn. R. Civ. P. 26.02(4). The Tennessee Rules of Civil Procedure do not require expert reports.

Under the Federal Rules of Civil Procedure, the expert disclosure requirements are more demanding. Although the use of


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interrogatories and depositions is still permitted, litigants must file a written expert report "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). Note that a written expert report is not required for expert witnesses who are not "retained or specially employed to provide expert testimony" (such as treating physicians) or who are a party's employee but whose duties do not regularly involve giving expert testimony (which is many, if not most, employee experts). Therefore, it is important that expert interrogatories always be posed in federal court despite the expert report requirement.

The written expert report must be prepared and signed by the witness. Fed. R. Civ. P. 26(a)(2)(B). It must include the following:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the data or other information considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;
(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
(vi) a statement of the compensation to be paid for the study and testimony in the case.

*Id.*

## V. Discovery (Other Than Required Initial Disclosures)

Interrogatories in federal court are limited to 25. *See* Fed. R. Civ. P. 33(a)(1). The Tennessee Rules of Civil Procedure do not contain a limit on the number of interrogatories. However, many state courts limit the number of interrogatories to 30 by local rule. The Federal Rules of Civil Procedure require discrete subparts to be counted as separate interrogatories. *See id.* Parties may obtain leave to serve additional interrogatories. *See id.*


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Depositions do not have specific duration and numerosity limits under the Tennessee Rules of Civil Procedure. Under the Federal Rules of Civil Procedure, however, each deposition is limited to one day of seven hours, *see* Fed. R. Civ. P. 30(d)(1), and each side is limited to ten depositions total, *see* Fed. R. Civ. P. 30(a)(2)(A)(i).

## VI. Pretrial Disclosures and Objections

The Federal Rules of Civil Procedure require litigants to make pretrial disclosures of its anticipated witnesses, portions of deposition transcripts that will be used, and an exhibit list. *See* Fed. R. Civ. P. 26(a)(3)(A). These disclosures must be made at least 30 days before trial. *See* Fed. R. Civ. P. 26(a)(3)(B). The Tennessee Rules of Civil Procedure do not include such requirements; however, in practice, Tennessee state courts almost always require such disclosures by local rule or pretrial order.

The functional difference between federal courts and Tennessee state courts regarding pretrial disclosures concerns objections. The Federal Rules of Civil Procedure require litigants to file objections, and failure to do so constitutes a waiver:

> Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). *An objection not so made – except for one under Federal Rule of Evidence 402 or 403 – is waived unless excused by the court for good cause*.

Fed. R. Civ. P. 26(a)(3)(B) (emphasis added). Not only do the Tennessee Rules of Civil Procedure not include such a provision, it is uncommon for Tennessee state courts to require the filing of objections by local rule, pretrial order, or otherwise.

## VII. Final Pretrial Conference and Final Pretrial Order


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Final Pretrial Conferences and Final Pretrial Orders are commonplace in federal court and generally absent from Tennessee state courts. The authority to hold a Final Pre-Trial Conference is found in Rule 16(e) of the Federal Rules of Civil Procedure:

**Final Pretrial Conference and Orders**. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

Fed. R. Civ. P. 16(e). Typically, a Final Pretrial Conference will include a discussion of the following topics:

- Jury selection procedure
- Voir dire procedure
- Jury instructions
- The use of technology in the courtroom

In the Middle District of Tennessee, it is customary for each party to include in the final pre-trial order its theory of the case, and the final pre-trial order supplants the pleadings.

## VIII. Voluntary Dismissals ("Nonsuits")

Voluntary dismissals (also called "nonsuits") are treated very differently under the Federal and Tennessee Rules of Civil Procedure. Under the Tennessee Rules of Civil Procedure, so long as a motion for summary judgment is not pending, plaintiffs have a right to take a nonsuit anytime before the conclusion of the trial (if a bench trial) or before the jury begins deliberations (if a jury trial):

Subject to the provisions of Rule 23.05, Rule 23.06, or Rule 66 or of any statute, and except when a motion for summary judgment made by an adverse party is pending, *the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice* by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties,


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and if a party has not already been served with a summons and complaint, the plaintiff shall also serve a copy of the complaint on that party; *or by an oral notice of dismissal made in open court during the trial of a cause or in jury trial at any time before the jury retires to consider its verdict and prior to the ruling of the court sustaining a motion for a directed verdict*.

Tenn. R. Civ. P. 41.01(1) (emphasis added).

Under the Federal Rules of Civil Procedure, the plaintiff's right to take a nonsuit without prejudice terminates when a defendant files an answer or motion for summary judgment:

Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:
(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
(ii) a stipulation of dismissal signed by all parties who have appeared.

Fed. R. Civ. P. 41(a)(1)(A).

Moreover, under the Tennessee Rules of Civil Procedure, the third nonsuit must be with prejudice, see Tenn. R. Civ. P. 41.01(2), whereas under the Federal Rules of Civil Procedure, the second nonsuit must be with prejudice, *see* Fed. R. Civ. P. 41(a)(1)(B).

## IX. Other Miscellaneous Differences

Other miscellaneous differences between the Federal and Tennessee Rules of Civil Procedure including the following:

- **Subpoenas**: In federal court, attorneys can issue and sign subpoenas; it is not necessary to obtain the Clerk's signature. *See* Fed. R. Civ. P. 45(a)(3). Blank subpoenas can be downloaded from each district court's web site. In state court, the Clerk must issue and sign all subpoenas. *See* Tenn. R. Civ. P. 45.01.
- A **Motion for Directed Verdict**, *see* Tenn. R. Civ. P. 50, is called a "Motion for Judgment as a Matter of Law" in federal


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court, *see* Fed. R. Civ. P. 50.

- A **temporary injunction**, *see* Tenn. R. Civ. P. 65, is called a "preliminary injunction" in federal court, *see* Fed. R. Civ. P. 65. Unlike in Tennessee state courts, evidentiary hearings are customary in federal court on motions for a preliminary injunction.
- The **deadline to file an Answer** in federal court is 21 days from service of the summons and complaint. Fed. R. Civ. P. 12(a)(1)(A)(i). In Tennessee state court, it is 30 days. Tenn. R. Civ. P. 12.01.
- The **deadline to file a Motion for New Trial** in federal court is 28 days after the entry of judgment. Fed. R. Civ. P. 59(b). In Tennessee state court, it is 30 days after the entry of judgment. Tenn. R. Civ. P. 59.02.
- The **deadline to file a Motion to Alter or Amend Judgment** in federal court is 28 days after the entry of judgment. Fed. R. Civ. P. 59(e). In Tennessee state court, it is 30 days after the entry of judgment. Tenn. R. Civ. P. 59.04.
- The **deadline to file a Renewed Motion for Judgment as a Matter of Law or Motion for New Trial** in federal court is 28 days after the entry of judgment or, if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged. *See* Fed. R. Civ. P. 50(b), 50(d). In Tennessee state court, it is 30 days. *See* Tenn. R. Civ. P. 50.02.
- There is no **"thirteenth juror" rule** in federal court. *Compare* Tenn. R. Civ. P. 59.06; Fed. R. Civ. P. 59.

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