PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 4. Summons

* * * * *

(i) Servingce Upon the United States, and Its Agencies, Corporations, or Officers, or Employees.

* * * * *

(2) **(A)** Service upon on an officer, agency, or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, shall be is effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision Rule 4(i)(1) and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, employee, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with

* New matter is underlined; matter to be omitted is lined through.

the performance of duties on behalf of the United States — whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4 (e), (f), or (g).

(3) The court shall allow a reasonable time ~~for~~ to serve~~ice of~~ process under ~~this subdivision~~ Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), ~~multiple officers, agencies, or corporations of the United States~~ if the plaintiff has ~~effected service on~~ served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

* * * * *

Committee Note

Paragraph (2)(B) is added to Rule 4(i) to require service on the United States when a United States officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. Decided cases provide uncertain guidance on the question whether the United States must be served in such actions. *See Vaccaro v. Dobre*, 81 F.3d 854, 856-857 (9th Cir. 1996); *Armstrong v. Sears*, 33 F.3d 182, 185-187 (2d Cir. 1994); *Ecclesiastical Order of the Ism of Am v. Chasin*, 845 F.2d 113, 116 (6th Cir.1988); *Light v. Wolf*, 816 F.2d 746 (D.C.Cir. 1987); *see also Simpkins v. District of Columbia*, 108 F.3d 366, 368-369 (D.C.Cir. 1997). Service on the United States will help to protect the interest of the individual defendant in securing representation by the United States, and will expedite the process of determining whether the United States will provide representation. It has been understood that the individual defendant must be served as an individual defendant, a requirement that is made explicit. Invocation of the individual service provisions of subdivisions (e), (f), and (g) invokes also the waiver-of-service provisions of subdivision (d).

Paragraph 2(B) reaches service when an officer or employee of the United States is sued in an individual capacity "for acts or omissions occurring in connection with the performance of duties on behalf of the United States." This phrase has been chosen as a functional phrase that can be applied without the occasionally distracting associations of such phrases as "scope of employment," "color of office," or "arising out of the employment." Many actions are brought against individual federal officers or employees of the United States for acts or omissions that have no connection whatever to their governmental roles. There is no reason to require service on the United States in these actions. The connection to federal employment that requires service on the United States must be

determined as a practical matter, considering whether the individual defendant has reasonable grounds to look to the United States for assistance and whether the United States has reasonable grounds for demanding formal notice of the action.

An action against a former officer or employee of the United States is covered by paragraph (2)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need to serve the United States.

Paragraph (3) is amended to ensure that failure to serve the United States in an action governed by paragraph 2(B) does not defeat an action. This protection is adopted because there will be cases in which the plaintiff reasonably fails to appreciate the need to serve the United States. There is no requirement, however, that the plaintiff show that the failure to serve the United States was reasonable. A reasonable time to effect service on the United States must be allowed after the failure is pointed out. An additional change ensures that if the United States or United States attorney is served in an action governed by paragraph 2(A), additional time is to be allowed even though no officer, employee, agency, or corporation of the United States was served.

Summary of Comments

The comments focused on the Rule 4 and Rule 12 amendments together. They are summarized following Rule 12.

GAP Report

The most important changes were made to ensure that no one would read the seemingly independent provisions of paragraphs 2(A) and 2(B) to mean that service must be made twice both on the United

States and on the United States employee when the employee is sued in both official and individual capacities. The word "only" was added in subparagraph (A) and the new phrase "whether or not the officer or employee is sued also in an individual capacity" was inserted in subparagraph (B).

Minor changes were made to include "Employees" in the catch-line for subdivision (i), and to add "or employee" in paragraph 2(A). Although it may seem awkward to think of suit against an employee in an official capacity, there is no clear definition that separates "officers" from "employees" for this purpose. The published proposal to amend Rule 12(a)(3) referred to actions against an employee sued in an official capacity, and it seemed better to make the rules parallel by adding "employee" to Rule 4(i)(2)(A) than by deleting it from Rule 12(a)(3)(A).

Rule 12. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings

(a) When Presented.

*** * * * ***

(3) **(A)** The United States, an agency of the United States, or an officer or ~~agency thereof~~ employee of the United States sued in an official capacity, shall serve an answer to the complaint or ~~to a~~ cross-claim~~;~~ — or a reply to a counterclaim~~;~~ — within 60 days after ~~the service upon~~ the

United States attorney is served with ~~of~~ the pleading ~~in which~~ asserting the claim ~~is asserted~~.

(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

* * * * *

Committee Note

Rule 12(a)(3)(B) is added to complement the addition of Rule 4(i)(2)(B). The purposes that underlie the requirement that service be made on the United States in an action that asserts individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States also require that the time to answer be extended to 60 days. Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.

An action against a former officer or employee of the United States is covered by subparagraph (3)(B) in the same way as an action

against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

GAP Report

No changes are recommended for Rule 12 as published.

Comments on Rule 4, 12 Proposals

98-CV-007, James E. Garvey: Favors Rules 4 and 12.

98-CV-070, Chicago Bar Assn.: "has no objections."

98-CV-124, Hon. David L. Piester (D.Neb. Magistrate Judge): The proposal may imply that an officer must be served with two summons when sued in both official and individual capacities. This reading draws from the literal wording of Rule 4(i)(2)(A) and (B) as published. (A) requires that when an officer is sued in an official capacity, service be made on the United States and by mailing a copy of the summons and complaint to the officer. (B) requires that when an officer is sued in an individual capacity, service be made on the United States and service also must be made on the officer in the manner prescribed by Rule 4(e), (f), or (g).

Certainly there is no purpose to require that the same officer be served twice. The proposed cure is a rewording of (B) that does not change this problem and destroys the parallel with the wording of (A), and addition of a new subparagraph (C):

> **(C)** Service on an officer or employee of the United States sued in both an individual capacity and an official capacity is effected by serving the officer or employee as prescribed in subparagraph (B), above, noting on the summons that the officer is sued in both capacities.

98CV147: Department of Justice — Drug Enforcement Administration: The proposals to amend Rules 4 and 12 are good for the reasons given.

98CV159: Pennsylvania Trial Lawyers Assn.: Supports the Rules 4 and 12 proposals "as written for the salutary reason of ensuring that federal officials where the subject of litigation receive legal representation."

98CV167: Florida Attorney General Robert A. Butterworth: Both Rule 4 and Rule 12 should be amended to include state officials. A state too must decide whether to provide legal representation. Twenty days is not time enough to frame an answer — the realities of bureaucratic processing mean that even after it is decided to provide an attorney for the state-official defendant, very little time is left. There is a corresponding temptation to file a motion to dismiss based on such legal challenges as can be found, providing shelter for a fact investigation that will support proper pleading.

98CV193: Philadelphia Bar Assn.: pp. 23-24: Picks up on a drafting oversight. Rule 4(i)(2) now refers to service on "an officer, agency, or corporation of the United States"; "employee" is not used. Rule 12(a)(3) likewise refers to "The United States or an officer or agency thereof," without referring to an "employee." In redrafting Rule 4(i), paragraph (2)(A) continues to refer only to "an officer of the United States sued in an official capacity." Proposed Rule 12(a)(3)(A), however, refers to "an officer or employee of the United States sued in an official capacity." The two rules should be made parallel. The Philadelphia Bar recommends that "employee[s]" be added to the caption of Rule 4(i), a desirable addition because paragraph (2)(B) will include employees. It also recommends that "employee" be added to (2)(A) at lines 7 and 13 of the published version. It seems odd, however, to think of an "employee" sued "in an official

capacity." Perhaps it is better to take "employee" out of Rule 12(a)(3)(A).

98CV214: Civil Litigation Unit, FBI General Counsel: Favors the Rules 4 and 12 proposals for the reasons advanced by the Department of Justice.

98CV258: Mr. Paige: Favors the Rule 4 and 12 proposals.

98CV267: D.C. Bar, Courts Lawyers & Admn. of Justice Section: Expresses support for the Rule 4 and 12 proposals, but without elaborating the reasons.

98CV268: Federal Magistrate Judges Assn.: Supports the Rule 4 and 12 proposals, characterizing them as non-controversial. "The amendment will assist the practitioner (as well as the courts) in clarifying and making explicit a party's service obligations. *** [S]ervice on the United States will help to protect the interests of the individual defendant * * * and will expedite the process of determining whether the United States will provide representation." The new Rule 4(i)(3) requirement of notice and opportunity to cure a failure to make all required service provides "clear direction" and a "spirit" that should be endorsed. The Rule 12 time for service complements the Rule 4 provisions — time is needed for the United States to decide whether to provide representation, and to prepare an answer if representation is provided.

B. Admiralty Rules B, C, E; Civil Rule 14

The Admiralty Rules proposals published in August 1998 were prompted by two primary goals. The first was to reflect the growing use of Admiralty procedure in civil forfeiture proceedings; the most important change in this area appears in Rule C(6), which for the first time establishes separate provisions for civil forfeiture proceedings. The second goal was to adjust for the 1993 amendments of Civil Rule 4. Civil Rule 14 is changed only to reflect the change of nomenclature in Admiralty Rule C(6).

There was little comment or testimony on these proposals. Minor drafting changes, made to reflect useful suggestions, are described in the GAP Report. One of these changes, in Rule C(3), acts on a comment that was addressed only to Rule B(1)(d). The change modifies the requirement that the court's clerk deliver the warrant of arrest to the marshal, so that the requirement is only that the warrant must be delivered to the marshal. The Advisory Committee recommends that there is no need to republish Rule C(3) to reflect this change, which establishes a parallel with Rule B in a way that conforms to changes earlier made in Civil Rule 4.

Rule B. In Personam Actions: Attachment and Garnishment~~: Special Provisions~~

~~**(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process.** With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods~~

~~and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing~~

~~under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.~~

~~**(2) Notice to Defendant.** No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the garnishee has given notice of the action to the defendant by mailing to the defendant a copy of the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt, or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4(d) or (i), or (c) that the~~

~~plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.~~

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process.

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so

stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d) **(i)** If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and

any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

(2) Notice to Defendant. No default judgment may be entered except upon proof — which may be by affidavit — that:

(a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4;

(b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

* * * * *

Committee Note

Rule B(1) is amended in two ways, and style changes have been made.

The service provisions of Rule C(3) are adopted in paragraph (d), providing alternatives to service by a marshal if the property to be seized is not a vessel or tangible property on board a vessel.

The provision that allows the plaintiff to invoke state attachment and garnishment remedies is amended to reflect the 1993 amendments of Civil Rule 4. Former Civil Rule 4(e), incorporated in Rule B(1), allowed general use of state quasi-in-rem jurisdiction if the defendant was not an inhabitant of, or found within, the state. Rule 4(e) was replaced in 1993 by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the

defendant cannot be obtained in the district where the action is brought. Little purpose would be served by incorporating Rule 4(n)(2) in Rule B, since maritime attachment and garnishment are available whenever the defendant is not found within the district, a concept that allows attachment or garnishment even in some circumstances in which personal jurisdiction also can be asserted. In order to protect against any possibility that elimination of the reference to state quasi-in-rem jurisdiction remedies might seem to defeat continued use of state security devices, paragraph (e) expressly incorporates Civil Rule 64. Because Rule 64 looks only to security, not jurisdiction, the former reference to Rule E(8) is deleted as no longer relevant.

Rule B(2)(a) is amended to reflect the 1993 redistribution of the service provisions once found in Civil Rule 4(d) and (i). These provisions are now found in many different subdivisions of Rule 4. The new reference simply incorporates Rule 4, without designating the new subdivisions, because the function of Rule B(2) is simply to describe the methods of notice that suffice to support a default judgment. Style changes also have been made.

Rule C. ~~Actions~~ In Rem Actions: Special Provisions

* * * * *

~~(2) Complaint.~~ ~~In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during~~

~~the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.~~

~~**(3) Judicial Authorization and Process.** Except in actions by the United States for forfeitures or federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of a vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant. If the property is a vessel or a vessel and tangible property on board the vessel, the warrant shall be delivered to the marshal for~~

~~service. If other property, tangible or intangible is the subject of the action, the warrant shall be delivered by the clerk to a person or organization authorized to enforce it, who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of the property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant~~

~~for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.~~

~~**(4) Notice.** No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be~~

~~filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, §30, as amended.~~

* * * * *

~~(6) Claim and Answer; Interrogatories.~~ ~~The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee, or attorney is duly~~

~~authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.~~

(2) Complaint. In an action in rem the complaint must:

(a) be verified;

(b) describe with reasonable particularity the property that is the subject of the action;

(c) in an admiralty and maritime proceeding, state that the property is within the district or will be within the district while the action is pending;

(d) in a forfeiture proceeding for violation of a federal statute, state:

(i) the place of seizure and whether it was on land or on navigable waters;

(ii) whether the property is within the district, and if the property is not within the district the statutory basis for the court's exercise of jurisdiction over the property; and

(iii) all allegations required by the statute under which the action is brought.

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(ii) **(A)** In other actions, the court must review the complaint and any supporting papers. If

the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

(B) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property that is the subject of the action. The plaintiff has the burden in any post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(b) Service.

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any supplemental process must be delivered to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(c) Deposit in court. If the property that is the subject of the action consists in whole or in part of freight, the proceeds of property sold, or other intangible property, the clerk must issue — in addition to the warrant — a summons directing any person controlling the property to show cause why it should not be deposited in court to abide the judgment.

(d) Supplemental process. The clerk may upon application issue supplemental process to enforce the court's order without further court order.

(4) Notice. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within 10 days after execution, the plaintiff must promptly — or within the time that the court allows — give public notice of the action and arrest in a newspaper designated by court

order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as amended.

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within 20 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows;

(ii) an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; and

(iii) a person who files a statement of interest in or right against the property must serve an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a):

(i) A person who asserts a right of possession or any ownership interest in the property that is

the subject of the action must file a verified statement of right or interest:

(A) within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must file an answer

within 20 days after filing the statement of interest or right.

(c) Interrogatories. Interrogatories may be served with the complaint in an in rem action without leave of court. Answers to the interrogatories must be served with the answer to the complaint.

Committee Note

Style changes have been made throughout the revised portions of Rule C. Several changes of meaning have been made as well.

Subdivision 2. In rem jurisdiction originally extended only to property within the judicial district. Since 1986, Congress has enacted a number of jurisdictional and venue statutes for forfeiture and criminal matters that in some circumstances permit a court to exercise authority over property outside the district. 28 U.S.C. § 1355(b)(1) allows a forfeiture action in the district where an act or omission giving rise to forfeiture occurred, or in any other district where venue is established by § 1395 or by any other statute. Section 1355(b)(2) allows an action to be brought as provided in (b)(1) or in the United States District Court for the District of Columbia when the forfeiture property is located in a foreign country or has been seized by authority of a foreign government. Section 1355(d) allows a court with jurisdiction under § 1355(b) to cause service in any other district of process required to bring the forfeiture property before the court. Section 1395 establishes venue of a civil proceeding for forfeiture in

the district where the forfeiture accrues or the defendant is found; in any district where the property is found; in any district into which the property is brought, if the property initially is outside any judicial district; or in any district where the vessel is arrested if the proceeding is an admiralty proceeding to forfeit a vessel. Section 1395(e) deals with a vessel or cargo entering a port of entry closed by the President, and transportation to or from a state or section declared to be in insurrection. 18 U.S.C. § 981(h) creates expanded jurisdiction and venue over property located elsewhere that is related to a criminal prosecution pending in the district. These amendments, and related amendments of Rule E(3), bring these Rules into step with the new statutes. No change is made as to admiralty and maritime proceedings that do not involve a forfeiture governed by one of the new statutes.

Subdivision (2) has been separated into lettered paragraphs to facilitate understanding.

Subdivision (3). Subdivision (3) has been rearranged and divided into lettered paragraphs to facilitate understanding.

Paragraph (b)(i) is amended to make it clear that any supplemental process addressed to a vessel or tangible property on board a vessel, as well as the original warrant, is to be served by the marshal.

Subdivision (4). Subdivision (4) has required that public notice state the time for filing an answer, but has not required that the notice set out the earlier time for filing a statement of interest or claim. The amendment requires that both times be stated.

A new provision is added, allowing termination of publication if the property is released more than 10 days after execution but before

publication is completed. Termination will save money, and also will reduce the risk of confusion as to the status of the property.

Subdivision (6). Subdivision (6) has applied a single set of undifferentiated provisions to civil forfeiture proceedings and to in rem admiralty proceedings. Because some differences in procedure are desirable, these proceedings are separated by adopting a new paragraph (a) for civil forfeiture proceedings and recasting the present rule as paragraph (b) for in rem admiralty proceedings. The provision for interrogatories and answers is carried forward as paragraph (c). Although this established procedure for serving interrogatories with the complaint departs from the general provisions of Civil Rule 26(d), the special needs of expedition that often arise in admiralty justify continuing the practice.

Both paragraphs (a) and (b) require a statement of interest or right rather than the "claim" formerly required. The new wording permits parallel drafting, and facilitates cross-references in other rules. The substantive nature of the statement remains the same as the former claim. The requirements of (a) and (b) are, however, different in some respects.

In a forfeiture proceeding governed by paragraph (a), a statement must be filed by a person who asserts an interest in or a right against the property involved. This category includes every right against the property, such as a lien, whether or not it establishes ownership or a right to possession. In determining who has an interest in or a right against property, courts may continue to rely on precedents that have developed the meaning of "claims" or "claimants" for the purpose of civil forfeiture proceedings.

In an admiralty and maritime proceeding governed by paragraph (b), a statement is filed only by a person claiming a right of

possession or ownership. Other claims against the property are advanced by intervention under Civil Rule 24, as it may be supplemented by local admiralty rules. The reference to ownership includes every interest that qualifies as ownership under domestic or foreign law. If an ownership interest is asserted, it makes no difference whether its character is legal, equitable, or something else.

Paragraph (a) provides more time than paragraph (b) for filing a statement. Admiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings.

Paragraphs (a) and (b) do not limit the right to make a restricted appearance under Rule E(8).

Rule E. Actions In Rem and Quasi In Rem: General Provisions

*** * * * ***

(3) Process.

~~(a) Territorial Limits of Effective Service. Process in rem and of maritime attachment and garnishment shall be served only within the district.~~

(a) In admiralty and maritime proceedings process in rem or of maritime attachment and garnishment may be served only within the district.

(b) In forfeiture cases process in rem may be served within the district or outside the district when authorized by statute.

(~~b~~**c**) **Issuance and Delivery.** Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

* * * * *

~~**(7) Security on Counterclaim.** Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause~~

~~shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.~~

(7) Security on Counterclaim.

(a) When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the

original claim must be stayed until this security is given, unless the court directs otherwise.

(b) The plaintiff is required to give security under Rule E(7)(a) when the United States or its corporate instrumentality counterclaims and would have been required to give security to respond in damages if a private party but is relieved by law from giving security.

~~**(8) Restricted Appearance.** An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.~~

(8) Restricted Appearance. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment, may be expressly restricted to the defense of such claim, and in that event is not an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) Disposition of Property; Sales.

*** * * * ***

~~(b) Interlocutory Sales. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or~~

~~other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.~~

(b) Interlocutory Sales; Delivery.

(i) On application of a party, the marshal, or other person having custody of the property, the court may order all or part of the property sold — with the sales proceeds, or as much of them as will satisfy the judgment, paid into court to await further orders of the court — if:

(A) the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or disproportionate; or

(C) there is an unreasonable delay in securing release of the property.

(ii) In the circumstances described in Rule E(9)(b)(i), the court, on motion by a defendant or a person filing a statement of interest or right under Rule C(6), may order that the property, rather than being sold, be delivered to the movant upon giving security under these rules.

*** * * * ***

(10) Preservation of Property. When the owner or another person remains in possession of property attached or arrested under the provisions of Rule E(4)(b) that permit execution of process without taking actual possession, the court, on a party's motion or on its own, may enter any order necessary to preserve the property and to prevent its removal.

Committee Note

Style changes have been made throughout the revised portions of Rule E. Several changes of meaning have been made as well.

Subdivision (3). Subdivision (3) is amended to reflect the distinction drawn in Rule C(2)(c) and (d). Service in an admiralty or maritime proceeding still must be made within the district, as reflected in Rule C(2)(c), while service in forfeiture proceedings may be made outside the district when authorized by statute, as reflected in Rule C(2)(d).

Subdivision (7). Subdivision (7)(a) is amended to make it clear that a plaintiff need give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security to respond in damages in the original action.

Subdivision (8). Subdivision (8) is amended to reflect the change in Rule B(1)(e) that deletes the former provision incorporating state quasi-in-rem jurisdiction. A restricted appearance is not appropriate

when state law is invoked only for security under Civil Rule 64, not as a basis of quasi-in-rem jurisdiction. But if state law allows a special, limited, or restricted appearance as an incident of the remedy adopted from state law, the state practice applies through Rule 64 "in the manner provided by" state law.

Subdivision (9). Subdivision 9(b)(ii) is amended to reflect the change in Rule C(6) that substitutes a statement of interest or right for a claim.

Subdivision (10). Subdivision 10 is new. It makes clear the authority of the court to preserve and to prevent removal of attached or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later

than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-

party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, ~~the claimant of~~ a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

* * * * *

(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or ~~claimant~~ person who asserts a right under Supplemental Rule C(6)(b)(i), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Committee Note

Subdivisions (a) and (c) are amended to reflect revisions in Supplemental Rule C(6).

GAP Report

Rule B(1)(a) was modified by moving "in an in personam action" out of paragraph (a) and into the first line of subdivision (1). This change makes it clear that all paragraphs of subdivision (1) apply when attachment is sought in an in personam action. Rule B(1)(d) was modified by changing the requirement that the clerk deliver the summons and process to the person or organization authorized to serve it. The new form requires only that the summons and process be delivered, not that the clerk effect the delivery. This change conforms to present practice in some districts and will facilitate rapid service. It matches the spirit of Civil Rule 4(b), which directs the clerk to issue the summons "to the plaintiff for service on the defendant." A parallel change is made in Rule C(3)(b).

Summary of Comments

98CV011: Jack E. Horsley: Speaking apparently to Rule C(6)(b)(i), suggests that it may invite a statement of right or interest that is conclusionary. Recommends adding these words at the end: " * * * must file a verified statement of right or interest based upon facts which support such a statement and not upon the conclusions of the person who asserts a right of possession and must file such a statement: * * *"

98CV077: Comm. on Civil Litigation, EDNY: This is the only extensive comment on the admiralty rules proposals. There are two suggestions for change. (1) Rule B now begins "With respect to any admiralty or maritime claim in personam * * *." The proposed rule begins merely "if a defendant in an in personam action * * *." The

suggestion is that an explicit reference to admiralty or maritime proceedings be restored: "if a defendant in an in personam action is not found within the district, a verified complaint that asserts an admiralty or maritime claim may * * *." This suggestion stems from a fear that plaintiffs may attempt to invoke Admiralty Rule B in non-admiralty proceedings. Use of Rule B in non-admiralty proceedings might, in turn, reopen the question whether Rule B is constitutional — it has been accepted only by distinguishing the special needs of admiralty from the needs of land-based litigation. The fact that Admiralty Rule A limits Rule B to admiralty and maritime claims, as well as "statutory condemnation proceedings analogous to maritime actions in rem," is not protection enough. (2) Rule B(1) does not now direct what happens to process of attachment and garnishment after the clerk issues it. Proposed Rule B(1)(d) directs the clerk to deliver the process to the marshal or another person eligible to make service. The present practice in E.D.N.Y. is that the clerk delivers the process to the attorney for the plaintiff, who in turn arranges delivery to the person who will make service. Requiring that process be delivered by the clerk to the server "very likely will occasion delay in cases where time is usually of the essence." The rule should provide that process "must be delivered" to the person making service, without designating who is to effect the delivery.

98CV214: Civil Litigation Unit, FBI General Counsel: Recommends adoption of the Rule 14 conforming amendment, but does not address the Admiralty Rules proposals otherwise.

98CV258, Mr. Paige: Is in favor of the proposed changes to Rule 14 and Admiralty Rules B, C, and E.

98CV267: D.C. Bar, Courts, Lawyers & Admn. of Justice Section: Supports the Rule 14 change without elaboration.

98CV268: Federal Magistrate Judges Assn.: Supports all of the Admiralty Rules proposals. There are repeated statements endorsing the style changes: The style changes in Rule B "are a significant improvement and provide clarity"; in Rule C, "[t]he result is much greater clarity" in a rule that "is written in rather archaic language, probably because it has been an outgrowth of admiralty law," and the effect is to "bring the verbiage of the rule into the 20th Century (just in time for the 21st)."

The changes in Rule B are supported because they reduce the need for service by the United States Marshal, reflect the 1993 changes in Civil Rule 4, and expressly confirm the availability of state security remedies through Civil Rule 64.

The changes in Rule C recognize the broadened statutory bases for forfeiture, and clearly identify differences in procedure between admiralty in rem proceedings and civil forfeiture proceedings. The continued practice that permits interrogatories with the complaint "recognizes the often exigent nature of admiralty actions." Other "small changes" "appear calculated merely to establish more clearly the actions expected of parties rather than place new duties or restrictions upon them."

The Rule E changes "are not considered controversial or significant in nature or scope."

C. Discovery Rules 5, 26, 30, 34, and 37

As detailed in last year's report and the Introduction, the package of proposed amendments to the discovery rules was developed on the basis of an unusually extensive information-gathering effort by the Advisory Committee. In October 1996, it appointed a Discovery Subcommittee, chaired by Hon. David F. Levi, and a Special

Reporter, Prof. Richard L. Marcus, to explore possible improvements to the discovery rules. Over the following year, the Discovery Subcommittee hosted a conference of lawyers and judges from around the country to discuss possible discovery amendments, representatives of the Subcommittee attended an ABA Section of Litigation convention at which a session was devoted to discovery problems, and the whole Advisory Committee hosted a two-day conference at Boston College Law School to explore a wide range of discovery problems and solutions. In addition, the Federal Judicial Center did a survey of 1,000 recently closed cases to obtain information on current discovery practice and possible rule amendments to improve that practice.

Having received this information, the Advisory Committee reviewed over 40 possible rule amendments and selected those that seemed most promising, directing the Discovery Subcommittee to prepare specific proposed amendments to address those areas. The Discovery Subcommittee then met for two days to develop specific proposals, and the Advisory Committee adopted the proposed amendments it brought to the Standing Committee last year from among those proposals.

At its June 1998 meeting, the Standing Committee authorized publication of proposed amendments to various rules relating to discovery — Civil Rules 5, 26, 30, 34, and 37.

The Advisory Committee held three public hearings on these proposed rule amendments — in Baltimore on Dec. 7, 1998, in San Francisco on Jan. 22, 1999, and in Chicago on Jan. 29, 1999. Altogether over 70 witnesses appeared and testified in the public hearings. In addition, the Advisory Committee received over 300

written comments.[**] Almost all of these comments and all of the testimony related to the proposed amendments to the discovery rules.

Perhaps in part due to the extent of the prepublication investigation of discovery issues — which had been on the Advisory Committee agenda almost continuously for over 20 years — the high volume of commentary made few new points.

The Advisory Committee's Discovery Subcommittee met in Chicago on Jan. 28, 1999, to discuss issues raised by commentary and testimony received by that time. In addition, after the formal comment period closed, the Subcommittee held a telephone conference to discuss possible proposals to the full Committee responsive to the public comments and testimony.

The Discovery Subcommittee recommended that the Advisory Committee adhere to the package that was published, subject to consideration of several adjustments based on the public comments and testimony. Most of the adjustments focused on the Committee Notes, but a few went to the language of the Rules themselves. Specific recommendations were made as to most of these matters. The Advisory Committee acted to adopt several proposed refinements of rule language and Committee Notes. With these changes, the Advisory Committee voted unanimously to recommend adoption of the complete discovery package.

[**] Approximately 30 of these comments were received after the agenda materials were prepared for the Advisory Committee's April 19-20 meeting, and were not included in the Summaries of Public Comments circulated in connection with that meeting * * *. All of these comments were received more than six weeks after Feb. 1, 1999, the last date on which comments were to be received.

Because the discovery package is lengthy, it is best introduced by a short summary. Detailed development follows. The package was the focus of the great majority of the public comments and testimony on the August 1998 Civil Rules proposals. Because the entire Summary of Public Comments is of necessity so long that it would interfere with ready review of this Report, the summary is attached at Tab__. The summary is organized to coincide with the topics in the order of presentation, which corresponds to the numerical order of the Rules. Brief summaries of the most salient points are included in this Report.

1. Rule 5(d). Service and Filing Pleadings and Other Papers

The amendment forbids filing discovery materials until they are used in the proceeding. The Advisory Committee has proposed no changes to this rule or the Committee Note as published.

2. Rule 26. General Provisions Regarding Discovery; Duty of Disclosure

The published amendment proposals included a number of changes to Rule 26. For purposes of comprehension, it seems desirable to separate these changes into categories, and they will be so treated in this memorandum.

(a) Rule 26(a). Required Disclosures; Methods to Discover Additional Matter

The proposed amendments make a number of changes in the disclosure provision adopted in the 1993 amendments. They narrow the initial disclosure obligation and remove the previous authority to

"opt out" of this requirement by local rule. At the same time, they exclude eight specified categories of proceedings from the initial disclosure requirements. They also permit any party to object that disclosure is not appropriate for the action and thereby submit to the court the question whether disclosure should occur. The amendments also provide for disclosure by added parties — who are not addressed in the current rule — and make a slight change in the timing of initial disclosures.

The Advisory Committee has decided to recommend different wording for the initial disclosure obligation. The published proposal called on each party to disclose information "supporting its claims or defenses." The new recommendation calls for disclosure of information that the disclosing party "may use to support its claims or defenses." This alternative wording was included in the published proposed amendments, and commentary was invited on the choice between that wording and the wording initially proposed. Except for this change, the Advisory Committee recommends no change to the rule as published. It has proposed some clarifications to the Committee Note to address issues raised during the public commentary period.

(b) Rule 26(b)(1). Discovery Scope and Limits. In General.

The published proposed amendment limited attorney-controlled discovery to matter "relevant to the claim or defense of any party," and authorized the court to order discovery "relevant to the subject matter involved in the action" on a showing of good cause. It also modified the last sentence of the current rule and included a reference to the limitations of Rule 26(b)(2) in this subdivision.

The Advisory Committee proposes changing one word in the amended rule as published to avoid the risk of an untoward interpretation. The published proposal provided that the court might, for good cause, order discovery of any "information" relevant to the subject matter involved in the action. The recommendation is to substitute "matter" for "information"; this change will avoid any confusion that might arise from the first sentence of current subdivision (b)(1), which defines the scope of discovery as "any matter" relevant to the claim or defense of any party. In addition, the Advisory Committee proposes adding explanatory material to the Committee Note to address concerns raised during the public commentary period.

(c) Rule 26(b)(2). Discovery Scope and Limits: Limitations.

The published proposed amendment removed prior authority to deviate from the national limitations on the number of depositions or interrogatories by local rule, or to establish durational limitations on depositions by local rule. The published materials also noted that the Advisory Committee was considering relocating to Rule 26(b)(2) the explicit authority to impose cost-bearing conditions on discovery that exceeded the limitations of Rule 26(b)(2) that was published for comment a proposed amendment to Rule 34(b). The materials invited public comment on the question of proper location.

The Advisory Committee now proposes including cost-bearing in Rule 26(b)(2) rather than in Rule 34(b). The form of this change is exactly the one included in the memorandum that accompanied the published proposals. It also proposes additional explanatory material in the Committee Note regarding cost-bearing, as well as minor changes in the Note to accommodate concerns that arose during the public commentary period.

(d) Rule 26(d) Timing and Sequence of Discovery.
Rule 26(f) Conference of Parties; Planning for Discovery

The published proposed amendments to Rule 26(d) remove the present authority to exempt cases by local rule from the moratorium on discovery before the Rule 26(f) conference, but exempt from that moratorium the categories of proceedings exempted from initial disclosure.

The Advisory Committee is not proposing any change in the published proposed amendments to Rule 26(d) or to the Committee Note.

The published proposed amendments to Rule 26(f) remove the present authority to exempt cases by local rule from the discovery conference requirement, but exempt from the conference requirement the categories of proceedings exempted from initial disclosure. The amendment also removed the requirement that this conference be a face-to-face meeting, but conferred authority on courts to require that it be conducted face-to-face. In addition, it changed the timing for the meeting in order to ensure that the resulting report is received by the court before its action under Rule 16(b).

Based on concerns raised during the public commentary period, the Advisory Committee proposes that a sentence be added to the rule to permit courts that move very rapidly with initial case management to adopt a local rule to shorten the period between the Rule 26(f) conference and the Rule 16(b) conference with the court, and to shorten the time for submission of the written report or relieve the parties of the obligation to submit a written report if they instead give the court an oral report. Additional language for the Committee Note is also proposed to address this additional rule provision. The

Advisory Committee concluded that this addition need not be published for comment; it responds to an issue that was raised in the comment process and should not be controversial.

3. Rule 30. Depositions Upon Oral Examination

The published proposed amendments would impose a presumptive limitation of depositions to "one day of seven hours." In addition, they would clarify a number of matters, including that any person — not only a party — who purports to instruct a deposition witness not to answer is subject to the limitations on such instructions imposed by amendments to Rule 30(d) in 1993.

The Advisory Committee proposes amending the published proposal to remove the "deponent veto" — the requirement that the deponent consent to extension of a deposition beyond the presumptive time limitation. The Advisory Committee also proposes to add clarifying language to the Committee Note regarding the proper computation of the deposition length limitation. In addition, it proposes a technical conforming amendment to Rule 30(f)(1) to remove the current direction to the court reporter to file a deposition transcript once it is completed. This change is necessary to give effect to the published change to Rule 5(d), which the Committee is recommending be forwarded to the Judicial Conference. Because it is purely a technical and conforming amendment, the Advisory Committee believes there is no need to publish it for comment.

4. Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

The published proposed amendments added to Rule 34(b) a provision explicitly authorizing the court to condition discovery

beyond the limitations of Rule 26(b)(i), (ii), or (iii) on payment of part or all of the costs of the responding party.

As noted above, the Advisory Committee decided that this cost-bearing provision would better be included in Rule 26(b)(2) itself (in the alternative form included in the published proposed amendments). Accordingly, it recommends that this proposed amendment to Rule 34(b) not be adopted. Owing to the reported frequency of concerns in document production situations, however, the Advisory Committee also proposes addition of a sentence to Rule 34(b) calling attention to the authority now made explicit in Rule 34(b). Appropriate changes to the Committee Note are also proposed. Because this change merely calls attention to a rule provision that has been published, the Committee does not believe that republication is needed.

5. Rule 37(c). Failure to Disclose; False or Misleading Disclosure; Refusal to Admit

The published proposal added failure to amend a prior response to discovery as required by Rule 26(e)(2) to the circumstances warranting the sanction of Rule 37(c)(1) — refusal to permit use of material not properly provided via supplementation — listed in the current rule.

The Advisory Committee proposes a clarifying revision of the wording of the published rule change.

Rule 5. Servingice and Filing ~~of~~ Pleadings and Other Papers

* * * * *

(d) Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, ~~shall~~ must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission ~~the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding~~.

* * * * *

Committee Note

Subdivision (d). Rule 5(d) is amended to provide that disclosures under Rule 26(a)(1) and (2), and discovery requests and responses under Rules 30, 31, 33, 34, and 36 must not be filed until they are used in the action. "Discovery requests" includes deposition notices and "discovery responses" includes objections. The rule supersedes and invalidates local rules that forbid, permit, or require filing of these materials before they are used in the action. The former Rule 26(a)(4) requirement that disclosures under Rule 26(a)(1) and (2) be filed has been removed. Disclosures under Rule 26(a)(3), however, must be promptly filed as provided in Rule 26(a)(3). Filings in connection with Rule 35 examinations, which involve a motion proceeding when the parties do not agree, are unaffected by these amendments.

Recognizing the costs imposed on parties and courts by required filing of discovery materials that are never used in an action, Rule 5(d) was amended in 1980 to authorize court orders that excuse filing. Since then, many districts have adopted local rules that excuse or forbid filing. In 1989 the Judicial Conference Local Rules Project concluded that these local rules were inconsistent with Rule 5(d), but urged the Advisory Committee to consider amending the rule. Local Rules Project at 92 (1989). The Judicial Conference of the Ninth Circuit gave the Committee similar advice in 1997. The reality of nonfiling reflected in these local rules has even been assumed in drafting the national rules. In 1993, Rule 30(f)(1) was amended to direct that the officer presiding at a deposition file it with the court or send it to the attorney who arranged for the transcript or recording. The Committee Note explained that this alternative to filing was designed for "courts which direct that depositions not be automatically filed." Rule 30(f)(1) has been amended to conform to this change in Rule 5(d).

Although this amendment is based on widespread experience with local rules, and confirms the results directed by these local rules, it is designed to supersede and invalidate local rules. There is no apparent reason to have different filing rules in different districts. Even if districts vary in present capacities to store filed materials that are not used in an action, there is little reason to continue expending court resources for this purpose. These costs and burdens would likely grow as parties make increased use of audio- and videotaped depositions. Equipment to facilitate review and reproduction of such discovery materials may prove costly to acquire, maintain, and operate.

The amended rule provides that discovery materials and disclosures under Rule 26(a)(1) and (a)(2) must not be filed until they are "used in the proceeding." This phrase is meant to refer to proceedings in court. This filing requirement is not triggered by "use" of discovery materials in other discovery activities, such as depositions. In connection with proceedings in court, however, the rule is to be interpreted broadly; any use of discovery materials in court in connection with a motion, a pretrial conference under Rule 16, or otherwise, should be interpreted as use in the proceeding.

Once discovery or disclosure materials are used in the proceeding, the filing requirements of Rule 5(d) should apply to them. But because the filing requirement applies only with regard to materials that are used, only those parts of voluminous materials that are actually used need be filed. Any party would be free to file other pertinent portions of materials that are so used. *See* Fed. R. Evid. 106; *cf.* Rule 32(a)(4). If the parties are unduly sparing in their submissions, the court may order further filings. By local rule, a court could provide appropriate direction regarding the filing of discovery materials, such as depositions, that are used in proceedings.

"Shall" is replaced by "must" under the program to conform amended rules to current style conventions when there is no ambiguity.

Summary of Comments

The comments regarding the proposed amendments to Rule 5(d) are summarized at pp. 4-7 of the Summary of Public Comments, which is found behind Tab 6 A-v.

Generally those who commented supported the change, in part because it brought the national rule into coordination with local practices in many places. E.g., American College of Trial Lawyers Fed. Cts. Comm. (98-CV-090), Federal Magistrate Judges Ass'n Rules Committee (98-CV-268), and Philadelphia Bar Ass'n (98-CV-193). Some raised questions about public access to discovery materials. The Public Citizen Litigation Group (98-CV-181) urged that the amendment would restrict public access to discovery materials too much, and counseled a number of changes, including return to the language originally proposed by the Advisory Committee ― that a party "need not" file discovery materials until they are used in the action (v. "must not" in the published amendments).

During its Oregon meeting, the Advisory Committee discussed some of these points. It considered whether to urge the Standing Committee to shift back to a "need not" formulation in the rule, but concluded that this change would not be productive. It also discussed possible Note language concerning retention of discovery materials. On that subject, Rule 30(f)(1) already has provisions regarding retention of depositions. Committee members felt that there are sufficient provisions regarding retention of such materials so that creating the appearance that the Committee Note imposes additional

obligations would not be a desirable undertaking. The Committee voted against adding language to the Note concerning retention of discovery materials.

GAP Report

The Advisory Committee recommends no changes to either the amendments to Rule 5(d) or the Committee Note as published.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order ~~or local rule~~, a party ~~shall~~ must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may

use to support its claims or defenses, unless solely for impeachment ~~relevant to disputed facts alleged with particularity in the pleadings~~, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment ~~that are relevant to disputed facts alleged with particularity in the pleadings~~;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials

bearing on the nature and extent of injuries suffered; and

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

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to proceedings in other courts; and

(viii) an action to enforce an arbitration award.

~~Unless otherwise stipulated or directed by the court,~~ T~~t~~hese disclosures must ~~shall~~ be made at or within 14 ~~10~~ days after the Rule 26(f) conference ~~meeting of the parties under subdivision (f).~~ unless a different time is set by stipulation or court order, or unless a party objects during

the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures — if any — are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must ~~shall~~ make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

* * * * *

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 26(a)(1) and (2) ~~in the preceding paragraphs~~, a party ~~shall~~ must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment ~~purposes~~:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures ~~shall~~ must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under ~~subparagraph (B)~~ Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under ~~subparagraph (C)~~ Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403

of the Federal Rules of Evidence, ~~shall be deemed~~ are waived unless excused by the court for good cause ~~shown~~.

(4) Form of Disclosures; ~~Filing~~. Unless the court orders otherwise ~~directed by order or local rule~~, all disclosures under ~~paragraphs~~ Rules 26(a)(1) through (3) must ~~shall~~ be made in writing, signed, and served.~~, and promptly filed with the court.~~

* * * * *

Committee Note

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice. The scope of the disclosure obligation is narrowed to cover only information that the disclosing party may use to support its position. In addition, the rule exempts specified categories of proceedings from initial disclosure, and permits a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made. Related changes are made in Rules 26(d) and (f).

The initial disclosure requirements added by the 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. The inclusion of the "opt out" provision reflected the strong opposition to initial disclosure felt in

some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure. The local option also recognized that — partly in response to the first publication in 1991 of a proposed disclosure rule — many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act. It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice. In addition, there was hope that local experience could identify categories of actions in which disclosure is not useful.

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. *See* D. Stienstra, Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (Federal Judicial Center, March 30, 1998) (describing and categorizing local regimes). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques, 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. *See* T. Willging, J. Shapard, D. Stienstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. 517-840 (1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. Discovery and Disclosure Practice, *supra*, at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§ 2072-2077.

These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal "standing" orders of an individual judge or court that purport to create exemptions from — or limit or expand — the disclosure provided under the national rule. *See* Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information in managing the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. "Use" includes any use at a pretrial conference, to support a motion, or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. The disclosure obligation attaches both to witnesses and documents a party intends to use and also to witnesses and to documents the party intends to use if — in the language of Rule 26(a)(3) — "the need arises."

A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The obligation to disclose information the party may use connects directly to the exclusion sanction of Rule 37(c)(1). Because the disclosure obligation is limited to material that the party may use, it is no longer tied to particularized allegations in the complaint. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.

The disclosure obligation applies to "claims and defenses," and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials "warranted on the evidence," and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. Impeachment information is similarly excluded from the initial disclosure requirement.

Subdivisions (a)(1)(C) and (D) are not changed. Should a case be exempted from initial disclosure by Rule 26(a)(1)(E) or by agreement or order, the insurance information described by subparagraph (D) should be subject to discovery, as it would have been under the principles of former Rule 26(b)(2), which was added in 1970 and deleted in 1993 as redundant in light of the new initial disclosure obligation.

New subdivision (a)(1)(E) excludes eight specified categories of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of "proceedings" rather than categories of "actions" because some might not properly be labeled "actions." Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties — and, when needed, the courts — with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories. The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as an "appeal" based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record. Item (vii), excluding a proceeding ancillary to proceedings in

other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Based on 1996 and 1997 case filing statistics, Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases. Should a defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

Subdivision (a)(1)(E)'s enumeration of exempt categories is exclusive. Although a case-specific order can alter or excuse initial disclosure, local rules or "standing" orders that purport to create general exemptions are invalid. *See* Rule 83.

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the

parties to review the disclosures, and for the court to consider the report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is encouraged.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be "inappropriate in the circumstances of the action." Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures — if any — should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others — such as the damages and insurance information called for by subdivisions (a)(1)(C) and (D) — may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is "first served or otherwise joined" after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervenor. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.

Subdivision (a)(3). The amendment to Rule 5(d) forbids filing disclosures under subdivisions (a)(1) and (a)(2) until they are used in the proceeding, and this change is reflected in an amendment to subdivision (a)(4). Disclosures under subdivision (a)(3), however, may be important to the court in connection with the final pretrial conference or otherwise in preparing for trial. The requirement that objections to certain matters be filed points up the court's need to be provided with these materials. Accordingly, the requirement that subdivision (a)(3) materials be filed has been moved from subdivision (a)(4) to subdivision (a)(3), and it has also been made clear that they — and any objections — should be filed "promptly."

Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) must not be filed until used in the proceeding. Subdivision (a)(3) has been amended to require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed, and served.

"Shall" is replaced by "must" under the program to conform amended rules to current style conventions when there is no ambiguity.

Summary of Comments

The comments concerning amendments proposed for Rule 26(a)(1) are found at pp. 9-70 of the Summary of Public Comments (Tab 6 A-v). The effort here will be to identify certain issues that the Advisory Committee focused upon as it reviewed the public commentary to the published proposed amendments to this subdivision. The Advisory Committee's proposed changes to Rule

26(a)(1) were designed to serve as part of an effort to restore national uniformity in discovery practice by requiring nationally uniform disclosure. In keeping with that goal, the amendments neither imposed the present strong form of disclosure nor abolished it altogether.

The proposed changes to Rule 26(a) generated a substantial amount of commentary, both favorable and unfavorable. As set forth in the GAP Note, the Advisory Committee has recommended making some changes to the published proposed amendments to the rule and to the Note, in part in response to issues raised in the public commentary. Other comments were found not to justify proposing changes in either the rule or the Note. This memorandum will try to identify and summarize the reaction to a variety of recurrent comments. The Summary of Public Comments recounts more fully the various views expressed.

National uniformity and the opt-out power: There was a great deal of commentary about national uniformity. See pp. 9-36 of the Summary of Public Comments. A substantial number of judges opposed elimination of the authority for their districts to opt out of disclosure. Some lawyers, generally from a few districts, also opposed elimination of the opt-out. The very great majority of the organized bar, and the great majority of individual lawyers and law professors who provided comments, favored restoring uniformity. Bar organizations that support uniformity include the New York State Bar Assoc. Commercial and Federal Litigation Section (98-CV-012), the Association of the Bar of the City of New York (98-CV-039), the ABA Section of Litigation (98-CV-050), the American College of Trial Lawyers Fed. Cts. Comm. (98-CV-090), the National Assoc. of Consumer Advocates (98-CV-120), the Chicago Council of Lawyers Federal Courts Comm. (98-CV-152), the Seventh Circuit Bar Assoc. (98-CV-154), the Philadelphia Bar Assoc. (98-CV-193), and the

Washington Legal Foundation (98-CV-201). The Federal Magistrate Judges' Assoc. Rules Comm. also supports uniformity (98-CV-268).

The Advisory Committee continues to favor uniformity, and there was no proposal to reconsider the adoption of a nationally uniform disclosure provision.

Narrowing of the disclosure obligation: There was also substantial comment on whether the national standard for initial disclosure should be narrower than the standard in current Rule 26(a)(1). See pp. 37-57 of the Summary of Public Comments. Some who favored uniformity continued to oppose disclosure and to urge its abolition. E.g., New York St. Bar Assoc. Comm. & Fed. Lit. Sec. (98-CV-012); Maryland Defense Counsel (98-CV-018). Many lawyers and bar organizations favored the narrowing of the disclosure obligation because the published change removes possible tensions with the attorney-client relationship and the work-product doctrine. E.g., Association of the Bar of the City of New York, 98-CV-039); ABA Section of Litigation (98-CV-050); Fed. Practice Section, Conn. Bar Assoc. (98-CV-157); Penn. Trial Lawyers Assoc. (98-CV-159). Some lawyers expressed misgivings that the change might expand the disclosure obligations of defendants in some instances because disclosure is no longer tied to particularity in pleading. E.g., Linda A. Willett (98-CV-038). Others opposed the change on the ground that disclosure should not be narrowed. E.g., E.D.N.Y. Comm. on Civil Lit. (98-CV-077); National Assoc. of Consumer Advocates (98-CV-120); Trial Lawyers Assoc. of Metropolitan Washington, D.C. (98-CV-180); Assoc. of Trial Lawyers of America (98-CV-183); Michigan Protection & Advocacy Serv., Inc. (98-CV-184); Trial Lawyers for Public Justice (98-CV-201). Some urged that numerical limits on discovery events should be lifted if disclosure were narrowed. E.g., Lawyers' Committee for Civil Rights Under Law (98-CV-198). In addition, some questioned excluding impeachment

material from the initial disclosure obligation. E.g., National Assoc. of Consumer Advocates (98-CV-120); Hon. David L. Piester (D. Neb.) (98-CV-124); Federal Magistrate Judges' Assoc. Rules Comm. (98-CV-268).

The Discovery Subcommittee considered the role of narrowing the scope of disclosure in making disclosure nationally mandatory, and it did not recommend changing the orientation of the amendments, which narrow initial disclosure. The Advisory Committee does not recommend retaining the present scope of initial disclosure as part of a nationwide rule.

The standard for initial disclosure: In the published proposed amendments, the Advisory Committee included an alternative — limiting disclosure to materials that the disclosing party "may use to support" its position in the action — to the standard embodied in the published proposed amendment. There were few comments addressed to the question which should be preferred. See Summary of Public Comments at pp. 58-59. The ABA Section of Litigation (98-CV-050) favored the version published as the proposed amendment — "supporting its claims or defenses" — but the Chair of that Section, who had drafted a provision like the "may use" version for his district, favored the "may use" version. (See testimony of H. Thomas Wells in San Francisco.)

The Discovery Subcommittee submitted the question to the full Advisory Committee, which debated the merits of the two versions, as reflected in the minutes (behind Tab 6 D, at pp. 10-11). Eventually the Advisory Committee decided with only one dissent to recommend adoption of the "may use to support" rule language. This language would connect more directly to the exclusion provisions of Rule 37(c)(1), and would avoid the need to "scour the earth" to find all supporting material even though a party would never consider

using it in the case, and would similarly avoid the need to disclose voluminous and duplicative supporting materials. It would also address the problem of material and witnesses that both support and hurt a party's case, permitting the party to decide not to disclose that which, on balance, it would decide not to use.

Handling of "low end" excluded categories of proceedings: Proposed Rule 26(a)(1)(E) would exempt from disclosure eight categories of proceedings. There were some comments favoring expansion or narrowing of these categories. See Summary of Public Comments at pp. 60-64. For example, the E.D.N.Y. Comm. on Civil Lit. (98-CV-056) would require the government to make disclosure in pro se prisoner cases, but not the plaintiff. The Attorney General of Oregon (98-CV-146) favored exempting all pro se actions. The Department of Justice (98-CV-266) favored exempting any action by the United States to recover on a loan, not just student loans, while the National Assoc. of Consumer Advocates (98-CV-120) opposed exempting any such cases on the ground that "[t]he government is holding all the cards, and it may be bluffing."

The Advisory Committee discussed these various ideas. It was noted that some judges on the Committee had found that pro se disclosure proceedings were beneficial. It was also observed that the committee was not aware of any reason for suspecting that student loan or other loan cases brought by the United States lack a proper foundation, but that actions involving Small Business Administration or other loans did not seem suitable for exclusion from disclosure in the same way as student loans. Eventually, no change in the exclusions of Rule 26(a)(1)(E) mustered Advisory Committee support.

The Committee did determine that additional Note language should be provided to address concerns raised in the commentary.

The Public Citizen Litigation Group (98-CV-181) and the Department of Justice (98-CV-266) raised concerns about whether the first exempted category, actions for review on an administrative record, is ambiguous. The Advisory Committee decided unanimously to add language to the Note to clarify when this exclusion should apply. Bankruptcy Judge Louise De Carl Adler (98-CV-208) raised questions about how the exemptions would apply to adversary proceedings in bankruptcy. The Committee unanimously decided to add language to the Note (suggested by the Reporter of the Bankruptcy Rules Committee) to address that concern and make it clear that the main source of direction for bankruptcy cases must be found in the Bankruptcy Rules.

"High end" exclusion: The proposed amendments allow the parties to agree to forgo disclosure. They also permit any party to object to disclosure even though another party wants it, and to submit the question to the court in the discovery plan required under Rule 26(f).

This provision prompted a number of comments. See Summary of Public Comments at pp. 65-68. Some supported the objection provision as an essential method for bringing the question to the judge's attention in cases in which initial disclosure would be wasteful. E.g., ABA Section of Litigation (98-CV-050); Federal Practice Section, Conn. Bar Assoc. (98-CV-157); Philadelphia Bar Assoc. (98-CV-193). Others opposed the change on the ground that it would delay disclosure or permit unilateral efforts to escape its effects. E.g., Public Citizen Lit. Group (98-CV-181).

The Discovery Subcommittee did not propose any change in the rule regarding objections to disclosure.

Other comments urged that discussion of the right to object in the Note be expanded. Some contended that "complex" cases should routinely be excluded on objection. E.g., Maryland Defense Counsel (98-CV-018); Stephen Valen (San Francisco hearing); Michael G. Briggs (Gen. Counsel, Houston Indus., Inc.) (San Francisco hearing); Douglas S. Grandstaff (Senior Lit. Counsel, Caterpillar, Inc.) (Chicago hearing).

At its Oregon meeting, the Advisory Committee considered additional Note language concerning circumstances that might justify forgoing disclosure. See Minutes (Tab 6 D) at pp. 12. Eventually, the difficulties outweighed the advantages. For example, to say that a dispositive motion might be a reason to defer disclosure could induce parties to file such motions. The Committee voted not to propose including such Note language.

Added parties: Rule 26(a) does not now provide for initial disclosure by parties added later in the suit. The proposed amendments address this omission by providing that such additional parties must make disclosure within 30 days of being added to the case unless a different time is set by agreement or by the court. Some commentators expressed misgivings about whether 30 days was a long enough time. E.g., Frederick C. Kentz, III (Gen. Counsel, Roche) (98-CV-173); U.S. Dep't of Justice (98-CV-266); see Summary of Public Comments at pp. 69-70. The Discovery Subcommittee did not propose any change in the 30-day period for disclosure by added parties.

GAP Report

The Advisory Committee recommends that the amendments to Rules 26(a)(1)(A) and (B) be changed so that initial disclosure applies to information the disclosing party "may use to support" its

claims or defenses. It also recommends changes in the Committee Note to explain that disclosure requirement. In addition, it recommends inclusion in the Note of further explanatory matter regarding the exclusion from initial disclosure provided in new Rule 26(a)(1)(E) for actions for review on an administrative record and the impact of these exclusions on bankruptcy proceedings. Minor wording improvements in the Note are also proposed.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that ~~which~~ is relevant to ~~the subject matter involved in the pending action, whether it relates to~~ the claim or defense of ~~the party seeking discovery or to the claim or defense of~~ any ~~other~~ party, including the existence, description, nature,

custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant ~~The~~ information ~~sought~~ need not be admissible at the trial if the discovery ~~information sought~~ appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

* * * * *

Committee Note

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the "subject matter" language. This proposal was withdrawn, and the Committee has since then made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the

"subject matter" language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. Discovery and Disclosure Practice, *supra*, at 44-45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the "subject matter" involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See* Discovery and Disclosure Practice, supra, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this

sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, "relevant" means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See* 8 Federal Practice & Procedure § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf.* Crawford-El v. Britton, 118 S. Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

Rule 26(b)(2) is amended to provide explicitly that a court may condition discovery that exceeds the limitations of subdivisions (b)(2)(i), (ii), or (iii) on payment of part or all of the reasonable expenses incurred by the responding party. If the court expands discovery beyond matters relevant to the claims or defenses on a showing of good cause, that conclusion would normally indicate that

the proposed discovery is consistent with the limitations of subdivision (b)(2); ordinarily a scope expansion would not justify a cost-bearing order. Nonetheless, as is true of discovery relevant to the claims or defenses, such broader discovery is subject to the limitations of subdivision (b)(2), and it could happen that some such proposed discovery might exceed the limitations of subdivision (b)(2) and therefore be denied or subject to a cost-bearing order. In any event, a party cannot automatically expand the scope of discovery by agreeing to pay the reasonable expenses of responding.

Summary of Comments

The proposed changes to Rule 26(b)(1) prompted a large number of comments. See Summary of Public Comments (Tab 6 A-v) at pp. 71-116. This memorandum will highlight certain issues.

A scope revision was originally proposed by the ABA Section of Litigation more than 20 years ago. It has been revived a number of times since then, most recently by the American College of Trial Lawyers.

The published revision of the scope of attorney-managed discovery excited a great deal of commentary. This included opposition from some bar organizations as well as support from others. See Summary of Public Comments at 71-104. Much of the commentary supported the change, some urging that it was necessary to focus the courts and the parties on the matters actually involved in the suit rather than the more amorphous concept of "subject matter" involved in the action. Some proponents of the change argued that overbroad discovery imposed vast litigation expense with no meaningful production of useful information. The "subject matter" language of the current rule was said to provide no meaningful

limitation on discovery, and to discourage judges from trying to contain it within sensible bounds.

Other comments vigorously opposed the change. It was contended that the current standard is well known, and that any change would invite abundant litigation about the meaning of the new terms. In addition, many argued that the change would erode notice pleading as litigants felt obliged to expand their complaints or answers to ensure that they could obtain broader discovery, perhaps sometimes nearing the limits of permissible pleading under Rule 11. At the same time, other means are said to exist to resolve these problems.

During its Oregon meeting, the Advisory Committee considered a motion to delete the division of scope between attorney-managed and court-managed discovery from the package recommended to the Standing Committee. There was extensive debate (see Minutes at pp. 26-32). Many of the above points were made by Advisory Committee members. After debate, the Advisory Committee voted 9-4 not to recommend any change in the basic proposal.

But the Committee did conclude that one change should be made in the proposed amendment as published to avoid any risk of misunderstanding. Specifically, the present rule allows discovery of any "matter" relevant to the subject matter involved in the pending action, but the proposed sentence authorizing the court to expand to the former limits speaks of "information" relevant to the subject matter involved in the action. Certainly there was no intention to provide a different standard, and the Advisory Committee therefore voted unanimously to recommend changing "information" to "matter" in that sentence.

The Advisory Committee also decided that additional Note material should be provided to address issues that emerged during the public comment period. One set of concerns focuses on information about such things as organizational arrangements, other or similar incidents, or possible impeachment. Some commentary suggested that some advocates might contend that the amendment to the rule adopts a categorical rule regarding the availability of discovery about such matters absent a court order. Because that was not intended, the Committee voted to add explanatory language to the Note stating that the determination whether such information is discoverable requires a case-by-case determination.

Another concern that emerged in the public comment process is that the court's authority to expand the scope of discovery to the subject matter involved in the action might be found directly linked to the cost-bearing provision now proposed to be included in Rule 26(b)(2). A significant number of witnesses who favored the scope revision said that they expected that any expansion beyond attorney-managed discovery would result in a cost-bearing order even though it was premised on a showing of good cause. Some who opposed the change to subdivision (b)(1) did so in part because they feared this cost-bearing consequence was meant. But the two proposals have independent origins, and were not intended to operate in tandem in this manner. Accordingly, the Committee voted to recommend the addition of Note language explaining that ordinarily a scope expansion would not justify a cost-bearing order.

Finally, there was some concern in public comment about what exactly was meant by the change to the last sentence of current Rule 26(b)(1) indicating that only "relevant" information was discoverable although not admissible. This might be taken to mean that relevance should be measured in terms set forth in the Federal Rules of Evidence. The Advisory Committee voted to recommend adding a

sentence to the Note explaining that, as used in that sentence of the rule, relevant means within the scope of discovery defined in this subdivision, including information relevant to the subject matter of the action if the court has so expanded the scope on a showing of good cause.

GAP Report

The Advisory Committee recommends changing the rule to authorize the court to expand discovery to any "matter" — not "information" — relevant to the subject matter involved in the action. In addition, it recommends additional clarifying material in the Committee Note about the impact of the change on some commonly disputed discovery topics, the relationship between cost-bearing under Rule 26(b)(2) and expansion of the scope of discovery on a showing of good cause, and the meaning of "relevant" in the revision to the last sentence of current subdivision (b)(1). In addition, some minor clarification of language changes have been proposed for the Committee Note.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(b) Discovery and Limits.

* * * * *

(2) Limitations. By order ~~or by local rule~~, the court may alter the limits in these rules on the number of

depositions and interrogatories~~;~~ or ~~and may also limit~~ the length of depositions under Rule 30~~.~~ ~~and~~ By order or local rule, the court may also limit the number of requests under Rule 36. The court shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule ~~shall be limited by the court~~, or require a party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party, if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the

parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under ~~subdivision~~ Rule 26(c).

* * * * *

Committee Note

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but "standing" orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them. This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 process.

The amended rule also makes explicit the authority that the Committee believes already exists under subdivision (b)(2) to condition marginal discovery on cost-bearing — to offer a party that

has sought discovery beyond the limitations of subdivision (b)(2)(i), (ii), or (iii) the alternative of bearing part or all of the cost of that peripheral discovery rather than to forbid it altogether. The authority to order cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation (i) or (ii). It is not expected that this cost-bearing provision would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might only occur in certain types of cases. The limits of (i), (ii), and (iii) can be violated even in "ordinary" litigation. It may be that discovery requests exceeding the limitations of subdivision (b)(2) occur most frequently in connection with document requests under Rule 34, *cf*. Rule 45(c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena), and Rule 34 now calls attention to the provisions of Rule 26(b)(2) for that reason. But the limitations also apply to discovery by other means.

In any situation in which discovery requests are challenged as exceeding the limitations of subdivision (b)(2), the court may fashion an appropriate order including cost-bearing. Where appropriate it could, for example, order that some discovery requests be fully satisfied because they are not disproportionate, direct that certain requests not be answered at all, and condition responses to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In determining whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by limitation (iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The court may enter a cost-bearing order in connection with a Rule 37(a) motion by the party seeking discovery, or on a Rule 26(c) motion by the party opposing discovery. The responding party may raise the limits of Rule 26(b)(2) in its objection to the discovery request or in a Rule 26(c) motion, or in response to a request under subdivision (b)(1) that the court authorize discovery beyond matters relevant to the claims or defenses. Alternatively, the court may act on its own initiative.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * * *

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by ~~local rule,~~ order~~,~~ or agreement of the parties, a party may not seek discovery from any source before the parties have ~~met and~~ conferred as required by ~~subdivision~~ Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by

deposition or otherwise, ~~shall~~ does not operate to delay any other party's discovery.

* * * * *

(f) Conference ~~Meeting~~ of Parties; Planning for Discovery. Except in categories of proceedings ~~actions~~ exempted from initial disclosure under Rule 26(a)(1)(E) ~~by local rule~~ or when otherwise ordered, the parties ~~shall~~ must, as soon as practicable and in any event at least 21 ~~14~~ days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer ~~meet~~ to consider ~~discuss~~ the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by ~~subdivision~~ Rule 26(a)(1), and to develop a proposed discovery plan~~. The plan shall~~ that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under ~~subdivision~~ Rule 26(a) ~~or local rule~~, including a statement as to when disclosures under ~~subdivision~~ Rule 26(a)(1) were made or will be made;

(2) 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 upon particular issues;

(3) 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

(4) any other orders that should be entered by the court under ~~subdivision~~ Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the

conference ~~and being present or represented at the meeting~~, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14~~10~~ days after the conference ~~meeting~~ a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

* * * * *

Committee Note

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but "standing" orders altering the moratorium are not authorized.

Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). "Standing" orders altering the conference requirement for categories of cases are not authorized.

The rule is amended to require only a "conference" of the parties, rather than a "meeting." There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to-face meeting, but "standing" orders so requiring are not authorized.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

"Shall" is replaced by "must," "does," or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

Summary of Comments

The comments on the published proposed amendments to Rules 26(d) and 26(f) are found at pp.119-124 of the Summary of Public Comments (Tab 6 A-v). Certain concerns will be addressed here.

As with the published proposals to eliminate the right to opt out in subdivisions (a)(1) and (b)(2), the elimination of the authority to opt out by local rule from the discovery conference and discovery moratorium provisions prompted some opposition from judges. Some were concerned that these provisions would delay proceedings

in their districts. In addition, objections were made to the moratorium on the ground that limitations proposed to the scope of initial disclosure under subdivision (a)(1) undercut the continued justification for the moratorium. Some also objected that there were no indications in the Note about when relief from the moratorium should be granted by the court. Others supported the creation of national uniformity, and also supported the sequence of activities prescribed under these subdivisions. Most who commented supported the elimination of the requirement for a face-to-face meeting, and some opposed authorizing local rules to impose such a requirement.

The Advisory Committee voted to recommend adding a sentence to the end of Rule 26(f) to deal with the problems that might be created in districts that begin case management very rapidly if that rapid initiation of case management would be delayed by the rule's provision that the Rule 26(f) conference occur at least 21 days before the Rule 16(b) scheduling conference, or by the requirement that a written report to the court be filed within 14 days after the Rule 26(f) conference. The proposed rule provision would authorize a local rule provision shortening these times if necessary, and excusing the written report if an oral report is made to the court during the Rule 16(b) conference. It decided not to recommend adding explanatory material to the Committee Note to subdivision (d) regarding the circumstances in which a court might grant relief from the discovery moratorium.

GAP Report

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court's action under Rule 16(b), and addition to the Committee Note of

explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

Rule 30. Depositions Upon Oral Examination

* * * * *

(d) Schedule and Duration; Motion to Terminate or Limit Examination.

(1) Any objection ~~to evidence~~ during a deposition ~~shall~~ must be stated concisely and in a non-argumentative and non-suggestive manner. A person ~~party~~ may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ~~on evidence~~ directed by the court, or to present a motion under ~~paragraph~~ Rule 30(d)(4~~3~~).

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. ~~By order or local rule, t~~The court ~~may limit the time permitted for the conduct of a deposition,~~

but shall must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person party, or other circumstance, impedes or delays the examination.

(3) If the court finds that any such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(43) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the

examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it ~~shall~~ may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition ~~shall~~ must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

* * * * *

(f) Certification and Delivery ~~Filing~~ by Officer; Exhibits; Copies~~; Notice of Filing~~.

(1) The officer ~~shall~~ must certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This

certificate ~~shall~~ must be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer ~~shall~~ must securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and ~~shall~~ must promptly ~~file it with the court in which the action is pending or~~ send it to the attorney who arranged for the transcript or recording, who ~~shall~~ must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness~~, shall~~ must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve

thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

* * * * *

COMMITTEE NOTE

Subdivision (d). Paragraph (1) has been amended to clarify the terms regarding behavior during depositions. The references to objections "to evidence" and limitations "on evidence" have been removed to avoid disputes about what is "evidence" and whether an objection is to, or a limitation is on, discovery instead. It is intended that the rule apply to any objection to a question or other issue arising during a deposition, and to any limitation imposed by the court in connection with a deposition, which might relate to duration or other matters.

The current rule places limitations on instructions that a witness not answer only when the instruction is made by a "party." Similar limitations should apply with regard to anyone who might purport to instruct a witness not to answer a question. Accordingly, the rule is amended to apply the limitation to instructions by any person. The amendment is not intended to confer new authority on nonparties to instruct witnesses to refuse to answer deposition questions. The amendment makes it clear that, whatever the legitimacy of giving such instructions, the nonparty is subject to the same limitations as parties.

Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances. This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition. For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition. The presumptive duration may be extended, or otherwise altered, by agreement. Absent agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.

Parties considering extending the time for a deposition — and courts asked to order an extension — might consider a variety of factors. For example, if the witness needs an interpreter, that may prolong the examination. If the examination will cover events occurring over a long period of time, that may justify allowing additional time. In cases in which the witness will be questioned about numerous or lengthy documents, it is often desirable for the interrogating party to send copies of the documents to the witness

sufficiently in advance of the deposition so that the witness can become familiar with them. Should the witness nevertheless not read the documents in advance, thereby prolonging the deposition, a court could consider that a reason for extending the time limit. If the examination reveals that documents have been requested but not produced, that may justify further examination once production has occurred. In multi-party cases, the need for each party to examine the witness may warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest. Similarly, should the lawyer for the witness want to examine the witness, that may require additional time. Finally, with regard to expert witnesses, there may more often be a need for additional time — even after the submission of the report required by Rule 26(a)(2) — for full exploration of the theories upon which the witness relies.

It is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the need for resort to the court. The limitation is phrased in terms of a single day on the assumption that ordinarily a single day would be preferable to a deposition extending over multiple days; if alternative arrangements would better suit the parties, they may agree to them. It is also assumed that there will be reasonable breaks during the day. Preoccupation with timing is to be avoided.

The rule directs the court to allow additional time where consistent with Rule 26(b)(2) if needed for a fair examination of the deponent. In addition, if the deponent or another person impedes or delays the examination, the court must authorize extra time. The amendment makes clear that additional time should also be allowed where the examination is impeded by an "other circumstance," which might include a power outage, a health emergency, or other event.

In keeping with the amendment to Rule 26(b)(2), the provision added in 1993 granting authority to adopt a local rule limiting the time permitted for depositions has been removed. The court may enter a case-specific order directing shorter depositions for all depositions in a case or with regard to a specific witness. The court may also order that a deposition be taken for limited periods on several days.

Paragraph (3) includes sanctions provisions formerly included in paragraph (2). It authorizes the court to impose an appropriate sanction on any person responsible for an impediment that frustrated the fair examination of the deponent. This could include the deponent, any party, or any other person involved in the deposition. If the impediment or delay results from an "other circumstance" under paragraph (2), ordinarily no sanction would be appropriate.

Former paragraph (3) has been renumbered (4) but is otherwise unchanged.

Subdivision (f)(1): This subdivision is amended because Rule 5(d) has been amended to direct that discovery materials, including depositions, ordinarily should not be filed. The rule already has provisions directing that the lawyer who arranged for the transcript or recording preserve the deposition. Rule 5(d) provides that, once the deposition is used in the proceeding, the attorney must file it with the court.

"Shall" is replaced by "must" or "may" under the program to conform amended rules to current style conventions when there is no ambiguity.

Summary of Comments

The comments received on Rule 30 are found at pp. 125-148 of the Summary of Public Comments (Tab 6 A-v). An effort will be made herein to identify and discuss several recurrent comments.

Most comments were about the deposition duration limitation the published amendment proposals would add to Rule 30(d)(2). The "deponent veto" provision, requiring consent of the deponent to extend the deposition beyond one day of seven hours, was criticized by many (including many who supported the amendment to impose a durational limitation) as likely to create problems. See pp. 144-146 of the Summary of Public Comments. The Advisory Committee voted unanimously to recommend that the requirement of the deponent's consent be deleted from the proposed amendment, and that the Committee Note be accordingly revised.

Other comments raised questions about how the limitation should be applied. Several questioned whether the intention was to permit breaks for lunch, for example. In addition, many questioned how the limitation would work in a situation under Rule 30(b)(6) in which the responding party designates more than one person to testify. The Advisory Committee unanimously recommends that two sentences be added to the Committee Note to provide guidance on these matters, indicating that reasonable breaks are expected and not counted against the seven-hour limitation, and that each person designated under Rule 30(b)(6) should be considered a separate witness for purposes of the one-day limitation.

Many who commented raised specific concerns about situations in which there might be good reason for the deposition to extend beyond one day. Under the published proposal, the parties may agree to extend the time, and the court may so order for good cause. The Advisory Committee considered a variety of specific examples that might be included in the Committee Note to provide direction on

these topics to parties considering extending the time, and to courts asked to do so. It decided to recommend additional Note language describing seven situations as examples that might warrant extending the deposition.

Much commentary opposed the entire concept of a rule limiting the length of depositions. There were many objections to the one-day limitation as arbitrary or micromanagement. Some said that most depositions that extend longer than one day do so for good reasons, and some who commented urged a limit of two days rather than one. Others favored the published proposal. A number of witnesses who have practiced under the three-hour limitation that applies in Illinois state courts thought that this limitation has worked. The Advisory Committee proposes no change to the durational limitation of one day of seven hours.

The published proposed amendments to Rule 30(d)(1) were generally applauded. See pp. 125-148 of the Summary of Public Comments. The Federal Magistrate Judges Association (98-CV-268) objected, however, that the published amendment might be read to empower nonparties to instruct a deponent not to answer a question. The Advisory Committee voted to recommend additional language in the Committee Note explaining that the amendment confers no new authority to make such instructions, but makes it clear that anyone who purports to make such an instruction is subject to the limitations imposed by the rule.

The need for a conforming change to another part of Rule 30 also emerged. Specifically, Rule 30(f)(1) currently instructs the court reporter, once the deposition transcript is completed, to "file it with the court in which the action is pending or send it to the attorney who arranged for the transcript or recording." The published amendment to Rule 5(d), however, directs that depositions not be filed until used

in the action. Accordingly, the Advisory Committee voted unanimously to recommend that Rule 30(f)(1) be amended to delete the directive that the recorder file the deposition and leave the directive that the recorder send it to the attorney who arranged for the transcript or recording. Because this is only a conforming amendment, it is believed that there is no need that it be published for public comment.

GAP Report

The Advisory Committee recommends deleting the requirement in the published proposed amendments that the deponent consent to extending a deposition beyond one day, and adding an amendment to Rule 30(f)(1) to conform to the published amendment to Rule 5(d) regarding filing of depositions. It also recommends conforming the Committee Note with regard to the deponent veto, and adding material to the Note to provide direction on computation of the durational limitation on depositions, to provide examples of situations in which the parties might agree — or the court order — that a deposition be extended, and to make clear that no new authority to instruct a witness is conferred by the amendment. One minor wording improvement in the Note is also suggested.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

* * * * *

(b) Procedure. The request ~~shall~~ must set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request ~~shall~~

must specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served ~~shall~~ must serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response ~~shall~~ must state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection ~~shall~~ must be stated. If objection is made to part of an item or category, the part ~~shall~~ must be specified and inspection permitted of the remaining parts.

The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. Such an order, or an order under Rule 26(c), is subject to the limitations of Rule 26(b)(2)(i), (ii), and (iii).

A party who produces documents for inspection ~~shall~~ must (i) produce them as they are kept in the usual course of business or ~~shall~~ (ii) organize and label them to correspond with the categories in the request.

* * * * *

Committee Note

Subdivision (b). The amendment calls attention to the provisions of Rule 26(b)(2)(i), (ii), and (iii). In 1998, the Committee published a proposal to amend Rule 34(b) to include explicit authority for the court to require the party seeking discovery to pay part or all of the cost of responding if the discovery sought exceeded the limitations of Rule 26(b)(2)(i), (ii), or (iii). See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, 181 F.R.D. 19, 64-68 (1998). After public comment and further

deliberation, the Committee decided that the cost-bearing provision more appropriately should be included in Rule 26(b)(2), and it has been added there. Because cost-bearing concerns often arise in connection with discovery pursuant to Rule 34, however, a change to Rule 34(b) appeared warranted to call attention to the availability of that device in connection with motions to compel Rule 34 discovery and Rule 26(c) protective orders in connection with document discovery.

"Shall" is replaced by "must," or deleted to avoid unnecessary repetition, under the program to conform amended rules to current style conventions when there is no ambiguity.

Summary of Comments

The published proposal to amend Rule 34(b) involved cost-bearing authority. The Advisory Committee has recommended that this subject be included in Rule 26(b)(2) instead, as discussed above. The public comments on cost-bearing were discussed in connection with that provision.

GAP Report

The Advisory Committee recommends amending the published proposals to remove the rule change and Note material explicitly authorizing cost-bearing and to include cost-bearing in Rule 26(b)(2) instead. However, because excessive cost is often a concern in connection with Rule 34 discovery, the Committee also unanimously recommends amendment of Rule 34(b) to include a sentence calling attention to the limitations of Rule 26(b)(2). In conjunction with that addition to the rule, it also recommends Note material describing the initial publication of the initial proposal to amend Rule 34(b), and the

shift of the provision to Rule 26(b)(2). Because this amendment merely calls attention to the addition of cost-bearing to Rule 26(b)(2), as was included in the published amendment proposals, the Committee does not believe republication is needed.

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions

* * * * *

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), ~~shall~~ is not, unless such failure is harmless, ~~be~~ permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including

attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under ~~subparagraphs~~ Rule 37(b)(2)(A), (B), and (C) ~~of subdivision (b)(2) of this rule~~ and may include informing the jury of the failure to make the disclosure.

* * * * *

COMMITTEE NOTE

Subdivision (c)(1). When this subdivision was added in 1993 to direct exclusion of materials not disclosed as required, the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted. In the face of this omission, courts may rely on inherent power to sanction for failure to supplement as required by Rule 26(e)(2), *see* 8 Federal Practice & Procedure § 2050 at 607-09, but that is an uncertain and unregulated ground for imposing sanctions. There is no obvious occasion for a Rule 37(a) motion in connection with failure to supplement, and ordinarily only Rule 37(c)(1) exists as rule-based authority for sanctions if this supplementation obligation is violated.

The amendment explicitly adds failure to comply with Rule 26(e)(2) as a ground for sanctions under Rule 37(c)(1), including exclusion of withheld materials. The rule provides that this sanction power only applies when the failure to supplement was "without substantial justification." Even if the failure was not substantially justified, a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless.

"Shall" is replaced by "is" under the program to conform amended rules to current style conventions when there is no ambiguity.

Summary of Comments

The comments on the published proposed amendment are found at pp. 169-170 of the Summary of Public Comments (Tab 6 A-v). Eleven commentators and two witnesses expressed support for the change. There was no expressed opposition.

The wording of the proposed rule amendment, however, needs to be changed. The published proposal adds failure to supplement as required by Rule 26(e)(2) as an occasion for application of the exclusion sanction provided in Rule 37(c)(1). But as worded it refers to failure "to disclose information," while Rule 26(e)(2) deals with failure to amend a prior response to discovery. Accordingly, the Advisory Committee unanimously recommends that the language be revised to make clear that it applies to a failure to amend a discovery response. This change is purely formal and no republication should be needed. Indeed, there is not even any need to change the Note due to the clarification of the rule.

GAP Report

The Advisory Committee recommends that the published amendment proposal be modified to state that the exclusion sanction can apply to failure "to amend a prior response to discovery as required by Rule 26(e)(2)." In addition, one minor phrasing change is recommended for the Committee Note.