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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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**To:** **Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure**

**From:** **Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules**

**Date:** **December 8, 1997**

**Re:** **Report of the Advisory Committee on Civil Rules**

## *I Introduction*

The Advisory Committee on Civil Rules and two of its subcommittees met at the Boston College of Law on September 4, 5, and 6, 1997. The Advisory Committee met again on October 6 and 7, 1997, in Deer Park, Utah. A summarizing statement of the topics considered at these meetings is provided in this Introduction. Part II recommends that this Committee approve for publication proposed revisions of Supplemental Admiralty Rules B, C, and E, with a parallel change in Civil Rule 14. Part III sets out several items for information. Part III(A) describes the ongoing work on discovery, spearheaded by the Discovery Subcommittee. Part III(B) summarizes the deliberations that led the Advisory Committee to defer further action on Civil Rule 23 class-action proposals, both those published for comment in August, 1996, and new proposals. Part III(C) describes the Mass Torts Subcommittee that is being formed, perhaps with liaisons from other Judicial Conference committees, to consider the ways in which the problems of mass-tort litigation might be addressed by combining proposals that can be advanced through the Rules Enabling Act process with proposals that require legislative action.

The September meeting was held to enable Advisory Committee members to participate in the Boston College Law School symposium on the discovery system that was organized by the Discovery Subcommittee. Several Standing Committee members also attended and participated in the conference. The conference's splendid success was reflected in the meeting of the Discovery Subcommittee that followed its conclusion. The Subcommittee helped the Special Reporter, Professor Marcus, to shape the discovery portion of the October meeting agenda.

The October meeting considered three main topics, as well as a few more nearly incidental matters. Discovery proposals, class-action revisions, and Admiralty Rules amendments dominated the agenda. The Admiralty Rules proposals are described in Part II. The class-action revisions and ongoing discovery work are described in Part III.

## *II ACTION ITEM*

## *Rules Proposed for Publication*

### *Admiralty Rules B, C, and E; Civil Rule 14*

The proposals to amend the Supplemental Admiralty Rules spring from the desire to adjust the rules to reflect the growing importance of civil forfeiture proceedings. In rem admiralty procedure has long been invoked for civil forfeiture proceedings. The dramatic growth in land-based civil forfeiture has demonstrated the need to adopt some distinctions between maritime and forfeiture procedure. The process of considering these changes led also to a small number of other proposed changes, including some designed to reflect the 1993 reorganization of Civil Rule 4.

These proposals have been developed over a long period. The initial work was done by the Maritime Law Association and the Department of Justice. The proposals that emerged from that process were considered at length by the Advisory Committee's Admiralty Rules Subcommittee. The chair of the MLA rules committee and a representative of the Department of Justice attended the Advisory Committee's October meeting and participated in the discussion that led to some final revisions of the proposals.

The proposals draw two major distinctions between forfeiture and admiralty proceedings, reflected in Rule C(6)(a) and (b). A longer time to respond is provided in forfeiture proceedings. And forfeiture proceedings allow an automatic right to participate to a broader range of those who assert rights against the forfeiture property than is permitted in maritime proceedings; the maritime procedure will continue to require intervention, rather than more direct participation, where intervention has been required in the past. These topics may be caught up in pending forfeiture legislation. Careful efforts are being made through the Administrative Office, in coordination with the Department of Justice, to keep abreast of legislative developments.

The portions of the rules affected by the proposed changes have been revised to incorporate current style conventions. These changes have included substantial reorganization of current rule provisions. Style suggestions were received from the Style Subcommittee after the Advisory Committee meeting. The suggestions were based on the pre-meeting draft, a matter of little consequence since few changes were made at the meeting. The draft submitted

for publication incorporates the suggestions made by Bryan Garner, as well as some of the suggestions made by Joseph Spaniol. Other of the suggestions have not been incorporated because there was not an adequate opportunity to review them with the Admiralty Subcommittee and the MLA and Department of Justice advisers. The Admiralty Subcommittee feared that adoption of these suggestions might have unintended substantive consequences, and has recommended that the style questions be carried forward for consideration along with the public comments and testimony.

*Admiralty Rule B*

Rule B governs maritime attachment, a procedure that can be used for one or both of two purposes. Maritime attachment may be used to establish quasi-in-rem jurisdiction when personal jurisdiction is not available and the claim does not support a true in rem claim against the attached property. Maritime attachment also is available as a security device when personal jurisdiction is available, so long as the defendant is not "found within the district."

Rule B(1)(d)(ii) is new. Rule C(3) was amended in 1993 to provide that in an in rem action service need not be made by a United States Marshal if the property seized is not a vessel or tangible property on board a vessel. Although a parallel change was considered for Rule B maritime attachment, for reasons that cannot be discovered only Rule C was changed. The Rule C(3) alternative is adopted by proposed Rule B(1)(d)(ii). The change reflects a continuing process of reducing the demands placed on the Marshals Service. Admiralty practitioners believe that service on board a vessel continues to involve sensitive and potentially dangerous circumstances that require the authority of an armed public official. Other attachments can be made effectively by any of the persons listed in the rule.

Rule B(1)(e) represents a significant change in a peculiar corner of present Rule B(1). Rule B(1) now provides that in addition to maritime attachment, the plaintiff may invoke state-law remedies for attachment and garnishment "pursuant to Rule 4(e)." Until 1993, Rule 4(e) allowed use of state attachment and garnishment procedures in an action against "a party not an inhabitant of or found within the state." In 1993, Rule 4(e) was revised and redesignated as Rule 4(n)(2). At a minimum, Rule B(1) must be revised to incorporate the correct portion of Rule 4. Present Rule 4(n)(2), however, allows invocation of state remedies as to assets "found within the district" only on "showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule." Maritime attachment is available in every such case. After lengthy discussion, it was concluded that nothing significant would be accomplished by continuing to incorporate Rule 4(n)(2) in Rule B.

At the same time, admiralty practitioners have found it helpful to invoke state-law security devices under Rule 64. There was some fear that reliance on Rule 64 might be found inconsistent with Rule B. Under Rule A, the Civil Rules apply in admiralty "except to the extent that they are inconsistent with these Supplemental Rules." To avoid any risk that Rule 64 might not continue to be available in admiralty, Rule B(1)(e) expressly incorporates Rule 64.

*Rule C*

Rule C(2)(d)(ii) is new. It reflects statutory provisions that permit a forfeiture proceeding against property that is not in the district.

Rule C(4) is amended to reflect the changes in terminology made in Rule C(6). In addition, an apparent gap is filled by providing for the first time that publication of notice of an in rem proceeding can be terminated if the property is released after the 10-day period that triggers the obligation to publish but before publication is completed.

Rule C(6) is split into separate subdivisions to reflect the distinctions between forfeiture and maritime in rem proceedings. Subdivision (a), governing forfeiture, reflects the two central distinctions. One distinction involves the nature of the interests that establish an automatic right to participate in the proceeding. Present Rule C(6) refers to the "claimant." This reference has generated confusion. "Claimant" is replaced in subdivision (a)(i) by "a person who asserts an interest in or right against the property." This phrase includes those who assert any sort of interest, including such non-ownership and nonpossessory interests as liens. Such a person can assert the interest or right by filing a statement of interest or right, and later filing an answer. Proposed subdivision (b)(i), governing admiralty proceedings, replaces "claimant" with the phrase "[a] person who asserts a right of possession or any ownership interest in the property." This phrase is narrower than the parallel phrase in (a)(i), and is intended to capture the traditional and still continuing admiralty practice. Under this practice a person who asserts an interest or right less than possession or ownership — such as many varieties of lien — can participate only by intervention, not by simply filing a statement of right or interest.

*Rule E*

Rule E(3) is amended to reflect statutory provisions that permit service of process outside the district in some forfeiture proceedings. (The parallel pleading change is made in Rule C(2)(d)(ii), described above; the statutes are illustrated in the Rule C Note.) The Advisory Committee, on recommendation of its Subcommittee, voted for the lengthier version set out as paragraphs

(a) and (b). The alternative version is set out because both Garner and Spaniol preferred it.

Rule E(7) is amended to make it clear that if Defendant A gives security, the plaintiff need not give security when Defendant B counterclaims.

Rule E(8) is amended to delete the provision for a restricted appearance when state quasi-in-rem jurisdiction provisions are invoked. This change reflects the amendment of Rule B(1)(e) that deletes the Rule B(1) provision invoking what now is Civil Rule 4(n)(2), as described above.

Rule E(9) is amended to reflect the changes in terminology in Rule C(6).

Rule E(10) is new. It provides for protection of attached or arrested property that remains in the possession of the owner or another person.

Finally, the change in Rule C(6) terminology requires parallel changes in Civil Rule 14(a) and (c).

*Publication Schedule.* The Admiralty Rules proposal offers an occasion to reflect on the time-consuming pace of the Enabling Act Process. The Advisory Committee has not deliberated on this question, and there is no recommendation that the publication period be shortened. The circumstances, however, provide a typical illustration of the circumstances that add to the time required to effect a rule change.

Development of these proposals has taken a long time. The areas of practice involved are not familiar even to most members of the Admiralty Subcommittee. The patient and careful work of the Maritime Law Association committee and the Department of Justice have provided strong reassurance that the proposals are well developed. They are eager to press toward actual adoption. If the proposals were published by early February, a three-month comment period ending in April might enable the Advisory Committee to make a final recommendation for adoption to the June, 1998 meeting of this Committee. If accepted, that would allow full time for consideration by the Judicial Conference in September and Supreme Court action by the end of April, 1999. The traditional six-month comment period would, for all practical purposes, set the process back by one year. Even if a final recommendation were made to this Committee in January, 1999, it would seem hasty to ask that the Judicial Conference act in March to recommend action by the Supreme Court before the end of April.

Although the time tables are clear enough, it is less certain whether there is in fact any great urgency. It would be nice to have a proposal published and a clear time table to show to

Congress as it considers forfeiture legislation. The topic is addressed primarily to specialized — indeed highly specialized — segments of the bar, who may be able to respond clearly and quickly. A highly visible and expert body of admiralty lawyers, the MLA, has been deeply involved with the drafting process already. Scrutiny by forfeiture specialists at the Department of Justice provides comparable reassurance on that front.

Set against these observations is the powerful force of ordinary practice. Part I(4)(b) of the Procedures for the Conduct of Business under the Enabling Act provides:

> In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.

Subparagraph (d) is longer:

> Exceptions to the time period for public comment and the public hearing requirement may be granted by the Standing Committee or its chairman when the Standing Committee or its chair determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. * * *

It would be difficult to argue "that the administration of justice requires" a one-year advance in the time required to effect these rule changes. The best that can be hoped is that after a normal six-month comment period, the responses will show no more than minor adjustments that could as well have been suggested in three months. But it remains possible that the full period will be needed to ferret out more elusive but more important issues that need to be addressed.

This observation on the frustrations that arise from the deliberately careful nature of the full process is offered as food for long-range thought. It may be that some experimentation will prove possible with matters that are not mere "technical or conforming amendment[s]," but that involve cohesive and highly specialized constituencies that can respond more rapidly than the many and diverse constituencies that are affected by most rule changes.

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

**Rule B. In Personam Actions: Attachment and Garnishment**

**(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process.**

**(a)** If a defendant in an in personam action 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 [to be] 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 clerk must deliver the summons, process, and any supplemental process to the marshal for service.

**(ii)** If the property is other tangible or intangible property, the clerk must deliver the summons, process, and any supplemental process 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. 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. In Rem Actions: Special Provisions**

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**(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 clerk must deliver the warrant and any supplemental process to the marshal for service.

**(ii)** If the property that is the subject of the action is other property, tangible or intangible, the clerk must deliver the warrant and any supplemental process 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.

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**(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 subdivision (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 subdivision 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(a)(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**

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**(3) Process.**

**(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 or quasi in rem may be served within the district or outside the district when authorized by statute.

**(~~b~~c)** * * *

**[Note**: Both Garner and Spaniol voted for an alternative draft that was rejected by the Advisory Committee:

**(a) Territorial limits of Effective Service.** In rem process and maritime garnishment and attachment may be served:

**(i)** within the district; or

**(ii)** outside the district when authorized by statute.]

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**(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 paragraph (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, 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; Sale.**

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**(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 (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.

*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).

## Civil Rule 14

**Rule 14. Third-Party Practice**

**(a) When Defendant May Bring in Third Party.** * * * 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 * * *.

**Committee Note**

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

**November, 1997 Draft: Spaniol Edits (Showing other changes too)**

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

**(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process.**

**(a)** ~~If a defendant in an in personam action 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 [to be] 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.~~ In an action in personam the court may issue process to attach a defendant's tangible or intangible property up to the value of the amount sued for — including property in the hands of any garnishee named in the process — if the plaintiff or the plaintiff's attorney files with the complaint an affidavit stating that to the affiant's knowledge 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~~ issue an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process ~~enforcing~~ to enforce the court's order ~~upon application~~ without further court order.

**(c~~b~~)** 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.~~, and t~~ The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(~~d~~c) ~~(i)~~ If the property is a vessel or tangible property on board a vessel, the clerk must deliver the summons, process, and any supplemental process to the marshal for service. Otherwise

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

(e) The plaintiff may invoke a state-law remedy~~ies~~ under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment ~~attachment and garnishment or similar seizure of the defendant's property under Rule 4(n) [as well as] [in addition or in the alternative to] the remedies provided in this Rule. Only Rule E(8) of these Rules applies to state remedies so invoked~~.

(2) **Default Judgment. ~~Notice to Defendant.~~** ~~No~~ The court may not enter a default judgment ~~may be entered~~ except upon proof — ~~which may be~~ by affidavit or otherwise — that: ~~of one of the following:~~

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

**(b)** ~~that~~ 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)** ~~that~~ 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. 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. In Rem Actions: Special Provisions**

* * * * *

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

**(a)** be verified;

**(b)** describe with reasonable **[redundant?]** 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 **[meaning "will arrive?]** within the district while the action is pending;

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

**(i)** the place of seizure and whether ~~it was~~ the seizure occurred 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~~ any other allegation~~s~~ required by the statute under which the action is brought.

**(3)** ~~**Judicial Authorization and Process.**~~ **Arrest Warrant.**

**(a)** ~~**Arrest Warrant**~~ **Issuance.**

**(~~i~~iii)** When the United States files a complaint ~~demanding a~~ seeking the forfeiture of property ~~for violation of a federal statute~~, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or seizure of other property

without requiring a certificate~~ion~~ of exigent circumstances.

**(~~iii~~i)** ~~**(A) In other actions, t**~~T~~he court must review the complaint and any supporting papers~~.~~, and ~~I~~if the conditions for an in rem action appear to exist, the court must ~~enter~~ issue an order ~~directing~~ authorizing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

**(~~B~~ii)** ~~But~~ 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~~ the 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.

**[Insert newly designated (iii) from above.]**

**(b) Service.**

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

~~**(ii) If the property that is the subject of the action is other property, tangible or intangible,**~~ the clerk must deliver the warrant and any supplemental process to a person or organization authorized to enforce it, who may be: (~~A~~i) a marshal; (~~B~~ii) someone under contract with the United States;

(~~C~~iii) someone specially appointed by the court for that purpose; or, (~~D~~iv) 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~~ funds 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 ~~of the court~~.

**(4) Notice.** No notice — other than the 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 having general circulation in the district, as 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~~ a forfeiture action for the 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 the execution of process, or after ~~(2) completed~~ the publication of notice under Rule C(4), whichever is earlier, or

~~**(B)**~~ within the time that the court allows;

**(ii)** an agent, bailee, or attorney must ~~describe~~ 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 subdivision (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)~~ the completion~~ed~~ of publication of notice under subdivision C(4), whichever is earlier, 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 the 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 ~~at the time of answering~~ 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(a)(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)** 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 or quasi in rem may be served within the district or outside the district when authorized by statute.

**(~~b~~c)** * * *

* * * * *

**(7) Security on a Counterclaim.**

**(a)** When a person who has given security for ~~to respond in~~ 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 ~~to respond in~~ damages ~~to~~ arising from the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until ~~this~~ security on the counterclaim is given, unless the court directs otherwise.

**(b)** The plaintiff is required to give security under paragraph (a) when the United States or its corporate instrumentality asserts a counterclaim~~s and would have been required to give security to respond in damages if a private party but is relieved by law from giving security~~ even though the United States has not given security for damages on the original claim.

**(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 under these Supplemental Rules or under Rule 4(n),~~ 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; Sale.**

* * * * *

**(b) Interlocutory Sales; Delivery.**

**(i)** Upon ~~On~~ application of a party, the marshal, or other person having custody of the property, the court may order that all or part of the property be sold ~~with the sales~~ and that the proceeds, or ~~as much of them as will satisfy the judgment,~~ a portion thereof be 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 the release of the property.

**(ii)** In the above circumstances ~~described in (i)~~, the court, upon motion ~~by~~ of 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~~ who must give security ~~under these rules~~.

* * * * *

**(10) Preservation of Property.** ~~When the owner or another person remains in~~ If the marshal or other person having the warrant does not take possession of the 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 ~~of a party~~ or on its own, may ~~[must]~~ enter any order necessary to preserve the property ~~and~~ or 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 ~~incorporates state law quasi-in-rem jurisdiction under Civil Rule 4(n). The reference to attachment and garnishment includes all forms of borrowed state process, whatever the state name may be~~ 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.

*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).

## Civil Rule 14

**Rule 14. Third-Party Practice**

**(a) When Defendant May Bring in Third Party.** * * * 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 * * *.

**Committee Note**

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

## *III Information Items*

### *(A) Discovery Project*

The Discovery Subcommittee was created at the October, 1996 Advisory Committee meeting to carry on the studies of discovery that have been an almost constant fixture on the Committee's agenda for the last three decades. The immediate impetus was provided by several concerns. The Federal Rules Committee of the American College of Trial Lawyers had recommended that the time had come to consider once more a proposal to narrow the general scope of civil discovery that was first advanced by the American Bar Association in 1977. Moreover, the Civil Justice Reform Act of 1990 and the RAND Institute's report in response urged that means for reducing cost be found. And finally, emerging experience with disclosure under the 1993 provisions of Civil Rule 26(a), combined with the wide diversity of disclosure practice under local rules, suggested that the time had come to begin to review disclosure and seek some uniformity in the national rules.

From the beginning, the scope of the discovery project has been broader than the immediate impetus. Complaints continue to be made about the operation of the discovery rules in cases that constitute a small percentage of all federal litigation but that contribute a large share of the difficult case administration and case management problems. A study of disclosure, moreover, directly involves study of the discovery moratorium and discovery conference practices adopted in Civil Rules 26(d) and (f) as part of the disclosure system. As a package, it was hoped that these devices would help the parties to engage in more responsible discovery planning, reducing the need to consider other rules or to provoke still greater judicial management. Rather than attempt to view some parts of discovery practice in isolation, it was determined that all issues would be open for inquiry.

It was recognized that the broad scope of inquiry does not automatically translate into broad ambitions for reform. There is strong support for the view that the present discovery rules, coupled with the pretrial management powers established by Civil Rule 16, provide all the authority needed for effectively controlling discovery. There also is strong support for the view that there should be a pause in reform efforts, giving litigants and courts time to fully digest and shape the several sets of rules changes adopted between 1970 and 1993. It was agreed that further changes must be supported by strong reasons unless there is broad support throughout the profession or there is clear promise that substantially the same amount of useful information can be discovered at lower cost. The Advisory Committee does believe that the conjoint uniformity and disclosure questions must be addressed now, but all else may be suspended indefinitely.

Early in its deliberations, the Discovery Subcommittee convened a one-day conference of highly experienced litigators from a variety of practice specialties and perspectives. This conference was useful for several purposes. Initially, it confirmed the general impression that discovery now works reasonably well in most cases. But it also confirmed the view that problems remain. It is worthwhile to explore further the possibility that some of the problems may be reduced by further rules changes. The problems discussed also were important in helping the Discovery Subcommittee and its Special Reporter, Professor Richard Marcus, in planning the Boston College conference described below.

The Discovery Subcommittee also worked with the Federal Judicial Center to design a questionnaire study of discovery practices. The study was based on a sample of 1,000 closed cases that were selected to weed out cases of types that often do not involve any discovery — social security disability review cases are one of the most obvious categories of "no discovery" cases. The study, which was nearly complete by the time of the Boston College conference, reinforced the results of earlier empiric studies. Even in a sample of cases selected as these were, there were a substantial number of cases with no discovery. In most cases, the total level of discovery activity was modest. There was no general sense of an emergency in discovery practice.

The Boston College discovery conference was held in early September. All members of the Advisory Committee, and several members and the Reporter of the Standing Committee, attended. In addition to academic papers, the conference included several panels of lawyers who represented a sterling cross-section of the best and most experienced litigators the country has to offer. Several major lawyer organizations were invited to participate, and did. The conference concluded with a panel of rulemaking veterans. It seems safe to say that the conference was as successful as a conference can be. It is beyond doubt that the conference admirably served the Advisory Committee's desire to gather as much information as possible from as many lawyers as possible.

With the conclusion of the Boston College conference, the Discovery Subcommittee and the Advisory Committee moved from a stage that primarily involved the gathering of information to a stage that continues to seek out information but that also seeks to work through the information to an evaluation of possible responses. The first full day of the October Committee meeting was devoted to discovery topics. A summary of the discussion is set out at pages 4 to 21 of the October Minutes. The Discovery Subcommittee is scheduled to meet on January 6 and 7 to develop specific proposals for consideration at the March Advisory Committee meeting. A bare summary of the central topics illustrates the directions of present study.

*Uniformity*. Both at the Boston College conference and elsewhere, the Committee has found widespread concern with the disuniformity of disclosure practice. Civil Rule 26(a)(1) was deliberately written to allow individual districts to opt out of the national disclosure rule, either to adhere to a local disclosure rule or to dispense entirely with disclosure. Concerns range from abstract principle to simple pragmatism. In principle, there should be a uniform national practice to support the intrinsic values of uniformity. The more pragmatic concerns face lawyers — and even more often large litigants — who must learn to comply with diverse local practices as litigation confronts them in many different courts. As widespread as the concerns are, their depth is less certain. Although there is much interest in restoring uniformity — a goal that resonates to the entire history of the Local Rules project — the ultimate conclusion is not foregone.

*Disclosure*. The uniformity inquiry necessarily entails an examination of disclosure itself. The RAND study of early experience under the Civil Justice Reform Act, the Federal Judicial Center study, and reports on local plans all indicate that the dire fears of disclosure opponents have not been realized in practice. There even is some ground for a tentative suggestion that disclosure may have some of the hoped-for beneficial effects. But the evidence so far suggests that disclosure also has not had important general benefits independent of the Rule 26(f) conference. And some cogent doubts remain. Disclosure and the Rule 26(f) conference may be unnecessary work in small cases that would have little or no discovery. The duty to continually supplement disclosure under Rule 26(e)(1) may yet prove burdensome. The fear that untoward sanctions will be visited on disclosure failures probably cannot be evaluated until disclosure practice has matured over a period that includes several years of trials completed in a disclosure regime. And there is little way to gather evidence to support or refute the fear that disclosure will, by forcing superior counsel to reveal information that would not have been obtained by discovery, unbalance the adversary system and disrupt attorney-client relationships. The Discovery Subcommittee will provide, to support further Committee deliberations, at least three drafts. One will abandon all disclosure, another will require uniform adherence to the present national rule, and the third will seek some middle ground — perhaps disclosure by each party of the information it will rely on at trial.

*Discovery Management*. A third major topic will address the balance between the parties and the court in discovery management. Perhaps the single most frequently repeated theme at discovery hearings and conferences has been the view that the discovery rules need not be changed. They are designed to be administered by the parties without judicial interference and without much need for judicial assistance. For the most part they work well in that mode. What is needed is more consistent and ready availability of judicial management for the small portion of cases that can lead to big

discovery problems. But it is difficult to rewrite the rules yet again to emphasize how important it is that judges actually use the tools provided by Rule 16 and the discovery rules. Various alternatives have been suggested. One is to distinguish sharply between three stages: (1) initial disclosure; (2) a "core" discovery stage, perhaps limiting still further the presumptive numbers of interrogatories and depositions set by present rules, and perhaps even adding some form of quantity limit on document discovery; and (3) a final stage that permits discovery only under a plan adopted and enforced by the court. A simpler alternative would be to require that a judge become involved in shaping a discovery plan on request by any party. Parallel changes might be made in Rule 16(b), clearly authorizing a conditional scheduling order before the parties have had a Rule 26(f) conference. It also may be desirable to consider the value of setting presumptive discovery cut-off times and even trial dates. The RAND study reported favorably on the combination of early case management, early discovery cut-offs, and the early fixing of firm trial dates. At the same time, local circumstances may prove so diverse that a uniform national rule would be unworkable, failing even as a means of forcing more judges to become more involved in pretrial management. The Discovery Subcommittee will report on all of these matters.

*Scope of Discovery*. Rule 26(b)(1) defines the scope of discovery to include "any matter, not privileged, which is relevant to the subject matter involved in the pending action." The longstanding proposal has been that the problems of discovery could be substantially reduced if the scope of discovery were narrowed to matters relevant to the claims — or perhaps the issues — framed by the pleadings. Although this proposal has been often considered and as often rejected by the Advisory Committee, it will be considered one more time. In addition, the Discovery Subcommittee will attempt to draft for Committee consideration some alternative to the occasionally criticized final sentence of Rule 26(b)(1), which provides that "[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

*Document Discovery*. Many lawyers believe that most of the problems that remain in discovery practice arise from document discovery, particularly in the "big documents" case. A number of general approaches have been suggested, and remain open for consideration. Among the possibilities are the probably fruitless attempt to establish presumptive limits parallel to the 1993 limits on the numbers of interrogatories or depositions; a document-specific rule that narrows the scope of production-discovery below the scope allowed by Rule 26(b)(1) for other means of discovery; and an amendment to Rule 26(b)(2) that makes explicit the power — now provided by the protective-order powers of Rule 26(c) — to allow defined document discovery only if the demanding party pays the

response costs. In addition to such general proposals, at least two specific issues have been identified for attention. One involves discovery of information stored by electronic means. The general principle is clear enough — information stored in a computer is as discoverable as information stored on paper. But lawyers report that there are a continually shifting array of problems arising from changing methods of storing, deleting, and retrieving electronic information. The initial sense of the Advisory Committee is that these problems will continue to change so rapidly that the cumbersome rulemaking process cannot at present hope to achieve lasting, or even relevant, responses. It may be that similar problems will plague other advisory committees to an extent that will justify coordinated work.

The other specific document discovery problem deserves separate discussion. Many lawyers report that the costs of responding to massive document requests are greatly increased by the need for very careful screening to avoid inadvertent waiver of privileges. They also report that these problems are greatly reduced when parties of good will agree to a protective order that allows the demanding party to examine documents informally, before they are formally produced, without triggering any waiver. The demanding party then commonly makes a much narrower and better focused demand, enabling the producing party to make equally focused and effective privilege objections. It is recognized that this procedure is vulnerable to arguments by third parties that the protective order does not defeat waiver. The Discovery Subcommittee will explore the possibility of establishing some similar procedure by rule. If this path is pursued very far, the Evidence Rules Committee will be asked to participate. And all committees must begin thinking about the special Enabling Act provisions for privileges. Any rule that creates, abolishes, or modifies a privilege can take effect only if approved by Congress, 28 U.S.C. § 2074(b). It must be decided whether a rule that simply defines the consequences of a federal discovery procedure modifies a privilege for § 2074 purposes. Even if it is determined that the rule governs discovery and its consequences, not the scope of the privilege, the question must be identified and discussed for the benefit of the Judicial Conference, the Supreme Court, and Congress.

*Protective Orders*. The Advisory Committee has worked on the Rule 26(c) protective order provisions for some time. Two proposals were published for comment. The questions raised by the second proposal and the hearing testimony and comments have been carried forward as part of the larger discovery project. The Discovery Subcommittee has not been asked to review these matters further, but they continue to have a place on the agenda.

### *(B) Class Actions*

The Committee concluded its consideration of the testimony and comments on the Rule 23 proposals that were published in August, 1996. Active consideration of Rule 23 will continue on several fronts. It may be some time, however, before additional proposals are recommended for adoption.

At its May meeting, the Advisory Committee concluded that two of the proposed factors bearing on certification of a Rule 23(b)(3) class, published as (A) and (B), should be abandoned as unnecessary. A third proposed factor (C), suggesting consideration of the maturity of the claims, was revised and has been carried forward for further consideration with such other revisions as may one day be recommended.

In June, the Advisory Committee recommended that this Committee approve adoption of a revision of Rule 23(c)(1) that would allow the class certification decision to be made "when practicable" rather than "as soon as practicable." This proposal was remanded to the Advisory Committee for further consideration in conjunction with such other Rule 23 proposals as might be advanced. It remains as part of the ongoing Rule 23 study.

Great controversy has surrounded the 1996 proposal that Rule 23(b)(3) include a new factor (F), suggesting consideration "whether the probable relief to individual class members justifies the costs and burdens of class litigation." The proposal was an attempt to provide a means of denying certification of classes that seem calculated to enrich class counsel without providing any meaningful benefit to class members. It has been staunchly defended, and even criticized as an unduly timid approach. It has been vehemently attacked as the death knell of small-claims class actions, a repeal of the private-attorney-general reform accomplished by the 1966 creation of (b)(3) class actions. The Committee concluded that the controversy reflects such deep divisions between legitimate competing views that any further study should focus on only one of the many alternatives considered. This alternative would allow certification of an opt-in class, rather than an opt-out class, when there is reason to question the desire of putative class members to resolve their claims through class litigation.

Successive Committee Rule 23 drafts have included opt-in classes in various roles. Early drafts allowed broad discretion to choose between opt-in and opt-out classes. Among possible uses for opt-in classes, mass tort cases were seen as particularly important. Many of the difficulties that surround class treatment of large individual claims can be reduced by limiting the class to those who elect to participate. More recent discussion has added a consideration that parallels the "just ain't worth it" concern reflected in proposed factor (F): certification of an opt-in class

may be an appropriate means of determining whether class members, rather than class counsel alone, care about enforcing the alleged class rights. These and other opt-in class possibilities will remain on the agenda for active consideration.

The 1996 publication-for-comment included also a proposed settlement-class provision, Rule 23(b)(4), and added an explicit hearing requirement to the settlement-approval provisions of Rule 23(e). The (b)(4) proposal was designed only to supersede the Third Circuit ruling that a (b)(3) class can be certified for settlement only if the same class would be certified for trial. Nearly a year after publication, the Supreme Court overruled the narrow holding of the Third Circuit approach in *Amchem Prods., Inc. v. Windsor*, 1997, 117 S.Ct. 2231, 2248, but it affirmed much of the Third Circuit's jurisprudence on settlement classes. The Supreme Court decision makes it unwise to proceed further with the (b)(4) proposal at this time. The Supreme Court opinion, moreover, seems in some ways broader than the proposal. Adoption of the proposal could easily lead to confusion and inconsistencies between the Court's intentions, the purposes of the rule, and the eventual interpretation of the rule. The Committee concluded that it is better not to attempt to respond by hurried drafting and publication of a new and more ambitious settlement-class proposal. Instead, these problems will continue to be considered in the framework where they seem most pressing, mass torts.

Many new Rule 23 proposals were advanced from the hearings and comments on the 1996 proposals. Two have been added to the package of continuing proposals. One of these would stiffen the "common evidence" requirement for a (b)(3) class. The other would seek to address repetitive requests to certify the same or overlapping classes. These topics will remain part of the Rule 23 agenda.

Congress continues to be interested in class actions. The Private Securities Litigation Reform Act of 1995 addressed several class action issues. Among the topics that seem of special interest to Congress are attorney fees and class notice. The Advisory Committee has considered several notice proposals, including attempts to encourage "plain English" notices that most class members can understand. Fee issues have been a persisting Committee concern, particularly as part of the effort to find some way to deal with class actions that seem calculated to win fees without producing any significant private benefit for class members or law-enforcement benefit for the public. Fee questions may move toward the uncertain line that separates procedure from substance. Both of these topics will remain part of the continuing Rule 23 project.

### *(C) Mass Torts*

The most challenging issues confronting current class action practice arise from dispersed mass torts. It is not clear whether

Rule 23, or an analogous new rule, provides the best means of dealing with widespread injuries arising from a common source or course of conduct. The Report of the National Bankruptcy Review Commission in October, 1997, proposes means of treating "Mass Future Claims" in bankruptcy. Many of the solutions that may be desirable outside of bankruptcy are likely to involve matters of jurisdiction or substance that are outside the Enabling Act process. At the same time, it seems inevitable that any solutions will require parallel changes in the Civil Rules. It is important that any Civil Rules revisions be accomplished within the Enabling Act framework.

The Advisory Committee has created a Mass Torts Subcommittee. Experience with the Discovery Subcommittee and Admiralty Subcommittee has proved the wisdom of providing intensive consideration of special problems by smaller subcommittees to prepare the way for more effective deliberation by the full Committee. The constitution of the Mass Torts Subcommittee, however, remains uncertain as this Report is written. If possible, it will be desirable to appoint a Special Reporter, and also to invite participation by representatives from other Judicial Conference committees. Mass torts problems raise issues within the scope of at least the Federal-State Jurisdiction Committee, the Bankruptcy Administration Committee, and the Judicial Panel on Multidistrict Litigation. The Court Administration and Case Management Committee may be interested as well. These possibilities may be resolved by the time this Committee meets in January. Whatever information can be provided then will help to describe the composition and initial directions of the Subcommittee.