

**Pointers for Practicing before the Honorable Gregory L. Frost,**  
**United States District Court for the Southern District of Ohio**

*Shawn Judge*  
*Law Clerk to the Honorable Gregory L. Frost*

The following non-exhaustive discussion of practice pointers targets procedural and professional issues or errors that arise on a regular basis on the docket of the Honorable Gregory L. Frost. These pointers suggest the preferred—and in some instances, the mandated—practice for counsel and parties. The pointers do not constitute a standing order of the Court and should be regarded only as advisory in nature. Current copies of the Local Civil, Criminal, and Patent Rules of the United States Court for the Southern District of Ohio can be obtained via the Court’s website: <http://www.ohsd.uscourts.gov/localrules.htm>

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- **Extensions of Time**
  - **General**
    - Do not wait until the last minute to seek an extension. Filing for an extension on the day a response is due does not engender goodwill and does not convey professionalism.
    - Recognize which judicial officer will likely address your motion and submit your proposed order to the appropriate judicial officer. The magistrate judge assigned to a case will generally address motions involving extensions related to pleading and discovery. Judge Frost will address motions for any extension that would affect any date set forth in a case scheduling order that he has issued, as well as all extensions requests in patent cases.
  - **Pleadings**
    - Parties can stipulate to extensions of time “not to exceed a total of twenty-one (21) days in which to file a motion in response to a pleading or any responsive pleading.” S. D. Ohio Civ. R. 6.1(a). A pleading is defined as a complaint, an answer, an answer to a counterclaim, an answer to a cross-claim, a third-party complaint, an answer to a third-party complaint, and a reply to an answer (if ordered by the court). *See* Fed. R. Civ. P. 7(a); S. D. Ohio Civ. R. 6.1(b).
    - File the stipulation with the Clerk of Court. Do not submit the stipulation to Judge Frost or to an assigned magistrate judge.
    - For pleading-related extensions beyond a total of twenty-one days, or when a stipulation cannot be reached, a party must obtain Court permission.
  - **Case Schedule Deadlines**
    - In seeking to extend a deadline, pay attention to S. D. Ohio Civ. R. 6.1(b). A party must file a motion to extend deadlines for everything but pleading-related filings. Local Civil Rule 7.3(a) mandates a pre-filing consultation with all parties (except prisoners proceeding pro se) who would be affected by the extension. The motion should state whether consent has been obtained. Note also that a stipulated extension is invalid and will likely be struck. A joint motion is proper; an agreed order is not.
    - Modification of the case schedule will only be obtained upon a showing of

good cause. Fed. R. Civ. P. 16(b)(4).

- **Motion Deadlines**

- A party seeking to extend the memorandum in opposition or reply deadline must file a motion with the Court. S. D. Ohio Civ. R. 6.1(b).
- Counsel would be advised to consider requested extensions that would not necessitate altering the established non-oral hearing date. This does not guarantee that Judge Frost will grant such an extension.

- **Dismissals**

- **Of entire case (pre-answer).** Prior to the filing of an answer, a plaintiff can voluntarily dismiss a case without filing a stipulation of dismissal and without a court order. Fed. R. Civ. P. 41(a)(1)(A)(I). Note that only the filing of a notice of dismissal is required, not a motion. Counsel should not submit a notice of dismissal that includes a signature line for a district judge.
- **Of entire case (post-answer).** After an answer has been filed, a plaintiff cannot voluntarily dismiss a case simply by filing a notice of dismissal. Rather, a plaintiff should file either an appropriately signed stipulation of dismissal under Fed. R. Civ. P. 41(a)(1)(A)(ii) or move the Court for an order of dismissal under Fed. R. Civ. P. 41(a)(2). Note that under Fed. R. Civ. P. 41(a)(1)(A)(ii), only the filing of a stipulation is required, not a motion. Counsel should not file a stipulated dismissal that includes a signature line for a district judge.
  - **All means all.** Note that Fed. R. Civ. P. 41(a)(1)(A)(ii) requires “a stipulation of dismissal signed by all parties who have appeared.” The Sixth Circuit has held that all parties who have appeared in a case must sign the stipulated dismissal, regardless of whether a person or entity is still a party to the litigation. *See Anderson-Tully Co. v. Fed. Ins. Co.*, 347 F. App’x 171, 176 (6th Cir. 2009). In other words, even a previously dropped party must sign. If a plaintiff is unable or unwilling to obtain all the requisite signatures, the plaintiff should consider obtaining a dismissal via motion and court order under Fed. R. Civ. P. 41(a)(2).
- **Of individual party.** The Sixth Circuit has suggested, without conclusively deciding the issue, that dismissal of all claims against a single defendant should be pursuant to Fed. R. Civ. P. 21. *See AmSouth Bank v. Dale*, 386 F.3d 763, 778 (6th Cir. 2004); *Letherer v. Alger Group, L.L.C.*, 328 F.3d 262, 265-66 (6th Cir. 2003), *recognized as overruled on other grounds in Blackburn v. Oaktree Capital Mgmt., LLC*, 511 F.3d 633, 636 (6th Cir. 2008).

- **Of less than all claims.** The Sixth Circuit recognized in *Letherer* a previous holding from that court that Fed. R. Civ. P. 41 is confined to the dismissal of only an entire *action* and that it cannot provide a mechanism through which select *claims* can be dismissed. *Id.* at 266. The *Letherer* court also recognized both that the court of appeals has been inconsistent in applying this rule and that at least five other circuits have interpreted Fed. R. Civ. P. 41 less restrictively. *Id.* at 266 n.2. But although appearing to question the narrow interpretation of Fed. R. Civ. P. 41, the *Letherer* court did not resolve the issue; the district courts must adhere to precedent precluding the piecemeal dismissal of claims by stipulation. Two potential dismissal mechanisms for these circumstances exist in a Fed. R. Civ. P. 15 amendment to the complaint that would dismiss a claim or claims or a Rule 16 pre-trial order dismissing a select claim or select claims. *See, e.g., Baker v. City of Detroit*, 217 F. App'x 491, 496-97 (6th Cir. 2007) (recognizing that stipulations of dismissal, Rule 41 motions, and motions to dismiss can be construed as Rule 15 motions for leave to amend).
- **Of counterclaim, crossclaim, or third-party claim.** The foregoing conditions also apply to these types of claims. Fed. R. Civ. P. Rule 41(c).
- **Retention of post-dismissal jurisdiction to enforce settlement agreement.** Keep in mind that “a district court retains jurisdiction to enforce a settlement agreement if it either (1) has language in the dismissal order indicating its retention of jurisdiction, or (2) incorporates the terms of the settlement agreement into the dismissal order.” *Hehl v. City of Avon Lake*, 90 F. App'x 797, 801 (6th Cir. 2004). Absent such language, a court will lack subject matter jurisdiction after dismissal.
- **Qualification.** Note that the foregoing pointers generally do not apply to dismissals in proceedings under Fed. R. Civ. P. 71.1.
- **Deposition Transcripts**
  - **Signature of court reporter required.** An unsigned certification by a court reporter can preclude consideration of a deposition transcript. For example, an unsigned certification means that a filed transcript fails to qualify as proper summary judgment evidence under Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 30(f)(1); *cf. Soliday v. Miami County, Ohio*, No. C-3-91-153, 1993 WL 1377511, at \*5 n.4 (S.D. Ohio 1993) (stating that “the Court cannot consider” deposition testimony referenced in summary judgment reply memorandum but not filed with court); *Moore v. Florida Bank of Commerce*, 654 F. Supp. 38, 41 n.2 (S.D. Ohio 1986) (unauthenticated deposition not filed with court is not proper material under Rule 56); *Podlesnick v. Airborne Express, Inc.*, 550 F. Supp. 906, 910 (S.D. Ohio 1982) (depositions not filed with court but referred to in summary judgment memoranda were not considered in court’s decision). *See also Orr v. Bank of*

*America, NT & SA*, 285 F.3d 764, 774 (9th Cir. 2002) (discussing unauthenticated deposition extracts).

- **Party’s waiver not binding on court.** Note that Fed. R. Civ. P. 32(d)(4) indicates that a party waives any errors and irregularities related to depositions, including certifications, if that party fails to file a motion to suppress “promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.” But that rule targets only the parties and not the Court. In other words, the fact that a party has waived the right to attack a deposition transcript neither compels a district court to consider the transcript in contravention of Fed. R. Civ. P. 56(e) nor constrains the court from properly excluding the transcript *sua sponte* as invalid summary judgment evidence.
- **Nonreproducible court reporter signatures.** Note that some court reporters use a certification that reads as follows: “This certification bears an original signature in nonreproducible ink. The foregoing certification of the transcript does not apply to any reproduction of the same not bearing the signature of the certifying court reporter. [The court reporter] disclaims responsibility for any alterations which may have been made to the noncertified copies of this transcript.” Counsel who fail to catch this certification may be filing copies of certifications that are unsigned and thus invalid.
- **Signature of deponent.** Federal Rule of Civil Procedure 30(e) targets the signing of a deposition transcript by a deponent. Note that the failure to submit this signature to a court does not constitute the same quality of defect described above.

- **Default Judgment**

- **Two-step procedure is different than procedure in Ohio state courts.** A plaintiff seeking default judgment in a federal court must first obtain an entry of default as contemplated by Fed. R. Civ. P. 55(a). An entry of default is distinct from entry of a default judgment. *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 353 (6th Cir. 2003); *see also* 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2692 (3rd ed. 2003); S. D. Ohio Civ. R. 55.1(b). By asking *only* for a default judgment, a plaintiff would fail to follow the sequential procedure set forth in the Rule. *See Brantley v. Runyon*, No. C-1-96-842, 1997 WL 373739, at \*1 (S.D. Ohio June 19, 1997) (“In order to obtain a default judgment under Rule 55(b)(2), there must first be an entry of default as provided by Rule 55(a).”). *See also Webster Indus., Inc. v. Northwood Doors, Inc.*, 244 F. Supp. 2d 998, 1003 (N.D. Iowa 2003) (“ ‘entry of default under Rule 55(a) must precede grant of a default judgment under Rule

55(b)' ” (quoting *Hayek v. Big Brothers/Big Sisters of America*, 198 F.R.D. 518, 520 (N.D. Iowa 2001)); *Lee v. Brotherhood of Maint. of Way Employees–Burlington N. Sys. Fed’n*, 139 F.R.D. 376, 380 (D. Minnesota 1991) (“an entry of default is a prerequisite to a default judgment under Rule 55(b)”). Only after issuance of an entry of default under Fed. R. Civ. P. 55(a) will a court then enter a default judgment under Fed. R. Civ. P. 55(b). *Cf. O.J. Distrib., Inc.*, 340 F.3d . at 352 (“ ‘Rule 55 permits the clerk to enter a default when a party fails to defend an action as required. The court may *then* enter default judgment.’ ” (emphasis added) (quoting *Weiss v. St. Paul Fire and Marine Ins. Co.*, 283 F.3d 790, 794 (6th Cir. 2002))).

- **Plaintiff’s failure to pursue default judgment.** Pursuant to S. D. Ohio Civ. R. 55.1(a), a plaintiff who can properly seek an entry of default by the Clerk, but who fails to do so, risks a show cause order and possible dismissal for failure to prosecute. Similarly, under S. D. Ohio Civ. R. 55.1(b), a plaintiff who delays in seeking a default judgment after obtaining an entry of default risks a show cause order and possible dismissal for failure to prosecute.
- **Attorney’s Fees**
  - **Motion for attorney’s fees.** Counsel interested in obtaining attorney’s fees should take care to file a timely and properly supported motion. Counsel should take great care to recognize any applicable statutes or rules related to an application for attorney’s fees, costs, and expenses.
  - **Evidentiary hearing.** The Sixth Circuit has explained that “[e]videntiary hearings are not required in attorney’s fees determinations.” *Trustees for Michigan Laborers Health Care Fund v. Eastern Concrete Paving Co.*, 948 F.2d 1290, 1991 WL 224076, at \*3 (6th Cir. 1991) (unpublished table decision). *See also Bailey v. Heckler*, 777 F.2d 1167, 1171 (6th Cir. 1985) (“[A]n evidentiary hearing is not required in every instance of an application for attorney’s fees.”).

Upon receipt of a motion or application for attorney’s fees, however, it is standard practice for Judge Frost to schedule an evidentiary hearing that will take place after the close of briefing. *See Heflin v. Stewart County, Tenn.*, 968 F.2d 1214, 1992 WL 162554, at \*2 (6th Cir. 1992) (unpublished table decision) (noting that as a general rule, evidentiary hearings on motions for attorney’s fees “are favored”).

In a proceeding before any judge, attorney’s fees should not be awarded without providing the potentially liable party notice and an opportunity to be heard. *See Campbell v. Gooding*, 786 F.2d 1163, 1986 WL 16496, at \*3 (6th Cir. 1986) (unpublished table decision) (citing *Roadway Express v. Piper*, 447 U.S. 752, 767 (1980) (discussing award of attorney’s fees as sanction)).

- **Outline of possible standard practice.** No movant should call chambers and ask what evidence Judge Frost would like to receive at the hearing, but such calls are placed on a disconcertingly regular basis. Because the Court is in the business of resolving disputes and not in constructing or dispensing advisory litigation strategy, neither Judge Frost nor his staff will direct counsel how to support a motion for attorney’s fees. The following list of considerations reflects one *possible* approach to pursuing an award of attorney’s fees, but it is not a required approach.
  - **Submission of billing records.** Many counsel submit an itemized bill or invoice, including time sheets, *with* the motion for attorney’s fees that is of sufficient detail to permit meaningful review by the Court. Attention should be paid to disclosing the general nature of the work done and those who completed the work.
  - **Supplemental material: Background information, attorney profiles, and descriptions of worker roles.** Counsel may wish to supplement fee applications with supporting affidavits and exhibits. Such material could disclose the identities and qualifications of those who performed the work, including as necessary the education and experience of the worker involved. For example, one firm’s “law clerk” may be a law student who performed legal research and writing on a case, while another firm’s “law clerk” may be a technology adviser who operated a computer during trial containing deposition testimony. The more information counsel provides to the Court concerning the nature of the work performed and the role and background of those who performed the work, the easier it is for Judge Frost to analyze the application for fees.
  - **Expert witnesses.** Experienced counsel often present testimony from a disinterested live witness as to the reasonableness of the fees sought. The expert, generally an attorney experienced in this market and in the area of practice involved in the litigation, reviews the case and the bill prior to a hearing and offers an opinion as to the necessity of the work, costs, and expenses billed and the reasonableness of the rates charged. This or other witnesses could be questioned as to any apparent duplication of work and the appropriateness of the amount sought in light of the results achieved.
  - **Affidavits.** Many counsel submit affidavits in lieu of or to supplement live testimony. Affidavits could be submitted to place bills or supplemental material in the proper context for the Court.
  - **Obtaining a sufficient order.** The Sixth Circuit has required “the district court to articulate on the record findings of fact or conclusions of law

explaining the court’s reasoning and calculations performed to arrive at the fee award, sufficient to permit a meaningful review of the record.” *Bailey v. Heckler*, 777 F.2d 1167, 1171 (6th Cir. 1985). Counsel should tailor the fee application and hearing presentation to enable a court to meet this standard.

- **Miscellaneous Points**

- **Courtroom technology**

- Judge Frost’s upgraded courtroom enables counsel to utilize technology in presenting their cases. Counsel who may wish to use Powerpoint presentations, DVDs, or other technological enhancements should contact courtroom deputy Scott Miller (614.719.3014) prior to trial to coordinate their efforts. Mr. Miller can arrange for counsel to view the technology available and to receive some basic training at the time of the final pretrial conference; interested counsel should contact Mr. Miller beforehand.

- **Electronic filing**

- For more information: <http://www.ohsd.uscourts.gov/cmecf.htm>
- **Courtesy copies** dropped off to chambers are appreciated only when lengthy motions or motions with voluminous attachments are filed. Courtesy copies are not required.
- Counsel are advised that Judge Frost is reluctant to excuse missed deadlines or other neglect based on the excuse that counsel did not receive notice of a court order via the electronic filing system. Regardless of whether there is a malfunction in the electronic filing system, all parties and counsel have an obligation to monitor the court’s docket in their case. *See Fox v. American Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004) (rejecting a claimed malfunction in the court’s CM/ECF electronic filing case system as “an updated version of the classic ‘my dog ate my homework’ line”).

- **Filing under seal**

- Parties often seek to file under seal material that does not necessitate such secrecy. Do not use filing under seal as a strategic maneuver designed to inconvenience the opposing party.
- A party seeking to file a new case under seal should prepare a motion for leave to file under seal to accompany the initial pleading. Upon

presentation of the complaint and the motion to the Clerk's office, that office will be able to inform counsel of the judicial officer to whom the case will be assigned and contact chambers to obtain a decision on the motion.

- **Briefs**

- **Accelerating motions practice.** The Court, pursuant to its inherent authority and S. D. Ohio Civ. R. 1.1(c), can modify the filing deadlines set forth in S. D. Ohio Civ. R. 7.2(a)(2) in any given case. A party seeking a time-sensitive decision that would be frustrated by the standard response periods should assert in his or her initial motion a request for truncated response times.
- **Length of briefs.** Local Civil Rule 7.2(a)(3) provides that “[m]emoranda in support of or in opposition to any motion or application to the Court should not exceed twenty (20) pages.” Judge Frost does not interpret this oddly worded rule to prohibit briefing in excess of twenty pages, and he does not require a motion for leave to file a brief that exceeds what amounts to an aspirational page count. Rather, the rule requires only that a memorandum in excess of twenty pages be accompanied by the table of contents and summary required by S. D. Ohio Civ. R. 7.2(a)(3).

- **Non-oral hearings**

- A non-oral hearing is a case-tracking mechanism in which Judge Frost sets a specific date on which the case file is picked up. Counsel need not attend the “hearing,” because there is no actual hearing. Rather, this is the date on which Judge Frost seeks to begin addressing the pending motion(s) that necessitated the hearing date. As a general guideline, Judge Frost seeks to issue a decision within three months of the non-oral hearing; as a practical reality, he often issues a decision in several days to weeks after the non-oral hearing. This timeline is subject to potentially conflicting deadlines in other cases and the trial schedule. Keep in mind when asking for extensions the Court's scheduling practices and the need for Judge Frost to provide himself with adequate time to complete the work.

- **Patent Cases**

- In most cases on his docket, Judge Frost and a magistrate judge assigned to a case will each work on various components of the case. Generally, this division of duties includes the magistrate judge handling a case up to the filing of dispositive motions, with Judge Frost becoming more directly

involved from the filing of dispositive motions onward. Patent cases are an exception to this general rule. Because Judge Frost handles all aspects of each patent case on his docket, with the exception of *pro hac vice* admissions, counsel should direct all motions to his attention and not to the magistrate judge who appears on the docket as assigned to the case.

- **Proposed Orders**

- The preferred practice is to submit a proposed order both as an attachment to the related motion and by e-mail to chambers at frost\_chambers@ohsd.uscourts.gov. Counsel should ensure that the proposed order is directed to the correct judicial officer (the district court judge or the magistrate judge) and that the form of the proposed order complies with the local rules, such as S. D. Ohio Civ. R. 7.4. For more on proposed orders, see the *Electronic Filing Policies and Procedures Manual*, available at <http://www.ohsd.uscourts.gov/cmecf.htm>.

- **Related Cases**

- Counsel should note their responsibility to identify on the civil cover sheet filed with a complaint whether a case is related to any other pending action. See S. D. Ohio Civ. R. 3.1(b).
- Counsel should also note their responsibility to identify on the civil cover sheet filed with a complaint whether a case constitutes a refiled or removed action previously before this Court. Previously dismissed actions shall be assigned to the same district judge and magistrate judge who received the initial case assignment, subject to limited exceptions. See S. D. Ohio Civ. R. 41.1.

- **Sanctions**

- **Exercise restraint in seeking sanctions.** Many counsel routinely make motions for sanctions, especially in regard to discovery disputes. This is a trigger that once pulled cannot be stopped in terms of its potential effect on the civility of the litigation. Attorneys who habitually seek sanctions based on slight or nonexistent infractions risk building an unfavorable reputation and incurring skeptical consideration by a wary judge.

- **Settlement**

- Referral of a case to the District Mediator, Robert Kaiser, may be initiated by Judge Frost, a party, or Mr. Kaiser. Judge Frost has adopted a standard practice of *sua sponte* referring fee-shifting cases or cases that appear well

suiting for early settlement discussions for mediation immediately upon the close of pleading. Any party wishing to invoke such early mediation services should contact Chambers or Mr. Kaiser (513.564.7330). For more detailed information about the mediation program:

<http://www.ohsd.uscourts.gov/mediation.html>

- In addition to the efforts of the District Mediator, Settlement Week remains a mechanism for mediating a case.
- At the request of any party, Judge Frost will schedule a mediation with the parties. The parties should not treat such a mediation as a vehicle to argue their case or through which they might obtain Judge Frost's views on the case. Rather, parties should approach the mediation in good faith. A party that attends a mediation and fails to have settlement authority risks sanctions.
- Unless otherwise specified, Judge Frost expects that dismissal entries following settlement will be filed within no more than thirty days from settlement. To facilitate a prompt dismissal in accordance with this expectation even prior to full satisfaction of every term of a settlement, counsel should consider filing a dismissal entry that includes a retention of jurisdiction provision.
- **Standing Orders**
  - To learn various trial-related deadlines and courtroom procedures, counsel should consult a judge's relevant standing order(s) well in advance of a scheduled trial date. Counsel can obtain Judge Frost's current standing orders, as well as the standing orders of each judge in the Southern District, at the following website: <http://www.ohsd.uscourts.gov>
- **TROs & Preliminary Injunctions**
  - Too many attorneys use them as a way of getting to the merits early. Don't fabricate emergency situations.
  - Be prepared for prompt action. Too often counsel will file for emergency injunctive relief and will then be surprised or unprepared to proceed with expedited proceedings on their motion. In general, counsel should expect Judge Frost to hold a S. D. Ohio Civ. R. 65.1(a) informal preliminary conference either the day on which the injunctive relief motion is filed or the next business day. Counsel should be prepared during that conference to discuss a hearing date. Judge Frost rarely issues a temporary restraining order without conducting an in-court hearing on the motion.

- Note that a motion is required to seek a temporary restraining order or a preliminary injunction. Simply asking for such relief in the complaint is insufficient. *See* S. D. Ohio Civ. R. 65.1(b).
- **Contacting Chambers**
  - **Chambers line:** 614.719.3300
  - **Chambers facsimile:** 614.719.3305
  - **Chambers email:** frost\_chambers@ohsd.uscourts.gov
  - **Even-numbered cases:** Shawn Judge, 614.719.3303
  - **Odd-numbered cases:** Penny Barrick, 614.719.3302
  - **Courtroom Deputy:** Scott Miller, 614.719.3014
  - **Judicial Assistant:** Kristin Norcia, 614.719.3300
  - ***Ex parte* communications.** This is not a big problem, but—especially when counsel repeatedly appears before the Court and gets to know Chambers staff—there is often the temptation to adopt too casual a manner when discussing a case with the staff. Do not have counsel who are not on a case call a law clerk with whom they went to law school, previously worked, or know socially to seek information or ask for an extension. This does not work.
  - **Pre-judging of motions.** Do not ask what a judge will decide *if* you file a motion. The Court is not in the business of issuing advisory decisions on what an actual decision of the Court would be.
  - **Timing of decision.** Do not call to ask when a judge will file a decision.