COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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BANKRUPTCY RULES

May 1, 1992

TO: Honorable Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

Enclosed as Attachment A are proposed amendments to the Federal Rules of Civil Procedure and to the Federal Rules of Evidence. With the accompanying Committee Notes, these were approved by the Advisory Committee on Civil Rules on April 15, 1992, for submission to the Standing Committee under rule 5b of the governing procedures. It should be noted that the proposed amendments to Rule 43 have been withdrawn for further study.

Most of the proposed amendments were published in August 1991, accompanied by a solicitation for comments from the bench, bar, and public. Hundreds of written comments were received and reviewed by the Advisory Committee. Public hearings were held in Los Angeles, California, on November 21, 1991, and in Atlanta, Georgia, on February 19 and 20, 1992.

Several of the proposed amendments are ones that were returned by the Supreme Court in December 1991 for further study. These had been published for comment in October 1989; approved by the Advisory Committee, Standing Committee, and Judicial Conference in April, June, and September 1990; and submitted to the Supreme Court in November 1990. The Advisory Committee has reviewed these amendments and made a few changes in the text or Notes.

Finally, there are a few proposed amendments not previously published that, being technical in nature, are recommended for approval under the exception to the requirement for public comment and hearing provided in rule 4d of the governing procedures.

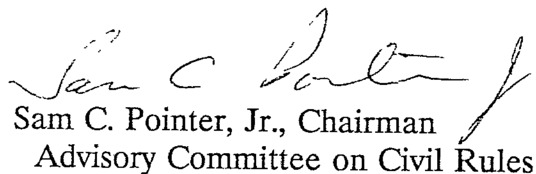
Attachment B is a report identifying and discussing the primary criticisms and suggestions, and explaining the changes made by the Advisory Committee after considering these comments. It also reflects particular aspects of the proposed changes on which there was disagreement among Committee members. There were, however, no requests to submit any "minority reports," and, with the exception of one proposed change (Rule 702 of the Federal Rules of Evidence), the Committee was unanimous in recommending that the proposed amendments be adopted. The report also indicates those proposed technical amendments that are recommended for adoption under rule 4d of the governing procedures without public notice and opportunity for comment.

Professor Carrington, Reporter for the Advisory Committee, will submit a separate report that summarizes the written comments received and the testimony presented at public hearings.

We request that the Standing Committee approve these proposals and transmit them to the Judicial Conference, together with those technical amendments (primarily involving the new title of "Magistrate Judge") that were approved by the Standing Committee in 1991.

In response to the call for self-appraisal under the "sunset" standards, we believe that the work of the Committee is on-going, is needed, and should be allowed to proceed through continuation of the Committee.

Sincerely,



Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules

cc: Secretary of Standing Committee (with copies for other members)
Style Committee, Standing Committee
Chairmen, other Advisory Committees
Members and Reporter, Advisory Committee on Civil Rules

Attachments:
A--Proposed Amendments
B--Report on Issues and Changes

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

AND THE

FEDERAL RULES OF EVIDENCE

SUBMITTED TO

STANDING COMMITTEE
ON
RULES OF PRACTICE AND PROCEDURE

BY

ADVISORY COMMITTEE
ON
CIVIL RULES

MAY 1992

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope *and Purpose* of Rules

1 These rules govern the procedure in the United States district courts in all suits
2 of a civil nature whether cognizable as cases at law or in equity or in admiralty, with
3 the exceptions stated in Rule 81. They shall be construed *and administered* to secure
4 the just, speedy, and inexpensive determination of every action.

COMMITTEE NOTES

The purpose of this revision, adding the words "and administered" to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

Rule 4. ~~**Process**~~ *Summons*

1 (a) ~~**Summons: Issuance.** Upon the filing of the complaint the clerk shall~~
2 ~~forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's~~
3 ~~attorney, who shall be responsible for prompt service of the summons and a copy of~~
4 ~~the complaint. Upon request of the plaintiff separate or additional summons shall~~
5 ~~issue against any defendants.~~

6 ~~(b) **Same:**~~ **Form.** The summons shall be signed by the clerk, ~~be under~~ *bear* the
7 seal of the court, ~~contain the name of~~ *identify* the court and ~~the names of~~ the parties,
8 be directed to the defendant, *and* state the name and address of the plaintiff's
9 attorney~~, if any, otherwise the plaintiff's address~~ *or, if unrepresented, of the plaintiff*~~;~~
10 ~~and~~ *It shall also state* the time within which ~~these rules require~~ the defendant ~~to~~ *must*
11 appear and defend, and ~~shall~~ notify the defendant that ~~in case of the defendant's~~
12 failure to do so *will result in a* judgment by default ~~will be rendered~~ against the
13 defendant for the relief demanded in the complaint. ~~When, under Rule 4(e), service~~
14 ~~is made pursuant to a statute or rule of court of a state, the summons, or notice, or~~
15 ~~order in lieu of summons shall correspond as nearly as may be to that required by the~~
16 ~~statute or rule.~~ *The court may allow a summons to be amended.*

17 *(b) Issuance. Upon or after filing the complaint, the plaintiff may present a*
18 *summons to the clerk for signature and seal. If the summons is in proper form, the clerk*
19 *shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or*
20 *a copy of the summons if addressed to multiple defendants, shall be issued for each*
21 *defendant to be served.*

22 (c) **Service** ***with Complaint; by Whom Made.***

(1) ~~Process, other than a subpoena or a summons and complaint, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.~~ *A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.*

(2)~~(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served~~ *Service may be effected* by any person who is not a party and *who* is ~~not less than~~ *at least* 18 years of age. *At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is*

~~(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose, only—~~

~~(i) on behalf of a party~~ authorized to proceed in forma pauperis pursuant to ~~Title~~ 28~~,~~ U.S.C. § 1915~~,~~ or ~~of a seaman~~ *is* authorized to proceed *as a seaman* under ~~Title~~ 28~~,~~ U.S.C. § 1916~~,~~*.*

~~(ii) on behalf of the United States or an officer or agency of the United States, or~~

~~(iii) pursuant to an order issued by the court stating that a United~~

46 ~~States marshal or deputy United States marshal, or a person specially~~
47 ~~appointed for that purpose, is required to serve the summons and~~
48 ~~complaint in order that service be properly effected in that particular~~
49 ~~action.~~
50 ~~(C) A summons and complaint may be served upon a defendant of any~~
51 ~~class referred to in paragraph (1) or (3) of subdivision (d) of this rule—~~
52 ~~(i) pursuant to the law of the State in which the district court is held~~
53 ~~for the service of summons or other like process upon such defendant in~~
54 ~~an action brought in the courts of general jurisdiction of that State, or~~
55 ~~(ii) by mailing a copy of the summons and of the complaint (by first~~
56 ~~class mail, postage prepaid) to the person to be served, together with two~~
57 ~~copies of a notice and acknowledgment conforming substantially to form~~
58 ~~18-A and a return envelope, postage prepaid, addressed to the sender. If~~
59 ~~no acknowledgment of service under this subdivision of this rule is received~~
60 ~~by the sender within 20 days after the date of mailing, service of such~~
61 ~~summons and complaint shall be made under subparagraph (A) or (B) of~~
62 ~~this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).~~
63 ~~(D) Unless good cause is shown for not doing so the court shall order the~~
64 ~~payment of the costs of personal service by the person served if such person does~~
65 ~~not complete and return with 20 days after mailing, the notice and~~
66 ~~acknowledgment of receipt of summons.~~
67 ~~(E) The notice and acknowledgment of receipt of summons and complaint~~
68 ~~shall be executed under oath or affirmation.~~

69 ~~(3) The court shall freely make special appointments to serve summonses~~
70 ~~and complaints under paragraph (2)(B) of this subdivision of this rule and all~~
71 ~~other process under paragraph (1) of this subdivision of this rule.~~

72 **(d)** ~~**Summons and Complaint: Person to be Served.**~~ *Waiver of Service; Duty to*
73 *Save Costs of Service; Request to Waive.* ~~The summons and complaint shall be served~~
74 ~~together. The plaintiff shall furnish the person making service with such copies as are~~
75 ~~necessary. Service shall be made as follows:~~

76 *(1) A defendant who waives service of a summons does not thereby waive any*
77 *objection to the venue or to the jurisdiction of the court over the person of the*
78 *defendant.*

79 *(2) An individual, corporation, or association that is subject to service under*
80 *subdivision (e), (f), or (h) and that receives notice of an action in the manner*
81 *provided in this paragraph has a duty to avoid unnecessary costs of serving the*
82 *summons. To avoid costs, the plaintiff may notify such a defendant of the*
83 *commencement of the action and request that the defendant waive service of a*
84 *summons. The notice and request*

85 *(A) shall be in writing and shall be addressed directly to the defendant,*
86 *if an individual, or else to an officer or managing or general agent (or other*
87 *agent authorized by appointment or law to receive service of process) of a*
88 *defendant subject to service under subdivision (h);*

89 *(B) shall be dispatched through first-class mail or other reliable means;*

90 *(C) shall be accompanied by a copy of the complaint and shall identify*
91 *the court in which it has been filed;*

92 *(D) shall inform the defendant, by means of a text prescribed in an*
93 *official form promulgated pursuant to Rule 84, of the consequences of*
94 *compliance and of a failure to comply with the request;*
95 *(E) shall set forth the date on which the request is sent;*
96 *(F) shall allow the defendant a reasonable time to return the waiver,*
97 *which shall be at least 30 days from the date on which the request is sent, or*
98 *60 days from that date if the defendant is addressed outside any judicial*
99 *district of the United States; and*
100 *(G) shall provide the defendant with an extra copy of the notice and*
101 *request, as well as a prepaid means of compliance in writing.*
102 *If the defendant fails to comply with the request, the court shall impose the costs*
103 *subsequently incurred in effecting service on the defendant unless good cause for the*
104 *failure be shown.*
105 *(3) A defendant that, before being served with process, timely returns a waiver*
106 *so requested is not required to serve an answer to the complaint until 60 days after*
107 *the date on which the request for waiver of service was sent, or 90 days after that*
108 *date if the defendant was addressed outside any judicial district of the United States.*
109 *(4) When the plaintiff files a waiver of service with the court, the action shall*
110 *proceed, except as provided in paragraph (3), as if a summons and complaint had*
111 *been served at the time of filing the waiver, and no proof of service shall be required.*
112 *(5) The costs to be imposed on a defendant under paragraph (2) for failure*
113 *to comply with a request to waive service of a summons shall include the costs*
114 *subsequently incurred in effecting service under subdivision (e), (f), or (h), together*

115 *with the costs, including a reasonable attorney's fee, of any motion required to*
116 *collect the costs of service.*

117 (*e*~~1~~) *Service Upon Individuals Within a Judicial District of the United States. Unless*
118 *otherwise provided by federal law, service* ~~U~~*u*pon an individual *from whom a waiver has*
119 *not been obtained and filed,* other than an infant or an incompetent person, *may be*
120 *effected in any judicial district of the United States:*

121 *(1) pursuant to the law of the state in which the district court is located, or*
122 *in which service is effected, for the service of a summons upon the defendant in an*
123 *action brought in the courts of general jurisdiction of the State; or*

124 *(2)* by delivering a copy of the summons and of the complaint to the
125 individual personally or by leaving copies thereof at the individual's dwelling
126 house or usual place of abode with some person of suitable age and discretion
127 then residing therein or by delivering a copy of the summons and of the
128 complaint to an agent authorized by appointment or by law to receive service of
129 process.

130 *(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by*
131 *federal law, service upon an individual from whom a waiver has not been obtained and*
132 *filed, other than an infant or an incompetent person, may be effected in a place not within*
133 *any judicial district of the United States:*

134 *(1) by any internationally agreed means reasonably calculated to give notice,*
135 *such as those means authorized by the Hague Convention on the Service Abroad*
136 *of Judicial and Extrajudicial Documents; or*

137 *(2) if there is no internationally agreed means of service or the applicable*

138 *international agreement allows other means of service, provided that service is*

139 *reasonably calculated to give notice:*

140 *(A) in the manner prescribed by the law of the foreign country for*

141 *service in that country in an action in any of its courts of general jurisdiction;*

142 *or*

143 *(B) as directed by the foreign authority in response to a letter rogatory*

144 *or letter of request; or*

145 *(C) unless prohibited by the law of the foreign country, by*

146 *(i) delivery to the individual personally of a copy of the summons*

147 *and the complaint; or*

148 *(ii) any form of mail requiring a signed receipt, to be addressed*

149 *and dispatched by the clerk of the court to the party to be served; or*

150 *(3) by other means not prohibited by international agreement as may be*

151 *directed by the court if the court finds that internationally agreed means or the law*

152 *of the foreign country (A) will not provide a lawful means by which service can be*

153 *effected or (B), in cases of urgency, will not permit service of process within the time*

154 *required by the circumstances.*

155 (*g*~~2~~) *Service Upon Infants and Incompetent Persons. Service u*~~U~~pon an infant or

156 an incompetent person ~~by serving the summons and complaint~~ *in a judicial district of*

157 *the United States shall be effected* in the manner prescribed by the law of the state in

158 which the service is made for the service of summons or like process upon any such

159 defendant in an action brought in the courts of general jurisdiction of that state.

160 *Service upon an infant or an incompetent person in a place not within any judicial district*

161 *of the United States shall be effected in the manner prescribed by paragraph (2)(A) or*

162 *(2)(B) of subdivision (f) or by such means as the court may direct.*

163 (*h*~~3~~) *Service Upon Corporations and Associations. Unless otherwise provided by*

164 *federal law, service u*~~U~~pon a domestic or foreign corporation or upon a partnership or

165 other unincorporated association ~~which~~ *that* is subject to suit under a common name,

166 *and from which a waiver of service has not been obtained and filed, shall be effected:*

167 *(1) in a judicial district of the United States in the manner prescribed for*

168 *individuals by subdivision (e)(1), or* by delivering a copy of the summons and of

169 the complaint to an officer, a managing or general agent, or to any other agent

170 authorized by appointment or by law to receive service of process and, if the

171 agent is one authorized by statute to receive service and the statute so requires,

172 by also mailing a copy to the defendant~~,~~ *, or*

173 *(2) in a place not within any judicial district of the United States in any*

174 *manner prescribed for individuals by subdivision (f) except personal delivery as*

175 *provided in paragraph (2)(C)(i) thereof.*

176 (*i*~~4~~) *Service Upon the United States, and Its Agencies, Corporations, or Officers.*

177 *(1) Service u*~~U~~pon the United States~~;~~ *shall be effected*

178 *(A)* by delivering a copy of the summons and of the complaint to the

179 United States attorney for the district in which the action is brought or to

180 an assistant United States attorney or clerical employee designated by the

181 United States attorney in a writing filed with the clerk of the court *or by*

182 *sending a copy of the summons and of the complaint by registered or certified*

183 *mail addressed to the civil process clerk at the office of the United States*

184 *attorney* and

185 *(B)* by *also* sending a copy of the summons and of the complaint by

186 registered or certified mail to the Attorney General of the United States

187 at Washington, District of Columbia, and

188 *(C)* in any action attacking the validity of an order of an officer or

189 agency of the United States not made a party, by also sending a copy of the

190 summons and of the complaint by registered or certified mail to ~~such~~ *the*

191 officer or agency.

192 (~~5~~*2) Service* ~~—U~~*u*pon an officer*,* ~~or~~ agency*, or corporation* of the United

193 States~~,~~ *shall be effected* by serving the United States *in the manner prescribed by*

194 *paragraph (1) of this subdivision* and by *also* sending a copy of the summons and

195 of the complaint by registered or certified mail to ~~such~~ *the* officer*,* ~~or~~ agency*, or*

196 *corporation*. ~~If the agency is a corporation the copy shall be delivered as~~

197 ~~provided in paragraph (3) of this subdivision of this rule.~~

198 *(3) The court shall allow a reasonable time for service of process under this*

199 *subdivision for the purpose of curing the failure to serve multiple officers, agencies,*

200 *or corporations of the United States if the plaintiff has effected service on either the*

201 *United States attorney or the Attorney General of the United States.*

202 (*j*~~6~~) *Service Upon Foreign, State, or Local Governments.*

203 *(1) Service upon a foreign state or a political subdivision, agency, or*

204 *instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.*

205 *(2) Service u*~~U~~pon a state*,* ~~or~~ municipal corporation*,* or other governmental

206 organization ~~thereof~~ subject to suit~~,~~ *shall be effected* by delivering a copy of the

207 summons and of the complaint to ~~the~~ *its* chief executive officer ~~thereof~~ or by
208 serving the summons and complaint in the manner prescribed by the law of that
209 state for the service of summons or other like process upon any such defendant.
210 ~~(e) **Summons: Service Upon Party Not Inhabitant of or Found Within State.**~~
211 ~~Whenever a statute of the United States or an order of court thereunder provides for~~
212 ~~service of a summons, or of a notice, or of an order in lieu of summons upon a party~~
213 ~~not an inhabitant of or found within the state in which the district court is held, service~~
214 ~~may be made under the circumstances and in the manner prescribed by the statute or~~
215 ~~order, or, if there is no provision therein prescribing the manner of service, in a~~
216 ~~manner stated in this rule. Whenever a statute or rule of court of the state in which~~
217 ~~the district court is held provides (1) for service of a summons, or of a notice, or of~~
218 ~~an order in lieu of summons upon a party not an inhabitant of or found within the~~
219 ~~state, or (2) for service upon or notice to such a party to appear and respond or~~
220 ~~defend in an action by reason of the attachment or garnishment or similar seizure of~~
221 ~~the party's property located within the state, service may in either case be made under~~
222 ~~the circumstances and in the manner prescribed in the statute or rule.~~
223 (~~f~~*k*) **Territorial Limits of Effective Service.** ~~All process other than a subpoena~~
224 ~~may be served anywhere within the territorial limits of the state in which the district~~
225 ~~court is held, and, when authorized by a statute of the United States or by these rules,~~
226 ~~beyond the territorial limits of that state. In addition, persons who are brought in as~~
227 ~~parties pursuant to Rule 14, or as additional parties to a pending action or a~~
228 ~~counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner~~
229 ~~stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state~~

230 ~~but within the United States that are not more than 100 miles from the place in which~~
231 ~~the action is commenced, or to which it is assigned or transferred for trial; and persons~~
232 ~~required to respond to an order of commitment for civil contempt may be served at~~
233 ~~the same places. A subpoena may be served within the territorial limits provided in~~
234 ~~Rule 45.~~
235 *(1) Service of a summons or filing a waiver of service is effective to establish*
236 *jurisdiction over the person of a defendant*
237 *(A) who could be subjected to the jurisdiction of a court of general*
238 *jurisdiction in the state in which the district court is located, or*
239 *(B) who is a party joined under Rule 14 or Rule 19 and is served at a*
240 *place within a judicial district of the United States and not more than 100*
241 *miles from the place from which the summons issues, or*
242 *(C) who is subject to the federal interpleader jurisdiction under 28*
243 *U.S.C. § 1335, or*
244 *(D) when authorized by a statute of the United States.*
245 *(2) If the exercise of jurisdiction is consistent with the Constitution and laws*
246 *of the United States, serving a summons or filing a waiver of service is also effective,*
247 *with respect to claims arising under federal law, to establish personal jurisdiction*
248 *over the person of any defendant who is not subject to the jurisdiction of the courts*
249 *of general jurisdiction of any state.*
250 **(g)** ~~**Return.**~~ *Proof of Service. If service is not waived, t*~~T~~he person ~~serving the~~
251 ~~process~~ *effecting service* shall make proof ~~of service~~ thereof to the court ~~promptly and~~
252 ~~in any event within the time during which the person served must respond to the~~

253 ~~process~~. If service is made by a person other than a United States marshal or deputy
254 United States marshal, ~~such~~ *the* person shall make affidavit thereof. *Proof of service*
255 *in a place not within any judicial district of the United States shall, if effected under*
256 *paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention,*
257 *and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the*
258 *addressee or other evidence of delivery to the addressee satisfactory to the court.* ~~If service~~
259 ~~is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the~~
260 ~~sender's filing with the court the acknowledgment received pursuant to such~~
261 ~~subdivision.~~ Failure to make proof of service does not affect the validity of the
262 service. *The court may allow proof of service to be amended.*

263 ~~**(h) Amendment.** At any time in its discretion and upon such terms as it deems~~
264 ~~just, the court may allow any process or proof of service thereof to be amended, unless~~
265 ~~it clearly appears that material prejudice would result to the substantial rights of the~~
266 ~~party against whom the process issued.~~

267 ~~**(i) Alternative Provisions for Service in a Foreign Country.**~~

268 ~~**(1) Manner.** When the federal or state law referred to in subdivision (e)~~
269 ~~of this rule authorizes service upon a party not an inhabitant of or found within~~
270 ~~the state in which the district court is held, and service is to be effected upon the~~
271 ~~party in a foreign country, it is also sufficient if service of the summons and~~
272 ~~complaint is made: (A) in the manner prescribed by the law of the foreign~~
273 ~~country for service in that country in an action in any of its courts of general~~
274 ~~jurisdiction; or (B) as directed by the foreign authority in response to a letter~~
275 ~~rogatory, when service in either case is reasonably calculated to give actual~~

276 ~~notice; or (C) upon an individual, by delivery to the individual personally, and~~
277 ~~upon a corporation or partnership or association, by delivery to an officer, a~~
278 ~~managing or general agent; or (D) by any form of mail, requiring a signed~~
279 ~~receipt, to be addressed and dispatched by the clerk of the court to the party to~~
280 ~~be served; or (E) as directed by order of the court. Service under (C) or (E)~~
281 ~~above may be made by any person who is not a party and is not less than 18~~
282 ~~years of age or who is designated by order of the district court or by the foreign~~
283 ~~court. On request, the clerk shall deliver the summons to the plaintiff for~~
284 ~~transmission to the person or the foreign court or officer who will make the~~
285 ~~service.~~
286 ~~(2) **Return.** Proof of service may be made as prescribed by subdivision (g)~~
287 ~~of this rule, or by the law of the foreign country, or by order of the court. When~~
288 ~~service is made pursuant to subparagraph (1)(D) of this subdivision, proof of~~
289 ~~service shall include a receipt signed by the addressee or other evidence of~~
290 ~~delivery to the addressee satisfactory to the court.~~
291 (~~j~~*m*) ~~**Summons:**~~—**Time Limit for Service.** If ~~a~~ service of the summons and
292 complaint is not made upon a defendant within 120 days after the filing of the
293 complaint ~~and the party on whose behalf such service was required cannot show good~~
294 ~~cause why such service was not made within that period~~, the *court* ~~action shall be~~
295 ~~dismissed as to that defendant without prejudice.~~, upon ~~the court's~~ *motion or on its*
296 own initiative ~~with~~ *after* notice to ~~such party or upon motion~~ *the plaintiff, shall dismiss*
297 *the action without prejudice as to that defendant or direct that service be effected within*
298 *a specified time; provided that if the plaintiff shows good cause for the failure, the court*

299 *shall extend the time for service for an appropriate period*. This subdivision ~~shall~~ *does*

300 not apply to service in a foreign country pursuant to subdivision (~~i~~*f*) *or (j)(1)* ~~of this~~

301 ~~rule~~.

302 *(n) Seizure of Property; Service of Summons Not Feasible.*

303 *(1) If a statute of the United States so provides, the court may assert*

304 *jurisdiction over property. Notice to claimants of the property shall then be sent in*

305 *the manner provided by the statute or by service of a summons under this rule.*

306 *(2) Upon a showing that personal jurisdiction over a defendant cannot, in the*

307 *district where the action is brought, be obtained with reasonable efforts by service of*

308 *summons in any manner authorized by this rule, the court may assert jurisdiction*

309 *over any of the defendant's assets found within the district by seizing the assets under*

310 *the circumstances and in the manner provided by the law of the state in which the*

311 *district court is located.*

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of federal court jurisdiction be disapproved, the Committee nevertheless recommends adoption of the balance of the rule, with subdivision (k)(1) becoming simply subdivision (k). The Committee Notes would be revised to eliminate references to subdivision (k)(2).

Purposes of Revision. The general purpose of this revision is to facilitate the service of the summons and complaint. The revised rule explicitly authorizes a means for service of the summons and complaint on any defendant. While the methods of service so authorized always provide appropriate notice to persons against whom claims are made, effective service under this rule does not assure that personal jurisdiction has been established over the defendant served.

First, the revised rule authorizes the use of any means of service provided by the law

not only of the forum state, but also of the state in which a defendant is served, unless the defendant is a minor or incompetent.

Second, the revised rule clarifies and enhances the cost-saving practice of securing the assent of the defendant to dispense with actual service of the summons and complaint. This practice was introduced to the rule in 1983 by an act of Congress authorizing "service-by-mail," a procedure that effects economic service with cooperation of the defendant. Defendants that magnify costs of service by requiring expensive service not necessary to achieve full notice of an action brought against them are required to bear the wasteful costs. This provision is made available in actions against defendants who cannot be served in the districts in which the actions are brought.

Third, the revision reduces the hazard of commencing an action against the United States or its officers, agencies, and corporations. A party failing to effect service on all the offices of the United States as required by the rule is assured adequate time to cure defects in service.

Fourth, the revision calls attention to the important effect of the Hague Convention and other treaties bearing on service of documents in foreign countries and favors the use of internationally agreed means of service. In some respects, these treaties have facilitated service in foreign countries but are not fully known to the bar.

Finally, the revised rule extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States. The present territorial limits on the effectiveness of service to subject a defendant to the jurisdiction of the court over the defendant's person are retained for all actions in which there is a state in which personal jurisdiction can be asserted consistently with state law and the Fourteenth Amendment. A new provision enables district courts to exercise jurisdiction, if permissible under the Constitution and not precluded by statute, when a federal claim is made against a defendant not subject to the jurisdiction of any single state.

The revised rule is reorganized to make its provisions more accessible to those not familiar with all of them. Additional subdivisions in this rule allow for more captions; several overlaps among subdivisions are eliminated; and several disconnected provisions are removed, to be relocated in a new Rule 4.1.

<u>The Caption of the Rule</u>. Prior to this revision, Rule 4 was entitled "Process" and applied to the service of not only the summons but also other process as well, although these are not covered by the revised rule. Service of process in eminent domain proceedings is governed by Rule 71A. Service of a subpoena is governed by Rule 45, and service of papers such as orders, motions, notices, pleadings, and other documents is governed by Rule 5.

The revised rule is entitled "Summons" and applies only to that form of legal process. Unless service of the summons is waived, a summons must be served whenever a person is joined as a party against whom a claim is made. Those few provisions of the former rule

which relate specifically to service of process other than a summons are relocated in Rule 4.1 in order to simplify the text of this rule.

Subdivision (a). Revised subdivision (a) contains most of the language of the former subdivision (b). The second sentence of the former subdivision (b) has been stricken, so that the federal court summons will be the same in all cases. Few states now employ distinctive requirements of form for a summons and the applicability of such a requirement in federal court can only serve as a trap for an unwary party or attorney. A sentence is added to this subdivision authorizing an amendment of a summons. This sentence replaces the rarely used former subdivision 4(h). See 4A Wright & Miller, Federal Practice and Procedure § 1131 (2d ed. 1987).

Subdivision (b). Revised subdivision (b) replaces the former subdivision (a). The revised text makes clear that the responsibility for filling in the summons falls on the plaintiff, not the clerk of the court. If there are multiple defendants, the plaintiff may secure issuance of a summons for each defendant, or may serve copies of a single original bearing the names of multiple defendants if the addressee of the summons is effectively identified.

Subdivision (c). Paragraph (1) of revised subdivision (c) retains language from the former subdivision (d)(1). Paragraph (2) retains language from the former subdivision (a), and adds an appropriate caution regarding the time limit for service set forth in subdivision (m).

The 1983 revision of Rule 4 relieved the marshals' offices of much of the burden of serving the summons. Subdivision (c) eliminates the requirement for service by the marshal's office in actions in which the party seeking service is the United States. The United States, like other civil litigants, is now permitted to designate any person who is 18 years of age and not a party to serve its summons.

The court remains obligated to appoint a marshal, a deputy, or some other person to effect service of a summons in two classes of cases specified by statute: actions brought in forma pauperis or by a seaman. 28 U.S.C. §§ 1915, 1916. The court also retains discretion to appoint a process server on motion of a party. If a law enforcement presence appears to be necessary or advisable to keep the peace, the court should appoint a marshal or deputy or other official person to make the service. The Department of Justice may also call upon the Marshals Service to perform services in actions brought by the United States. 28 U.S.C. § 651.

Subdivision (d). This text is new, but is substantially derived from the former subdivisions (c)(2)(C) and (D), added to the rule by Congress in 1983. The aims of the provision are to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel. The rule operates to impose upon the defendant those costs that could have been avoided if the defendant had cooperated reasonably in the manner prescribed. This device is useful in dealing with defendants who are furtive, who reside in places not easily reached by process servers, or who are outside

the United States and can be served only at substantial and unnecessary expense. Illustratively, there is no useful purpose achieved by requiring a plaintiff to comply with all the formalities of service in a foreign country, including costs of translation, when suing a defendant manufacturer, fluent in English, whose products are widely distributed in the United States. See Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989).

The former text described this process as service-by-mail. This language misled some plaintiffs into thinking that service could be effected by mail without the affirmative cooperation of the defendant. E.g., Gulley v. Mayo Foundation, 886 F.2d 161 (8th Cir. 1989). It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service.

The request for waiver of service may be sent only to defendants subject to service under subdivision (e), (f), or (h). The United States is not expected to waive service for the reason that its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice. The same principle is applied to agencies, corporations, and officers of the United States and to other governments and entities subject to service under subdivision (j). Moreover, there are policy reasons why governmental entities should not be confronted with the potential for bearing costs of service in cases in which they ultimately prevail. Infants or incompetent persons likewise are not called upon to waive service because, due to their presumed inability to understand the request and its consequences, they must generally be served through fiduciaries.

It was unclear whether the former rule authorized mailing of a request for "acknowledgement of service" to defendants outside the forum state. See 1 R. Casad, Jurisdiction in Civil Actions (2d Ed.) 5-29, 30 (1991) and cases cited. But, as Professor Casad observed, there was no reason not to e[illegible] this device in an effort to obtain service outside the state, and there are many instan[illegible] [illegible]h it was in fact so used, with respect both to defendants within the United States a[illegible] [illegible] defendants in other countries.

The opportunity for waiver has distinct advantages to a foreign defendant. By waiving service, the defendant can reduce the costs that may ultimately be taxed against it if unsuccessful in the lawsuit, including the sometimes substantial expense of translation that may be wholly unnecessary for defendants fluent in English. Moreover, a defendant that waives service is afforded substantially more time to defend against the action than if it had been formally served: under Rule 12, a defendant ordinarily [illegible] only 20 days after service in which to file its answer or raise objections by motion, but [illegible]gning a waiver it is allowed 90 days after the date the request for waiver was mailed in which to submit its defenses. Because of the additional time needed for mailing and the unreliability of some foreign mail services, a period of 60 days (rather than the 30 days required for domestic transmissions) is provided for a return of a waiver sent to a foreign country.

It is hoped that, since transmission of the notice and waiver forms is a private nonjudicial act, does not purport to effect service, and is not accompanied by any summons or directive from a court, use of the procedure will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail or have objected to the

"service-by-mail" provisions of the former rule. Unless the addressee consents, receipt of the request under the revised rule does not give rise to any obligation to answer the lawsuit, does not provide a basis for default judgment, and does not suspend the statute of limitations in those states where the period continues to run until service. The only adverse consequence to the foreign defendant is one shared by domestic defendants; namely, the potential imposition of costs of service that, if successful in the litigation, it would not otherwise have to bear. However, this shifting of expense would not be proper under the rule if the foreign defendant's refusal to waive service was based upon a policy of its government prohibiting all waivers of service.

With respect to a defendant located in a foreign country like the United Kingdom, which accepts documents in English, whose Central Authority acts promptly in effecting service, and whose policies discourage its residents from waiving formal service, there will be little reason for a plaintiff to send the notice and request under subdivision (d) rather than use convention methods. On the other hand, the procedure offers significant potential benefits to a plaintiff when suing a defendant that, though fluent in English, is located in country where, as a condition to formal service under a convention, documents must be translated into another language or where formal service will be otherwise costly or time-consuming.

Paragraph (1) is explicit that a timely waiver of service of a summons does not prejudice the right of a defendant to object by means of a motion authorized by Rule 12(b)(2) to the absence of jurisdiction over the defendant's person, or to assert other defenses that may be available. The only issues eliminated are those involving the sufficiency of the summons or the sufficiency of the method by which it is served.

Paragraph (2) states what the present rule implies: the defendant has a duty to avoid costs associated with the service of a summons not needed to inform the defendant regarding the commencement of an action. The text of the rule also sets forth the requirements for a Notice and Request for Waiver sufficient to put the cost-shifting provision in place. These requirements are illustrated in Forms 1A and 1B, which replace the former Form 18-A.

Paragraph (2)(A) is explicit that a request for waiver of service by a corporate defendant must be addressed to a person qualified to receive service. The general mail rooms of large organizations cannot be required to identify the appropriate individual recipient for an institutional summons.

Paragraph (2)(B) permits the use of alternatives to the United States mails in sending the Notice and Request. While private messenger services or electronic communications may be more expensive than the mail, they may be equally reliable and on occasion more convenient to the parties. Especially with respect to transmissions to foreign countries, alternative means may be desirable, for in some countries facsimile transmission is the most efficient and economical means of communication. If electronic means such as facsimile transmission are employed, the sender should maintain a record of the transmission to assure proof of transmission if receipt is denied, but a party receiving such a transmission

has a duty to cooperate and cannot avoid liability for the resulting cost of formal service if the transmission is prevented at the point of receipt.

A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, but sufficient cause should be rare. It is not a good cause for failure to waive service that the claim is unjust or that the court lacks jurisdiction. Sufficient cause not to shift the cost of service would exist, however, if the defendant did not receive the request, was insufficiently literate in English to understand it, or was located in a foreign country whose laws or policies prohibited its residents from waiving service of formal judicial process even from its own courts.

Paragraph (3) extends the time for answer if, before being served with process, the defendant waives formal service. The extension is intended to serve as an inducement to waive service and to assure that a defendant will not gain any delay by declining to waive service and thereby causing the additional time needed to effect service. By waiving service, a defendant is not called upon to respond to the complaint until 60 days from the date the notice was sent to it--90 days if the notice was sent to a foreign country--rather than within the 20 day period from date of service specified in Rule 12.

Paragraph (4) clarifies the effective date of service when service is waived; the provision is needed to resolve an issue arising when applicable law requires service of process to toll the statute of limitations. E.g., Morse v. Elmira Country Club, 752 F.2d 35 (2d Cir. 1984). Cf. Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

The provisions in former subdivision (c)(2)(C)(ii) of this rule may have been misleading to some parties. Some plaintiffs, not reading the rule carefully, supposed that receipt by the defendant of the mailed complaint had the effect both of establishing the jurisdiction of the court over the defendant's person and of tolling the statute of limitations in actions in which service of the summons is required to toll the limitations period. The revised rule is clear that, if the waiver is not returned and filed, the limitations period under such a law is not tolled and the action will not otherwise proceed until formal service of process is effected.

Some state limitations laws may toll an otherwise applicable statute at the time when the defendant receives notice of the action. Nevertheless, the device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by filing the action. Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in subdivisions (e), (f), or (h).

The procedure of requesting waiver of service should also not be used if the time for service under subdivision (m) will expire before the date on which the waiver must be returned. While a plaintiff has been allowed additional time for service in that situation, e.g., Prather v. Raymond Constr. Co., 570 F. Supp. 278 (N.D. Ga. 1983), the court could refuse a request for additional time unless the defendant appears to have evaded service pursuant to subdivision (e) or (h). It may be noted that the presumptive time limit for service under subdivision (m) does not apply to service in a foreign country.

Paragraph (5) is a cost-shifting provision retained from the former rule. The costs that may be imposed on the defendant could include, for example, costs of unneeded translation or the cost of the time of a process server required to make contact with a defendant residing in guarded apartment houses or residential developments. The paragraph is explicit that the costs of enforcing the cost-shifting provision are themselves recoverable from a defendant who fails to return the waiver. In the absence of such a provision, the purpose of the rule would be frustrated by the cost of its enforcement, which is likely to be high in relation to the small benefit secured by the plaintiff.

Some plaintiffs may send a notice and request for waiver and, without waiting for return of the waiver, also proceed with efforts to effect formal service on the defendant. To discourage this practice, the cost-shifting provisions in paragraphs (2) and (5) are limited to costs of effecting service incurred after the time expires for the defendant to return the waiver. Moreover, by returning the waiver within the time allowed and before being served with process, a defendant receives the benefit of the longer period for responding to the complaint afforded for waivers under paragraph (3).

Subdivision (e). This subdivision replaces former subdivisions (c)(2)(C)(i) and (d)(1). It provides a means for service of summons on individuals within a judicial district of the United States. Together with subdivision (f), it provides for service on persons anywhere, subject to constitutional and statutory constraints.

Service of the summons under this subdivision does not conclusively establish the jurisdiction of the court over the person of the defendant. A defendant may assert the territorial limits of the court's reach set forth in subdivision (k), including the constitutional limitations that may be imposed by the Due Process Clause of the Fifth Amendment.

Paragraph (1) authorizes service in any judicial district in conformity with state law. This paragraph sets forth the language of former subdivision (c)(2)(C)(i), which authorized the use of the law of the state in which the district court sits, but adds as an alternative the use of the law of the state in which the service is effected.

Paragraph (2) retains the text of the former subdivision (d)(1) and authorizes the use of the familiar methods of personal or abode service or service on an authorized agent in any judicial district.

To conform to these provisions, the former subdivision (e) bearing on proceedings against parties not found within the state is stricken. Likewise stricken is the first sentence of the former subdivision (f), which had restricted the authority of the federal process server to the state in which the district court sits.

Subdivision (f). This subdivision provides for service on individuals who are in a foreign country, replacing the former subdivision (i) that was added to Rule 4 in 1963. Reflecting the pattern of Rule 4 in incorporating state law limitations on the exercise of jurisdiction over persons, the former subdivision (i) limited service outside the United States to cases in which extraterritorial service was authorized by state or federal law. The new

rule eliminates the requirement of explicit authorization. On occasion, service in a foreign country was held to be improper for lack of statutory authority. E.g., Martens v. Winder, 341 F.2d 197 (9th Cir.), cert. denied, 382 U.S. 937 (1965). This authority, however, was found to exist by implication. E.g., SEC v. VTR, Inc., 39 F.R.D. 19 (S.D.N.Y. 1966). Given the substantial increase in the number of international transactions and events that are the subject of litigation in federal courts, it is appropriate to infer a general legislative authority to effect service on defendants in a foreign country.

A secondary effect of this provision for foreign service of a federal summons is to facilitate the use of federal long-arm law in actions brought to enforce the federal law against defendants who cannot be served under any state law but who can be constitutionally subjected to the jurisdiction of the federal court. Such a provision is set forth in paragraph (2) of subdivision (k) of this rule, applicable only to persons not subject to the territorial jurisdiction of any particular state.

Paragraph (1) gives effect to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, which entered into force for the United States on February 10, 1969. See 28 U.S.C.A., Fed. R. Civ. P. 4 (Supp. 1986). This Convention is an important means of dealing with problems of service in a foreign country. See generally 1 B. Ristau, International Judicial Assistance §§ 4-1-1 to 4-5-2 (1990). Use of the Convention procedures, when available, is mandatory if documents must be transmitted abroad to effect service. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) (noting that voluntary use of these procedures may be desirable even when service could constitutionally be effected in another manner); J. Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U. Pitt. L. Rev. 903 (1989). Therefore, this paragraph provides that, when service is to be effected outside a judicial district of the United States, the methods of service appropriate under an applicable treaty shall be employed if available and if the treaty so requires.

The Hague Convention furnishes safeguards against the abridgment of rights of parties through inadequate notice. Article 15 provides for verification of actual notice or a demonstration that process was served by a method prescribed by the internal laws of the foreign state before a default judgment may be entered. Article 16 of the Convention also enables the judge to extend the time for appeal after judgment if the defendant shows a lack of adequate notice either to defend or to appeal the judgment, or has disclosed a prima facie case on the merits.

The Hague Convention does not specify a time within which a foreign country's Central Authority must effect service, but Article 15 does provide that alternate methods may be used if a Central Authority does not respond within six months. Generally, a Central Authority can be expected to respond much more quickly than that limit might permit, but there have been occasions when the signatory state was dilatory or refused to cooperate for substantive reasons. In such cases, resort may be had to the provision set forth in subdivision (f)(3).

Two minor changes in the text reflect the Hague Convention. First, the term "letter

of request" has been added. Although these words are synonymous with "letter rogatory," "letter of request" is preferred in modern usage. The provision should not be interpreted to authorize use of a letter of request when there is in fact no treaty obligation on the receiving country to honor such a request from this country or when the United States does not extend diplomatic recognition to the foreign nation. Second, the passage formerly found in subdivision (i)(1)(B), "when service in either case is reasonably calculated to give actual notice," has been relocated.

Paragraph (2) provides alternative methods for use when internationally agreed methods are not intended to be exclusive, or where there is no international agreement applicable. It contains most of the language formerly set forth in subdivision (i) of the rule. Service by methods that would violate foreign law is not generally authorized. Subparagraphs (A) and (B) prescribe the more appropriate methods for conforming to local practice or using a local authority. Subparagraph (C) prescribes other methods authorized by the former rule.

Paragraph (3) authorizes the court to approve other methods of service not prohibited by international agreements in specified circumstances. In approving exceptional service in urgent circumstances, the paragraph tracks the text of the Hague Convention. Other circumstances that might justify the use of additional methods include the failure of the foreign country's Central Authority to effect service within the six-month period provided by the Convention, or the refusal of the Central Authority to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States. In such cases, the court shall direct the method of service and may approve means that are not explicitly authorized by international agreement or indeed that are contrary to foreign law provided they are not prohibited by international agreement. Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law. A court may in some instances specially authorize use of ordinary mail. Cf. Levin v. Ruby Trading Corp., 248 F. Supp. 537 (S.D.N.Y. 1965).

Subdivision (g). This subdivision retains the text of former subdivision (d)(2). Provision is made for service upon an infant or incompetent person in a foreign country.

Subdivision (h). This subdivision retains the text of former subdivision (d)(3), with changes reflecting those made in subdivision (e). It also contains the provisions for service on a corporation or association in a foreign country, as formerly found in subdivision (i).

Frequent use should be made of the Notice and Request procedure set forth in subdivision (d) in actions against corporations. Care must be taken, however, to address the request to an individual officer or authorized agent of the corporation. It is not effective use of the Notice and Request procedure if the mail is sent undirected to the mail room of the organization.

Subdivision (i). This subdivision retains much of the text of former subdivisions (d)(4) and (d)(5). Paragraph (1) provides for service of a summons on the United States; it

amends former subdivision (d)(4) to permit the United States attorney to be served by registered or certified mail. The rule does not authorize the use of the Notice and Request procedure of revised subdivision (d) when the United States is the defendant. To assure proper handling of mail in the United States attorney's office, the authorized mail service must be specifically addressed to the civil process clerk of the office of the United States Attorney.

Paragraph (2) replaces former subdivision (d)(5). Paragraph (3) saves the plaintiff from the hazard of losing a substantive right because of failure to comply with the complex requirements of multiple service under this subdivision. That risk has proved to be more than nominal. E.g., Whale v. United States, 792 F.2d 951 (9th Cir. 1986). This provision should be read in connection with the provisions of subdivision (c) of Rule 15 to preclude the loss of substantive rights against the United States or its agencies, corporations, or officers resulting from a plaintiff's failure to correctly identify and serve all the persons who should be named or served.

Subdivision (j). This subdivision retains the text of former subdivision (d)(6) without material change. The waiver-of-service provision is also inapplicable to actions against governments subject to service pursuant to this subdivision.

The revision adds a new paragraph (1) referring to the statute governing service of a summons on a foreign state and its political subdivisions, agencies, and instrumentalities, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1608. The caption of the subdivision reflects that change.

Subdivision (k). This subdivision replaces the former subdivision (f), with no change in the title. Paragraph (1) retains the substance of the former rule in explicitly authorizing the exercise of personal jurisdiction over persons who can be reached under state long-arm law, the "100-mile bulge" provision added in 1963, or the federal interpleader act. Paragraph (1)(D) is new, but merely calls attention to federal legislation that may provide for nationwide or even world-wide service of process in cases arising under particular federal laws. Congress has provided for nationwide service of process and full exercise of territorial jurisdiction by all district courts with respect to specified federal actions. See 1 R. Casad, Jurisdiction in Civil Actions (2d Ed.) chap. 5 (1991).

Paragraph (2) is new. It authorizes the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under any federal law if that person is subject to personal jurisdiction in no state. This addition is a companion to the amendments made in revised subdivisions (e) and (f).

This paragraph corrects a gap in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction.

In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in Omni Capital Int'l v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 111 (1987).

There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. Cf. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977). There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See DeJames v. Magnificent Carriers, 654 F.2d 280, 286 n.3 (3rd Cir.), cert. denied, 454 U.S. 1085 (1981). Compare World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-294 (1980); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985); Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 108-13 (1987). See generally R. Lusardi, Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign, 33 Vill. L. Rev. 1 (1988).

This provision does not affect the operation of federal venue legislation. See generally 28 U.S.C. § 1391. Nor does it affect the operation of federal law providing for the change of venue. 28 U.S.C. §§ 1404, 1406. The availability of transfer for fairness and convenience under § 1404 should preclude most conflicts between the full exercise of territorial jurisdiction permitted by this rule and the Fifth Amendment requirement of "fair play and substantial justice."

The district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so onerous that injustice could result. "[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 115 (1987), quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

This narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country, even though there might be diversity or alienage subject matter jurisdiction as to such claims. If, however, personal jurisdiction is established under this paragraph with respect to a federal claim, then 28 U.S.C. § 1367(a) provides supplemental jurisdiction over related claims against that defendant, subject to the court's discretion to decline exercise of that jurisdiction under 28

U.S.C. § 1367(c).

Subdivision (l). This subdivision assembles in one place all the provisions of the present rule bearing on proof of service. No material change in the rule is effected. The provision that proof of service can be amended by leave of court is retained from the former subdivision (h). See generally 4A Wright & Miller, Federal Practice and Procedure § 1132 (2d ed. 1987).

Subdivision (m). This subdivision retains much of the language of the present subdivision (j).

The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. Such relief formerly was afforded in some cases, partly in reliance on Rule 6(b). Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service. E.g., Ditkof v. Owens-Illinois, Inc., 114 F.R.D. 104 (E.D. Mich. 1987). A specific instance of good cause is set forth in paragraph (3) of this rule, which provides for extensions if necessary to correct oversights in compliance with the requirements of multiple service in actions against the United States or its officers, agencies, and corporations. The district court should also take care to protect pro se plaintiffs from consequences of confusion or delay attending the resolution of an in forma pauperis petition. Robinson v. America's Best Contacts & Eyeglasses, 876 F.2d 596 (7th Cir. 1989).

The 1983 revision of this subdivision referred to the "party on whose behalf such service was required," rather than to the "plaintiff," a term used generically elsewhere in this rule to refer to any party initiating a claim against a person who is not a party to the action. To simplify the text, the revision returns to the usual practice in the rule of referring simply to the plaintiff even though its principles apply with equal force to defendants who may assert claims against non-parties under Rules 13(h), 14, 19, 20, or 21.

Subdivision (n). This subdivision provides for in rem and quasi-in-rem jurisdiction. Paragraph (1) incorporates any requirements of 28 U.S.C. § 1655 or similar provisions bearing on seizures or liens.

Paragraph (2) provides for other uses of quasi-in-rem jurisdiction but limits its use to exigent circumstances. Provisional remedies may be employed as a means to secure jurisdiction over the property of a defendant whose person is not within reach of the court, but occasions for the use of this provision should be rare, as where the defendant is a fugitive or assets are in imminent danger of disappearing. Until 1963, it was not possible under Rule 4 to assert jurisdiction in a federal court over the property of a defendant not personally served. The 1963 amendment to subdivision (e) authorized the use of state law procedures authorizing seizures of assets as a basis for jurisdiction. Given the liberal availability of long-arm jurisdiction, the exercise of power quasi-in-rem has become almost an anachronism. Circumstances too spare to affiliate the defendant to the forum state

sufficiently to support long-arm jurisdiction over the defendant's person are also inadequate to support seizure of the defendant's assets fortuitously found within the state. Shaffer v. Heitner, 433 U.S. 186 (1977).

Rule 4.1 Service of Other Process

1 *(a) Generally. Process other than a summons as provided in Rule 4 or subpoena*
2 *as provided in Rule 45 shall be served by a United States marshal, a deputy United States*
3 *marshal, or a person specially appointed for that purpose, who shall make proof of service*
4 *as provided in Rule 4(l). The process may be served anywhere within the territorial limits*
5 *of the state in which the district court is located, and, when authorized by a statute of the*
6 *United States, beyond the territorial limits of that state.*
7 *(b) Enforcement of Orders: Commitment for Civil Contempt. An order of civil*
8 *commitment of a person held to be in contempt of a decree or injunction issued to enforce*
9 *the laws of the United States may be served and enforced in any district. Other orders in*
10 *civil contempt proceedings shall be served in the state in which the court issuing the order*
11 *to be enforced is located or elsewhere within the United States if not more than 100 miles*
12 *from the place at which the order to be enforced was issued.*

COMMITTEE NOTES

This is a new rule. Its purpose is to separate those few provisions of the former Rule 4 bearing on matters other than service of a summons to allow greater textual clarity in Rule 4. Subdivision (a) contains no new language.

Subdivision (b) replaces the final clause of the penultimate sentence of the former subdivision 4(f), a clause added to the rule in 1963. The new rule provides for nationwide service of orders of civil commitment enforcing decrees of injunctions issued to compel compliance with federal law. The rule makes no change in the practice with respect to the enforcement of injunctions or decrees not involving the enforcement of federally-created rights.

Service of process is not required to notify a party of a decree or injunction, or of an order that the party show cause why that party should not be held in contempt of such an order. With respect to a party who has once been served with a summons, the service of the decree or injunction itself or of an order to show cause can be made pursuant to Rule 5. Thus, for example, an injunction may be served on a party through that person's attorney.

Chagas v. United States, 369 F.2d 643 (5th Cir. 1966). The same is true for service of an order to show cause. Waffenschmidt v. Mackay, 763 F.2d 711 (5th Cir. 1985).

The new rule does not affect the reach of the court to impose criminal contempt sanctions. Nationwide enforcement of federal decrees and injunctions is already available with respect to criminal contempt: a federal court may effect the arrest of a criminal contemnor anywhere in the United States, 28 U.S.C. § 3041, and a contemnor when arrested may be subject to removal to the district in which punishment may be imposed. Fed. R. Crim. P. 40. Thus, the present law permits criminal contempt enforcement against a contemnor wherever that person may be found.

The effect of the revision is to provide a choice of civil or criminal contempt sanctions in those situations to which it applies. Contempt proceedings, whether civil or criminal, must be brought in the court that was allegedly defied by a contumacious act. Ex parte Bradley, 74 U.S. 366 (1869). This is so even if the offensive conduct or inaction occurred outside the district of the court in which the enforcement proceeding must be conducted. E.g., McCourtney v. United States, 291 Fed. 497 (8th Cir.), cert. denied, 263 U.S. 714 (1923). For this purpose, the rule as before does not distinguish between parties and other persons subject to contempt sanctions by reason of their relation or connection to parties.

Rule 5. Service and Filing of Pleadings and Other Papers.

1 * * * *

2 (e) **Filing with the Court Defined.** The filing of papers with the court as
3 required by these rules shall be made by filing them with the clerk of the court, except
4 that the judge may permit the papers to be filed with the judge, in which event the
5 judge shall note thereon the filing date and forthwith transmit them to the office of
6 the clerk. ~~Papers may be filed by facsimile transmission if permitted by rules of the~~
7 ~~district court, provided that the rules~~ *A court may, by local rule, permit papers to be filed*
8 *by facsimile or other electronic means if such means* are authorized by and consistent
9 with standards established by the Judicial Conference of the United States. The clerk
10 shall not refuse to accept for filing any paper presented for that purpose solely because
11 it is not presented in proper form as required by these rules or by any local rules or
12 practices.

COMMITTEE NOTES

This is a technical amendment, using the broader language of Rule 25 of the Federal Rules of Appellate Procedure. The district court--and the bankruptcy court by virtue of a cross-reference in Bankruptcy Rule 7005--can, by local rule, permit filing not only by facsimile transmissions but also by other electronic means, subject to standards approved by the Judicial Conference.

Rule 11. Signing of Pleadings, Motions, and Other Papers; *Representations to Court;* Sanctions

(a) Signature. Every pleading, *written* motion, and other paper ~~of a party represented by an attorney~~ shall be signed by at least one attorney of record in the attorney's individual name, *or, if the party is not represented by an attorney, shall be signed by the party.* ~~whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.~~ *Each paper shall state the signer's address and telephone number, if any.* Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ~~The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other~~ *An unsigned* paper ~~is not signed, it~~ shall be stricken unless ~~it is signed promptly after the~~ omission *of the signature* is *corrected promptly after being* called to the attention of the ~~pleader or movant~~ *attorney or party*.

(b) Representations to Court. ~~If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose~~

22 ~~upon the person who signed it, a represented party, or both, an appropriate sanction,~~
23 ~~which may include an order to pay to the other party or parties the amount of the~~
24 ~~reasonable expenses incurred because of the filing of the pleading, motion, or other~~
25 ~~paper, including a reasonable attorney's fee.~~ *By signing, presenting, or pursuing a*
26 *pleading, written motion, or other paper filed with or submitted to the court, an attorney*
27 *or unrepresented party is certifying that to the best of the person's knowledge, information,*
28 *and belief, formed after an inquiry reasonable under the circumstances,--*
29 *(1) it is not being presented or maintained for any improper purpose, such*
30 *as to harass or to cause unnecessary delay or needless increase in the cost of*
31 *litigation;*
32 *(2) the claims, defenses, and other legal contentions therein are warranted*
33 *by existing law or by a nonfrivolous argument for the extension, modification, or*
34 *reversal of existing law or the establishment of new law;*
35 *(3) the allegations and other factual contentions have evidentiary support or,*
36 *if specifically so identified, are likely to have evidentiary support after a reasonable*
37 *opportunity for further investigation or discovery; and*
38 *(4) the denials of factual contentions are warranted on the evidence or, if*
39 *specifically so identified, are reasonably based on a lack of information or belief.*
40 *(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court*
41 *determines that subdivision (b) has been violated, the court shall, subject to the conditions*
42 *stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that*
43 *have violated subdivision (b) or are responsible for the violation.*
44 *(1) **How Initiated.***

45 *(A) By Motion. A motion for sanctions under this rule shall be made*
46 *separately from other motions or requests and shall describe the specific*
47 *conduct alleged to violate subdivision (b). It shall be served as provided in*
48 *Rule 5, but shall not be filed with or presented to the court unless, within 21*
49 *days after service of the motion (or such other period as the court may*
50 *prescribe), the challenged paper, claim, defense, contention, allegation, or*
51 *denial is not withdrawn or appropriately corrected. If warranted, the court*
52 *may award to the party prevailing on the motion the reasonable expenses and*
53 *attorney's fees incurred in presenting or opposing the motion. Absent*
54 *exceptional circumstances, a law firm shall be held jointly responsible for*
55 *violations committed by its partners, associates, and employees.*
56 *(B) On Court's Initiative. On its own initiative, the court may enter an*
57 *order describing the specific conduct that appears to violate subdivision (b)*
58 *and directing an attorney, law firm, or party to show cause why it has not*
59 *violated subdivision (b) with respect thereto.*
60 *(2) Nature of Sanction; Limitations. A sanction imposed for violation of this*
61 *rule shall be limited to what is sufficient to deter repetition of such conduct or*
62 *comparable conduct by others similarly situated. Subject to the limitations in*
63 *subparagraphs (A) and (B), the sanction may consist of, or include, directives of a*
64 *nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion*
65 *and warranted for effective deterrence, an order directing payment to the movant of*
66 *some or all of the reasonable attorneys' fees and other expenses incurred as a direct*
67 *result of the violation.*

68 (A) Monetary sanctions may not be awarded against a represented
69 party for a violation of subdivision (b)(2).
70 (B) Monetary sanctions may not be awarded on the court's initiative
71 unless the court issues its order to show cause before a voluntary dismissal or
72 settlement of the claims made by or against the party which is, or whose
73 attorneys are, to be sanctioned.
74 (3) Order. When imposing sanctions, the court shall describe the conduct
75 determined to constitute a violation of this rule and explain the basis for the
76 sanction imposed.
77 (d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not
78 apply to disclosures and discovery requests, responses, objections, and motions that are
79 subject to the provisions of Rules 26 through 37.

COMMITTEE NOTES

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); G. Solovy, The Federal Law of Sanctions (1991); G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures

on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. Subject to the provisions of revised Rule 83(d), a court may require by local rule that papers contain additional information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and mandating sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for pursuing positions after they are no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with the court, but include the continued advocacy of positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference continues to insist on a claim or defense should be viewed as "pursuing" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "pursuing"--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not

a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. While the pleadings can be amended to signify the abandonment of an allegation or claim, less formal means should suffice in most circumstances.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations based on lack of information obtained in their initial investigation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not persist in that denial. It can be corrected by an amended answer, by informal communications, or at a pretrial conference.

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. See Manual for Complex Litigation, Second, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to order a sanction or what sanctions would be

appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may, in a particular case, be proper considerations. The court has significant discretion in determining what sanctions to impose for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, there are occasions, particularly for (b)(1) violations, in which, for effective deterrence, the court should direct not only that the person violating the rule make a monetary payment, but also that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the expense of litigation to an opposing party, any award of expenses to the other party should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, presenting, or advocating a document has a nondelegable responsibility to the court, and in most situations will be the one who should be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the

former rule. Cf. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for violations of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See Willy v. Coastal Corp., ___ U.S. ___ (1992); Business Guides, Inc. v. Chromatic Communications Enter. Inc., ___ U.S. ___ (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential

violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to extract an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing some allegation or contention, the motion should not be presented to the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court

leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. See Chambers v. NASCO, ___ U.S. ___ (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

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

1 **(a) When Presented.**—

2 *(1) Unless a different time is prescribed in a statute of the United States, a*~~A~~

3 defendant shall serve an answer

4 *(A)* within 20 days after *being served with* ~~the service of~~ the summons

5 and complaint ~~upon that defendant,~~ *or*

6 *(B) if service of the summons has been timely waived on request under*

7 *Rule 4(d), within 60 days after the date when the request for waiver was sent,*

8 *or within 90 days after that date if the defendant was addressed outside any*

9 *judicial district of the United States* ~~except when service is made under rule~~

10 ~~4(e) and a different time is prescribed in the order of court under the~~

11 ~~statute of the United States or in the statute or rule of court of the state~~.

12 *(2)* A party served with a pleading stating a cross-claim against that party

13 shall serve an answer thereto within 20 days after ~~the service upon that party~~

14 *being served*. The plaintiff shall serve a reply to a counterclaim in the answer

15 within 20 days after service of the answer, or, if a reply is ordered by the court,

16 within 20 days after service of the order, unless the order otherwise directs.—

17 *(3)* The United States or an officer or agency thereof shall serve an

18 answer to the complaint or to a cross-claim, or a reply to a counterclaim, within

19 60 days after the service upon the United States attorney of the pleading in

20 which the claim is asserted.

21 *(4) Unless a different time is fixed by court order, t*~~The~~ service of a motion

22 permitted under this rule alters these periods of time as follows~~, unless a~~

23 ~~different time is fixed by order of the court~~:

24 (~~1~~*A*) if the court denies the motion or postpones its disposition until

25 the trial on the merits, the responsive pleading shall be served within 10

26 days after notice of the court's action; *or*

27 (~~2~~*B*) if the court grants a motion for a more definite statement, the

28 responsive pleading shall be served within 10 days after the service of the

29 more definite statement.

30 * * * * *

COMMITTEE NOTES

Subdivision (a) is divided into paragraphs for greater clarity, and paragraph (1)(B) is added to reflect amendments to Rule 4. Consistent with Rule 4(d)(3), a defendant that timely waives service is allowed 60 days from the date the request was mailed in which to respond to the complaint, with an additional 30 days afforded if the request was sent out of the country. Service is timely waived if the waiver is returned within the time specified in the request (30 days after the request was mailed, or 60 days if mailed out of the country) and before being formally served with process. Sometimes a plaintiff may attempt to serve a defendant with process while also sending the defendant a request for waiver of service; if the defendant executes the waiver of service within the time specified and before being served with process, it should have the longer time to respond afforded by waiving service.

The date of sending the request is to be inserted by the plaintiff on the face of the request for waiver and on the waiver itself. This date is used to measure the return day for the waiver form, so that the plaintiff can know on a day certain whether formal service of process will be necessary; it is also a useful date to measure the time for answer when service is waived. The defendant who returns the waiver is given additional time for answer in order to assure that it loses nothing by waiving service of process.

Rule 15. Amended and Supplemental Pleadings

* * * *

(c) **Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(~~j~~m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

23 * * * * *

COMMITTEE NOTES

The amendment conforms the cross reference to Rule 4 to the revision of that rule.

Rule 16. Pretrial Conferences; Scheduling; Management

1 * * * *

2 **(b) Scheduling and Planning.** Except in categories of actions exempted by
3 district court rule as inappropriate, the *district* judge, or a magistrate *judge* when
4 authorized by district court rule, shall, *after receiving the report from the parties under*
5 *Rule 26(f) or* after consulting with the attorneys for the parties and any unrepresented
6 parties~~,~~ by a scheduling conference, telephone, mail, or other suitable means, enter a
7 scheduling order that limits the time

8 (1) to join other parties and to amend the pleadings;

9 (2) to file ~~and hear~~ motions; and

10 (3) to complete discovery.

11 The scheduling order may also include

12 *(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1)*
13 *and of the extent of discovery to be permitted;*

14 (4*5*) the date or dates for conferences before trial, a final pretrial
15 conference, and trial; and

16 (5*6*) any other matters appropriate in the circumstances of the case.

17 The order shall issue as soon as practicable but in no event more than ~~120~~*90* days
18 after ~~filing of the complaint~~ *the appearance of a defendant or, if earlier, more than 120*
19 *days after the complaint has been served on a defendant*. A schedule shall not be
20 modified except *upon a showing of good cause and* by leave of the *district* judge or*,*
21 *when authorized by local rule, by* a magistrate *judge* ~~when authorized by district court~~
22 ~~rule upon a showing of good cause~~.

23 (c) **Subjects ~~to be Discussed~~ _for Consideration_ at Pretrial Conferences.** ~~The~~
24 ~~participants a~~_A_t any conference under this rule ~~may consider and take action~~
25 _consideration may be given, and the court may take appropriate action,_ with respect to
26 (1) the formulation and simplification of the issues, including the
27 elimination of frivolous claims or defenses;
28 (2) the necessity or desirability of amendments to the pleadings;
29 (3) the possibility of obtaining admissions of fact and of documents which
30 will avoid unnecessary proof, stipulations regarding the authenticity of
31 documents, and advance rulings from the court on the admissibility of evidence;
32 (4) the avoidance of unnecessary proof and of cumulative evidence_, and_
33 _limitations or restrictions on the use of testimony under Rule 702 of the Federal_
34 _Rules of Evidence_;
35 _(5) the appropriateness and timing of summary adjudication under Rule 56;_
36 _(6) the control and scheduling of discovery, including orders affecting_
37 _disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;_
38 (~~5~~_7_) the identification of witnesses and documents, the need and schedule
39 for filing and exchanging pretrial briefs, and the date or dates for further
40 conferences and for trial;
41 (~~6~~_8_) the advisability of referring matters to a magistrate _judge_ or master;
42 (~~7~~_9_) ~~the possibility of~~ settlement ~~or~~ _and_ the use of ~~extrajudicial~~ _special_
43 procedures to ~~resolve~~ _assist in resolving_ the dispute _when authorized by statute or_
44 _local rule_;
45 (~~8~~_10_) the form and substance of the pretrial order;

46 (~~9~~*11*) the disposition of pending motions;

47 (1~~0~~*2*) the need for adopting special procedures for managing potentially

48 difficult or protracted actions that may involve complex issues, multiple parties,

49 difficult legal questions, or unusual proof problems;

50 *(13) an order for a separate trial pursuant to Rule 42(b) with respect to a*

51 *claim, counterclaim, cross-claim, or third-party claim, or with respect to any*

52 *particular issue in the case;*

53 *(14) an order directing a party or parties to present evidence early in the trial*

54 *with respect to a manageable issue that could, on the evidence, be the basis for a*

55 *judgment as a matter of law under Rule 50(a) or a judgment on partial findings*

56 *under Rule 52(c);*

57 *(15) an order establishing a reasonable limit on the time allowed for*

58 *presenting evidence;* and

59 (1~~1~~*6*) such other matters as may ~~aid in~~ *facilitate* the *just, speedy, and*

60 *inexpensive* disposition of the action.

61 At least one of the attorneys for each party participating in any conference before trial

62 shall have authority to enter into stipulations and to make admissions regarding all

63 matters that the participants may reasonably anticipate may be discussed. *If*

64 *appropriate, the court may require that a party or its representative be present or*

65 *reasonably available by telephone in order to consider possible settlement of the dispute.*

66 * * * *

COMMITTEE NOTES

Subdivision (b). One purpose of this amendment is to provide a more appropriate deadline for the initial scheduling order required by the rule. The former rule directed that

the order be entered within 120 days from the filing of the complaint. This requirement has created problems because Rule 4(m) allows 120 days for service and ordinarily at least one defendant should be available to participate in the process of formulating the scheduling order. The revision provides that the order is to be entered within 90 days after the date a defendant first appears (whether by answer or by a motion under Rule 12) or, if earlier (as may occur in some actions against the United States), within 120 days after service of the complaint on a defendant. The longer time provided by the revision is not intended to encourage unnecessary delays in entering the scheduling order. Indeed, in most cases the order can and should be entered at a much earlier date. Rather, the additional time is intended to alleviate problems in multi-defendant cases and should ordinarily be adequate to enable participation by all defendants initially named in the action.

New paragraph (4) has been added to highlight that it will frequently be desirable for the scheduling order to include provisions relating to the timing of disclosures under Rule 26(a). While the initial disclosures required by Rule 26(a)(1) will ordinarily have been made before entry of the scheduling order, the timing and sequence for disclosure of expert testimony and of the witnesses and exhibits to be used at trial should be tailored to the circumstances of the case and is a matter that should be considered at the initial scheduling conference. Similarly, the scheduling order might contain provisions modifying the extent of discovery (e.g., number and length of depositions) otherwise permitted under these rules or by a local rule.

The report from the attorneys concerning their meeting and proposed discovery plan, as required by revised Rule 26(f), should be submitted to the court before the scheduling order is entered. Their proposals, particularly regarding matters on which they agree, should be of substantial value to the court in setting the timing and limitations on discovery and should reduce the time of the court needed to conduct a meaningful conference under Rule 16(b). As under the prior rule, while a scheduling order is mandated, a scheduling conference is not. However, in view of the benefits to be derived from the litigants and a judicial officer meeting in person, a Rule 16(b) conference should, to the extent practicable, be held in all cases that will involve discovery.

This subdivision, as well as subdivision (c)(8), also is revised to reflect the new title of United States Magistrate Judges pursuant to the Judicial Improvements Act of 1990.

Subdivision (c). The primary purposes of the changes in subdivision (c) are to call attention to the opportunities for structuring of trial under Rules 42, 50, and 52 and to eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to facilitate settlement or to provide for an efficient and economical trial. The prefatory language of this subdivision is revised to clarify the court's power to enter appropriate orders at a conference notwithstanding the objection of a party. Of course settlement is dependent upon agreement by the parties and, indeed, a conference is most effective and productive when the parties participate in a spirit of cooperation and mindful of their responsibilities under Rule 1.

Paragraph (4) is revised to clarify that in advance of trial the court may address the

need for, and possible limitations on, the use of expert testimony under Rule 702 of the Federal Rules of Evidence. Even when proposed expert testimony might be admissible under the standards of Rules 403 and 702 of the evidence rules, the court may preclude or limit such testimony if the cost to the litigants--which may include the cost to adversaries of securing testimony on the same subjects by other experts--would be unduly expensive given the needs of the case and the other evidence available at trial.

Paragraph (5) is added (and the remaining paragraphs renumbered) in recognition that use of Rule 56 to avoid or reduce the scope of trial is a topic that can, and often should, be considered at a pretrial conference. Renumbered paragraph (11) enables the court to rule on pending motions for summary adjudication that are ripe for decision at the time of the conference. Often, however, the potential use of Rule 56 is a matter that arises from discussions during a conference. The court may then call for motions to be filed or, under revised Rule 56(g)(3), enter a show cause order that initiates the process.

Paragraph (6) is added to emphasize that a major objective of pretrial conferences should be to consider appropriate controls on the extent and timing of discovery. In many cases the court should also specify the times and sequence for disclosure of written reports from experts under revised Rule 26(a)(2)(B) and perhaps direct changes in the types of experts from whom written reports are required. Consideration should also be given to possible changes in the timing or form of the disclosure of trial witnesses and documents under Rule 26(a)(3).

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. §§ 473(a)(6), 473(b)(4), 651-68; Section 104(b)(2), Pub.L. 101-650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

The amendment of paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c), authorizing the court to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case. The sentence refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel. Finally, it should be noted that the

unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

The explicit authorization in the rule to require personal participation in the manner stated is not intended to limit the reasonable exercise of the court's inherent powers, e.g., G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989), or its power to require party participation under the Civil Justice Reform Act of 1990. See 28 U.S.C. § 473(b)(5) (civil justice expense and delay reduction plans adopted by district courts may include requirement that representatives "with authority to bind [parties] in settlement discussions" be available during settlement conferences).

New paragraphs (13) and (14) are added to call attention to the opportunities for structuring of trial under Rule 42 and under revised Rules 50 and 52.

Paragraph (15) is also new. It supplements the power of the court to limit the extent of evidence under Rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the length of trial established at a conference in advance of trial can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.

Rule 26. General Provisions Governing Discovery*; Duty of Disclosure*

1 **(a)** ***Required Disclosures;*** ~~**Discovery**~~ **Methods** ***to Discover Additional Matter.***

2 *(1) Initial Disclosures. Except to the extent otherwise stipulated or directed*
3 *by the court, a party shall, without awaiting a discovery request, provide to other*
4 *parties:*

5 *(A) the name and, if known, the address and telephone number of each*
6 *individual likely to have discoverable information relevant to disputed facts*
7 *alleged with particularity in the pleadings, identifying the subjects of the*
8 *information;*

9 *(B) a copy of, or a description by category and location of, all*
10 *documents, data compilations, and tangible things in the possession, custody,*
11 *or control of the party that are relevant to disputed facts alleged with*
12 *particularity in the pleadings;*

13 *(C) a computation of any category of damages claimed by the disclosing*
14 *party, making available for inspection and copying as under Rule 34 the*
15 *documents or other evidentiary material, not privileged or protected from*
16 *disclosure, on which such computation is based, including materials bearing*
17 *on the nature and extent of injuries suffered; and*

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

22 *Unless otherwise stipulated or directed by the court, these disclosures shall be made*

23 *at or within 10 days after the meeting of the parties under subdivision (f). A party*
24 *shall make its initial disclosures based on the information then reasonably available*
25 *to it and is not excused from making its disclosures because it has not fully*
26 *completed its investigation of the case or because it challenges the sufficiency of*
27 *another party's disclosures or because another party has not made its disclosures.*
28 *(2) Disclosure of Expert Testimony.*
29 *(A) In addition to the disclosures required by paragraph (1), a party*
30 *shall disclose to other parties the identity of any person who may be used at*
31 *trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of*
32 *Evidence.*
33 *(B) Except as otherwise stipulated or directed by the court, this*
34 *disclosure shall, with respect to a witness who is retained or specially employed*
35 *to provide expert testimony in the case or whose duties as an employee of the*
36 *party regularly involve giving expert testimony, be accompanied by a written*
37 *report prepared and signed by the witness. The report shall contain a complete*
38 *statement of all opinions to be expressed and the basis and reasons therefor;*
39 *the data or other information considered by the witness in forming the*
40 *opinions; any exhibits to be used as a summary of or support for the opinions;*
41 *the qualifications of the witness, including a list of all publications authored*
42 *by the witness within the preceding ten years; the compensation to be paid for*
43 *the study and testimony; and a listing of any other cases in which the witness*
44 *has testified as an expert at trial or by deposition within the preceding four*
45 *years.*

46 *(C) These disclosures shall be made at the times and in the sequence*
47 *directed by the court. In the absence of other directions from the court or*
48 *stipulation by the parties, the disclosures shall be made at least 90 days before*
49 *the trial date or the date the case is to be ready for trial or, if the evidence is*
50 *intended solely to contradict or rebut evidence on the same subject matter*
51 *identified by another party under paragraph (2)(B), within 30 days after the*
52 *disclosure made by the other party. The parties shall supplement these*
53 *disclosures when required under subdivision (e)(1).*
54 *(3) **Pretrial Disclosures.** In addition to the disclosures required in the*
55 *preceding paragraphs, a party shall provide to other parties the following information*
56 *regarding the evidence that it may present at trial other than solely for impeachment*
57 *purposes:*
58 *(A) the name and, if not previously provided, the address and telephone*
59 *number of each witness, separately identifying those whom the party expects*
60 *to present and those whom the party may call if the need arises;*
61 *(B) the designation of those witnesses whose testimony is expected to be*
62 *presented by means of a deposition and, if not taken stenographically, a*
63 *transcript of the pertinent portions of the deposition testimony; and*
64 *(C) an appropriate identification of each document or other exhibit,*
65 *including summaries of other evidence, separately identifying those which the*
66 *party expects to offer and those which the party may offer if the need arises.*
67 *Unless otherwise directed by the court, these disclosures shall be made at least 30*
68 *days before trial. Within 14 days thereafter, unless a different time is specified by*

69 *the court, a party may serve and file a list disclosing (i) any objections to the use*
70 *under Rule 32(a) of a deposition designated by another party under subparagraph*
71 *(B) and (ii) any objection, together with the grounds therefor, that may be made to*
72 *the admissibility of materials identified under subparagraph (C). Objections not so*
73 *disclosed, other than objections under Rules 402 and 403 of the Federal Rules of*
74 *Evidence, shall be deemed waived unless excused by the court for good cause shown.*
75 *(4) Form of Disclosures; Filing. Unless otherwise directed by order or local*
76 *rule, all disclosures under paragraphs (1) through (3) shall be made in writing,*
77 *signed, served, and promptly filed with the court.*
78 *(5) Methods to Discover Additional Matter.* Parties may obtain discovery
79 by one or more of the following methods: depositions upon oral examination or
80 written questions; written interrogatories; production of documents or things or
81 permission to enter upon land or other property *under Rule 34 or 45(a)(1)(C),*
82 for inspection and other purposes; physical and mental examinations; and
83 requests for admission. *Discovery at a place within a country having a treaty with*
84 *the United States applicable to the discovery must be conducted by methods*
85 *authorized by the treaty except that, if the court determines that those methods are*
86 *inadequate or inequitable, it may authorize other discovery methods not prohibited*
87 *by the treaty.*
88 **(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court
89 in accordance with these rules, the scope of discovery is as follows:
90 **(1) In General.** Parties may obtain discovery regarding any matter, not
91 privileged, which is relevant to the subject matter involved in the pending action,

92 whether it relates to the claim or defense of the party seeking discovery or to the
93 claim or defense of any other party, including the existence, description, nature,
94 custody, condition, and location of any books, documents, or other tangible
95 things and the identity and location of persons having knowledge of any
96 discoverable matter. ~~It is not a ground for objection that t~~*T*he information
97 sought *need not be* ~~will be in~~admissible at the trial if the information sought
98 appears reasonably calculated to lead to the discovery of admissible evidence.
99 *(2) Limitations. By order or by local rule, the court may alter the limits in*
100 *these rules on the number of depositions and interrogatories and may also limit the*
101 *length of depositions under Rule 30 and the number of requests under Rule 36.* ~~T~~
102 frequency or extent of use of the discovery methods ~~set forth in subdivision (a)~~
103 *otherwise permitted under these rules and by any local rule* shall be limited by the
104 court if it determines that: (i) the discovery sought is unreasonably cumulative
105 or duplicative, or is obtainable from some other source that is more convenient,
106 less burdensome, or less expensive; (ii) the party seeking discovery has had
107 ample opportunity by discovery in the action to obtain the information sought;
108 or (iii) ~~the discovery is unduly burdensome or expensive~~ *the burden or expense of*
109 *the proposed discovery outweighs its likely benefit*, taking into account the needs of
110 the case, the amount in controversy, ~~limitations on~~ the parties' resources, ~~and~~ the
111 importance of the issues at stake in the litigation*, and the importance of the*
112 *proposed discovery in resolving the issues*. The court may act upon its own
113 initiative after reasonable notice or pursuant to a motion under subdivision (c).
114 ~~**(2) Insurance Agreements.** A party may obtain discovery of the existence~~

115 ~~and contents of any insurance agreement under which any person carrying on an~~
116 ~~insurance business may be liable to satisfy part or all of a judgment which may~~
117 ~~be entered in the action or to indemnify or reimburse for payments made to~~
118 ~~satisfy the judgment. Information concerning the insurance agreement is not by~~
119 ~~reason of disclosure admissible in evidence at trial. For purpose of this~~
120 ~~paragraph, an application for insurance shall not be treated as part of an~~
121 ~~insurance agreement.~~

122 * * * *

123 (4) **Trial Preparation: Experts.** ~~Discovery of facts known and opinions~~
124 ~~held by experts, otherwise discoverable under the provisions of subdivision (b)(1)~~
125 ~~of this rule and acquired or developed in anticipation of litigation or for trial,~~
126 ~~may be obtained only as follows:~~

127 (A)~~(i)~~ A party may ~~through interrogatories require any other party~~
128 ~~to identify each person whom the other party expects to call as an expert~~
129 ~~witness at trial, to state the subject matter on which the expert is expected~~
130 ~~to testify, and to state the substance of the facts and opinions to which the~~
131 ~~expert is expected to testify and a summary of the grounds for each~~
132 ~~opinion. (ii) Upon motion, the court may order further discovery by other~~
133 ~~means, subject to such restrictions as to scope and such provisions,~~
134 ~~pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses~~
135 ~~as the court may deem appropriate.~~ *depose any person who has been*
136 *identified as an expert whose opinions may be presented at trial. If a report*
137 *from the expert is required under subdivision (a)(2)(B), the deposition shall*

138 *not be conducted until after the report is provided.*

139 (B) A party may*, through interrogatories or by deposition,* discover

140 facts known or opinions held by an expert who has been retained or

141 specially employed by another party in anticipation of litigation or

142 preparation for trial and who is not expected to be called as a witness at

143 trial~~,~~ only as provided in Rule 35(b) or upon a showing of exceptional

144 circumstances under which it is impracticable for the party seeking

145 discovery to obtain facts or opinions on the same subject by other means.

146 (C) Unless manifest injustice would result, (i) the court shall require

147 that the party seeking discovery pay the expert a reasonable fee for time

148 spent in responding to discovery under *this* subdivisions ~~(b)(4)(A)(ii) and~~

149 ~~(b)(4)(B) of this rule~~; and (ii) with respect to discovery obtained under

150 ~~subdivision (b)(4)(A)(ii) of this rule the court may require, and with~~

151 ~~respect to discovery obtained under~~ subdivision (b)(4)(B) of this rule the

152 court shall require~~,~~ the party seeking discovery to pay the other party a fair

153 portion of the fees and expenses reasonably incurred by the latter party in

154 obtaining facts and opinions from the expert.

155 *(5) Claims of Privilege or Protection of Trial Preparation Materials. When a*

156 *party withholds information otherwise discoverable under these rules by claiming that*

157 *it is privileged or subject to protection as trial preparation material, the party shall*

158 *make the claim expressly and shall describe the nature of the documents,*

159 *communications, or things not produced or disclosed in a manner that, without*

160 *revealing information itself privileged or protected, will enable other parties to assess*

161 *the applicability of the privilege or protection.*

162 (c) **Protective Orders.** Upon motion by a party or by the person from whom

163 discovery is sought, *accompanied by a certificate that the movant has in good faith*

164 *conferred or attempted to confer with other affected parties in an effort to resolve the*

165 *dispute without court action,* and for good cause shown, the court in which the action

166 is pending or alternatively, on matters relating to a deposition, the court in the district

167 where the deposition is to be taken may make any order which justice requires to

168 protect a party or person from annoyance, embarrassment, oppression, or undue

169 burden or expense, including one or more of the following:

170 (1) that the *disclosure or* discovery not be had;

171 (2) that the *disclosure or* discovery may be had only on specified terms and

172 conditions, including a designation of the time or place;

173 (3) that the discovery may be had only by a method of discovery other

174 than that selected by the party seeking discovery;

175 (4) that certain matters not be inquired into, or that the scope of the

176 *disclosure or* discovery be limited to certain matters;

177 (5) that discovery be conducted with no one present except persons

178 designated by the court;

179 (6) that a deposition, after being sealed, be opened only by order of the

180 court;

181 (7) that a trade secret or other confidential research, development, or

182 commercial information not be ~~disclosed~~ *revealed* or be ~~disclosed~~ *revealed* only

183 in a designated way; *and*

184 **(8)** that the parties simultaneously file specified documents or information
185 enclosed in sealed envelopes to be opened as directed by the court.
186 If the motion for a protective order is denied in whole or in part, the court may,
187 on such terms and conditions as are just, order that any party or *other* person provide
188 or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses
189 incurred in relation to the motion.

190 **(d) ~~Sequence and~~ Timing *and Sequence* of Discovery.** *Except when authorized*
191 *under these rules or by local rule, order, or agreement of the parties, a party may not seek*
192 *discovery from any source before the parties have met and conferred as required by*
193 *subdivision (f).* Unless the court upon motion, for the convenience of parties and
194 witnesses and in the interests of justice, orders otherwise, methods of discovery may
195 be used in any sequence, and the fact that a party is conducting discovery, whether by
196 deposition or otherwise, shall not operate to delay any other party's discovery.

197 **(e) Supplementation of *Disclosures and* Responses.** A party who has *made a*
198 *disclosure under subdivision (a) or* responded to a request for discovery with a *disclosure*
199 *or* response ~~that was complete when made~~ is under ~~no~~ *a* duty to supplement *or correct*
200 the *disclosure or* response to include information thereafter acquired ~~, except as follows~~
201 *if ordered by the court or in the following circumstances*:

202 **(1)** A party is under a duty ~~seasonably~~ to supplement ~~the response with~~
203 ~~respect to any question directly addressed to (A) the identity and location of~~
204 ~~persons having knowledge of discoverable matters, and (B) the identity of each~~
205 ~~person expected to be called as an expert witness at trial, the subject matter on~~
206 ~~which the person is expected to testify, and the substance of the person's~~

207 ~~testimony.~~ *at appropriate intervals its disclosures under subdivision (a) if the party*
208 *learns that in some material respect the information disclosed is incomplete or*
209 *incorrect and if the additional or corrective information has not otherwise been*
210 *made known to the other parties during the discovery process or in writing. With*
211 *respect to testimony of an expert from whom a report is required under subdivision*
212 *(a)(2)(B) the duty extends both to information contained in the report and to*
213 *information provided through a deposition of the expert, and any additions or other*
214 *changes to this information shall be disclosed by the time the party's disclosures*
215 *under Rule 26(a)(3) are due.*

216 (2) A party is under a duty seasonably to amend a prior response *to an*
217 *interrogatory, request for production, or request for admission* if the party *learns*
218 ~~obtains information upon the basis of which (A) the party knows~~ that the
219 response ~~was incorrect when made, or (B) the party knows that the response~~
220 ~~though correct when made is no longer true and the circumstances are such that~~
221 ~~a failure to amend the response is in substance a knowing concealment~~ *is in*
222 *some material respect incomplete or incorrect and if the additional or corrective*
223 *information has not otherwise been made known to the other parties during the*
224 *discovery process or in writing.*

225 ~~(3) A duty to supplement responses may be imposed by order of the court,~~
226 ~~agreement of the parties, or at any time prior to trial through new requests for~~
227 ~~supplementation of prior responses.~~

228 (f) *Meeting of Parties; Planning for* **Discovery** ~~**Conference.**~~ ~~At any time after~~
229 ~~commencement of an action the court may direct the attorneys for the parties to~~

230 ~~appear before it for a conference on the subject of discovery. The court shall do so~~
231 ~~upon motion by the attorney for any party if the motion includes~~ *Except in actions*
232 *exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable*
233 *and in any event at least 14 days before a scheduling conference is held or a scheduling*
234 *order is due under Rule 16(b), meet to discuss the nature and basis of their claims and*
235 *defenses and the possibilities for a prompt settlement or resolution of the case, to make*
236 *or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed*
237 *discovery plan. The plan shall indicate the parties' views and proposals concerning:*

238 **(1)** ~~A statement of the issues as they then appear;~~ *what changes should be*
239 *made in the timing, form, or requirement for disclosures under subdivision (a) or*
240 *local rule, including a statement as to when disclosures under subdivision (a)(1)*
241 *were made or will be made;*

242 **(2)** ~~A proposed plan and schedule of discovery;~~ *the subjects on which*
243 *discovery may be needed, when discovery should be completed, and whether*
244 *discovery should be conducted in phases or be limited to or focused upon particular*
245 *issues;*

246 **(3)** ~~Any limitations proposed to be placed on discovery;~~ *what changes*
247 *should be made in the limitations on discovery imposed under these rules or by local*
248 *rule, and what other limitations should be imposed; and*

249 **(4)** ~~A~~*a*ny other ~~proposed~~ orders ~~with respect to discovery~~ *that should be*
250 *entered by the court under subdivision (c) or under Rule 16(b) and (c).*~~; and~~

251 ~~(5) A statement showing that the attorney making the motion has made~~
252 ~~a reasonable effort to reach agreement with opposing attorneys on the matters~~

253 ~~set forth in the motion. Each party and each party's attorney are under a duty~~
254 ~~to participate in good faith in the framing of a discovery plan if a plan is~~
255 ~~proposed by the attorney for any party. Notice of the motion shall be served on~~
256 ~~all parties. Objections or additions to matters set forth in the motion shall be~~
257 ~~served not later than 10 days after service of the motion.~~

258 *The attorneys of record and all unrepresented parties that have appeared in the case*
259 *are jointly responsible for arranging and being present or represented at the meeting, for*
260 *attempting in good faith to agree on the proposed discovery plan, and for submitting to the*
261 *court within 10 days after the meeting a written report outlining the plan.* ~~Following the~~
262 ~~discovery conference, the court shall enter an order tentatively identifying the issues~~
263 ~~for discovery purposes, establishing a plan and schedule for discovery, setting~~
264 ~~limitations on discovery, if any; and determining such other matters, including the~~
265 ~~allocation of expenses, as are necessary for the proper management of discovery in the~~
266 ~~action. An order may be altered or amended whenever justice so requires.~~

267 ~~Subject to the right of a party who properly moves for a discovery conference to~~
268 ~~prompt convening of the conference, the court may combine the discovery conference~~
269 ~~with a pretrial conference authorized by Rule 16.~~

270 **(g) Signing of *Disclosures,* Discovery Requests, Responses, and Objections.**

271 *(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision*
272 *(a)(3) shall be signed by at least one attorney of record in the attorney's individual*
273 *name, whose address shall be stated. An unrepresented party shall sign the*
274 *disclosure and state the party's address. The signature of the attorney or party*
275 *constitutes a certification that to the best of the signer's knowledge, information, and*

276 *belief, formed after a reasonable inquiry, the disclosure is complete and correct as*
277 *of the time it is made.*

278 *(2)* Every *discovery* request, ~~for discovery or~~ response, or objection ~~thereto~~
279 made by a party represented by an attorney shall be signed by at least one
280 attorney of record in the attorney's individual name, whose address shall be
281 stated. A*n unrepresented* party ~~who is not represented by an attorney~~ shall sign
282 the request, response, or objection and state the party's address. The signature
283 of the attorney or party constitutes a certification ~~that the signer has read the~~
284 ~~request, response, or objection, and~~ that to the best of the signer's knowledge,
285 information, and belief, formed after a reasonable inquiry, ~~it~~ *the request, response,*
286 *or objection* is:

287 (~~1~~*A*) consistent with these rules and warranted by existing law or a
288 good faith argument for the extension, modification, or reversal of existing
289 law;

290 (~~2~~*B*) not interposed for any improper purpose, such as to harass or
291 to cause unnecessary delay or needless increase in the cost of litigation;
292 and

293 (~~3~~*C*) not unreasonable or unduly burdensome or expensive, given the
294 needs of the case, the discovery already had in the case, the amount in
295 controversy, and the importance of the issues at stake in the litigation.

296 —If a request, response, or objection is not signed, it shall be stricken unless it
297 is signed promptly after the omission is called to the attention of the party
298 making the request, response, or objection, and a party shall not be obligated to

299 take any action with respect to it until it is signed.

300 (3) If _without substantial justification_ a certification is made in violation of

301 the rule, the court, upon motion or upon its own initiative, shall impose upon the

302 person who made the certification, the party on whose behalf the _disclosure,_

303 request, response, or objection is made, or both, an appropriate sanction, which

304 may include an order to pay the amount of the reasonable expenses incurred

305 because of the violation, including a reasonable attorney's fee.

COMMITTEE NOTES

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3), as the trial date approaches, to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1348 (1978), and Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 721-23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be

achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate to the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the

existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence "relevant to disputed facts alleged with particularity in the pleadings." There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product.

Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must be held within 75 days after a defendant has first appeared in the case.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make an inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another

party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness, 1986 U. Ill. L. Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) and revised Rule 702 of the Federal Rules of Evidence provide an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(3)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--e.g., a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to

the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide "foundation" testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion "in limine" and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). Language is added to this paragraph to reflect a policy of balanced accommodation to international agreements bearing on methods of discovery. Cf. Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987). Although such treaties typically do not preclude the use of Rules 26-37 to secure information from persons in other countries, attorneys and judges should be cognizant of the adverse impact upon international relations of unduly intrusive discovery methods that offend the sensibilities of those governing other countries. See generally J. Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U. Pitt. L. Rev. 903 (1989); E. Alley & D. Prescott, Recent Developments in the United States under the Hague Evidence Convention, 2 Leiden J. Int'l Law 19 (1989). If certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that ordinarily other methods should not be employed in discovery at places in foreign countries, at least if the approved methods are adequate to meet the need of the litigant for timely access to the information.

The new provision applies only with respect to discovery sought to be conducted within a country that has an applicable convention or treaty with the United States. It does not cover discovery requests that a party subject to the power of the court provide in the United States (such as by answering interrogatories, appearing at a deposition, or producing documents for inspection in this country) information that may be located abroad or derived

from materials located abroad. Nevertheless, in such situations, although not governed by the amendment to Rule 26(a)(5), the court should consider, as part of its obligation to prevent discovery abuses involving foreign litigants, the availability and practicality of discovery through convention methods. See Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987). Likewise, the court should consider the general principles of comity in deciding what discovery to permit in countries not signatories to a convention or treaty with the United States.

The rule does not require resort to convention methods where such methods would be "inadequate." This provision allows the court to make a discreet determination on the particular facts as to the sufficiency of the internationally agreed discovery methods. For example, the court might excuse a party from having to resort to Hague Convention procedures if a country in which necessary information is located has imposed a blanket reservation that would prevent such discovery.

The rule also permits the court to authorize the use of non-convention discovery methods when needed to assure that discovery is not "inequitable." Foreign litigants should not be placed in a favored position when compared to domestic parties in the litigation, especially in commercial matters with respect to which the American litigants may be their economic competitors. Thus, an international litigant should not be permitted to obtain discovery from its American adversaries using the broader forms of discovery contained in Rules 26-37, while asserting constraints under a convention or the law of the party's own country to create obstacles to equivalent discovery initiated by its adversaries.

Indeed, the court is not precluded by the rule from authorizing use of discovery methods that may violate the laws of another country if necessary to assure that discovery is not inadequate or inequitable and if not prohibited by a treaty or convention with the United States. The court should, however, exercise caution in ordering such discovery, particularly if the impediment to the discovery is imposed at the instance of the foreign authority, not at the request of the litigant or non-party from whom information is sought. Moreover, in deciding upon an appropriate sanction for failure to comply with an order for such discovery, the court should take into account the fact that non-compliance was motivated by the party's need to conform to the law of a foreign country. See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958). In no circumstance can the court authorize discovery methods that are prohibited by a treaty that is the law of the United States, for the proscriptions of the treaty take precedence over these rules.

This paragraph is also revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging

discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection. The paragraph also applies

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are

withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items "otherwise discoverable." If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a "party," applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful

for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a "discovery conference" and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after an answer has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. The additional time is afforded in recognition that the discussion at the meeting of the claims and defenses may be useful in defining the issues with respect to which the initial disclosures should be made. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should

describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for a scheduling order under Rule 16(b), such as cases in which there will be no discovery (e.g., bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (e.g., government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (e.g., actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

Rule 28. Persons Before Whom Depositions May Be Taken

1 * * * *

2 **(b) In Foreign Countries.** *Subject to the provisions of Rule 26(a)(5)* ~~In a~~
3 ~~foreign country~~, depositions may be taken *in a foreign country* (1) *pursuant to any*
4 *applicable treaty or convention, or (2) pursuant to a letter of request (whether or not*
5 *captioned a letter rogatory), or (3)* on notice before a person authorized to administer
6 oaths in the place ~~in which~~ *where* the examination is held, either by the law thereof or
7 by the law of the United States, or (~~2~~*4*) before a person commissioned by the court,
8 and a person so commissioned shall have the power by virtue of the commission to
9 administer any necessary oath and take testimony~~, or (3) pursuant to a letter rogatory~~.
10 A commission or a letter ~~rogatory~~ *of request* shall be issued on application and notice
11 and on terms that are just and appropriate. It is not requisite to the issuance of a
12 commission or a letter ~~rogatory~~ *of request* that the taking of the deposition in any other
13 manner is impracticable or inconvenient; and both a commission and a letter ~~rogatory~~
14 *of request* may be issued in proper cases. A notice or commission may designate the
15 person before whom the deposition is to be taken either by name or descriptive title.
16 A letter ~~rogatory~~ *of request* may be addressed "To the Appropriate Authority in [here
17 name the country]." *When a letter of request or any other device is used pursuant to any*
18 *applicable treaty or convention, it shall be captioned in the form prescribed by that treaty*
19 *or convention.* Evidence obtained in response to a letter ~~rogatory~~ *of request* need not
20 be excluded merely ~~for the reason that~~ *because* it is not a verbatim transcript*, because*
21 ~~or that~~ the testimony was not taken under oath*,* or ~~for~~ *because of* any similar departure
22 from the requirements for depositions taken within the United States under these

23 rules.

24 * * * *

COMMITTEE NOTES

This revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad. Pursuant to revised Rule 26(a)(5), the party taking the deposition is ordinarily obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means, even though a verbatim transcript is not available or testimony cannot be taken under oath.

The term "letter of request" has been substituted in the rule for the term "letter rogatory" because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of letter of request. There are several other minor changes that are designed merely to carry out the intent of the other alterations.

Rule 29. Stipulations Regarding Discovery Procedure

1 Unless ~~the court orders~~ otherwise *directed by the court*, the parties may by written
2 stipulation (1) provide that depositions may be taken before any person, at any time
3 or place, upon any notice, and in any manner and when so taken may be used like
4 other depositions, and (2) modify ~~the procedures for other methods of~~ *other procedures*
5 *governing or limitations placed upon* discovery, except that stipulations extending the
6 time provided in Rules 33, 34, and 36 for responses to discovery may*, if they would*
7 *interfere with any time set for completion of discovery, for hearing of a motion, or for trial,*
8 be made only with the approval of the court.

COMMITTEE NOTES

This rule is revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery. Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc. Likewise, when more depositions or interrogatories are needed than allowed under these rules or when more time is needed to complete a deposition than allowed under a local rule, they can, by agreeing to the additional discovery, eliminate the need for a special motion addressed to the court.

Under the revised rule, the litigants ordinarily are not required to obtain the court's approval of these stipulations. By order or local rule, the court can, however, direct that its approval be obtained for particular types of stipulations; and, in any event, approval must be obtained if a stipulation to extend the 30-day period for responding to interrogatories, requests for production, or requests for admissions would interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial.

Rule 30. Depositions Upon Oral Examination

1 **(a) When Depositions May Be Taken*; When Leave Required*.**

2 *(1)* ~~After commencement of the action, any~~ party may take the testimony
3 of any person, including a party, by deposition upon oral examination *without*
4 *leave of court except as provided in paragraph (2)*. ~~Leave of court, granted with~~
5 ~~or without notice, must be obtained only if the plaintiff seeks to take a~~
6 ~~deposition prior to the expiration of 30 days after service of the summons and~~
7 ~~complaint upon any defendant or service made under Rule 4(e), except that~~
8 ~~leave is not required (1) if a defendant has served a notice of taking deposition~~
9 ~~or otherwise sought discovery, or (2) if special notice is given as provided in~~
10 ~~subdivision (b)(2) of this rule.~~ The attendance of witnesses may be compelled
11 by subpoena as provided in Rule 45. ~~The deposition of a person confined in~~
12 ~~prison may be taken only by leave of court on such terms as the court prescribes.~~

13 *(2) A party must obtain leave of court, which shall be granted to the extent*
14 *consistent with the principles stated in Rule 26(b)(2), if the person to be examined*
15 *is confined in prison or if, without the written stipulation of the parties,*

16 *(A) a proposed deposition would result in more than ten depositions*
17 *being taken under this rule or Rule 31 by the plaintiffs, or by the defendants,*
18 *or by third-party defendants;*

19 *(B) the person to be examined already has been deposed in the case;*
20 *or*

21 *(C) a party seeks to take a deposition before the time specified in Rule*
22 *26(d) unless the notice contains a certification, with supporting facts, that the*

23 *person to be examined is expected to leave the United States and be*
24 *unavailable for examination in this country unless deposed before that time.*
25 **(b) Notice of Examination: General Requirements; ~~Special Notice;~~**
26 **~~Non-Stenographic~~ *Method of* Recording; Production of Documents and Things;**
27 **Deposition of Organization; Deposition by Telephone.**
28 (1) A party desiring to take the deposition of any person upon oral
29 examination shall give reasonable notice in writing to every other party to the
30 action. The notice shall state the time and place for taking the deposition and
31 the name and address of each person to be examined, if known, and, if the name
32 is not known, a general description sufficient to identify the person or the
33 particular class or group to which the person belongs. If a subpoena duces
34 tecum is to be served on the person to be examined, the designation of the
35 materials to be produced as set forth in the subpoena shall be attached to, or
36 included in, the notice.
37 (2) ~~Leave of court is not required for the taking of a deposition by the~~
38 ~~plaintiff if the notice (A) states that the person to be examined is about to go~~
39 ~~out of the district where the action is pending and more than 100 miles from the~~
40 ~~place of trial, or is about to go out of the United States, or is bound on a voyage~~
41 ~~to sea, and will be unavailable for examination unless the person's deposition is~~
42 ~~taken before expiration of the 30-day period, and (B) sets forth facts to support~~
43 ~~the statement. The plaintiff's attorney shall sign the notice, and the attorney's~~
44 ~~signature constitutes a certification by the attorney that to the best of the~~
45 ~~attorney's knowledge, information, and belief the statement and supporting facts~~

46 ~~are true. The sanctions provided by Rule 11 are applicable to the certification.~~

47 ~~If a party shows that when the party was served with notice under this~~

48 ~~subdivision (b)(2) the party was unable through the exercise of diligence to~~

49 ~~obtain counsel to represent the party at the taking of the deposition, the~~

50 ~~deposition may not be used against the party.~~

51 *The party taking the deposition shall state in the notice the method by which*

52 *the testimony shall be recorded. Unless the court orders otherwise, it may be*

53 *recorded by sound, sound-and-visual, or stenographic means, and the party taking*

54 *the deposition shall bear the cost of the recording. Any party may arrange for a*

55 *transcription to be made from the recording of a deposition taken by*

56 *nonstenographic means.*

57 (3) ~~The court may for cause shown enlarge or shorten the time for taking~~

58 ~~the deposition.~~ *With prior notice to the deponent and other parties, any party may*

59 *designate another method to record the deponent's testimony in addition to the*

60 *method specified by the person taking the deposition. The additional record or*

61 *transcript shall be made at that party's expense unless the court otherwise orders.*

62 (4) ~~The parties may stipulate in writing or the court may upon motion~~

63 ~~order that the testimony at a deposition be recorded by other than stenographic~~

64 ~~means. The stipulation or order shall designate the person before whom the~~

65 ~~deposition shall be taken, the manner of recording, preserving and filing the~~

66 ~~deposition, and may include other provisions to assure that the recorded~~

67 ~~testimony will be accurate and trustworthy. A party may arrange to have a~~

68 ~~stenographic transcription made at the party's own expense. Any objections~~

~~under subdivision (e), any changes made by the witness, the witness' signature identifying the deposition as the witness' own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.~~ *Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.*

* * * *

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone *or other remote electronic means*. For the purposes of this rule and Rules 28(a), 37(a)(1), *and* 37(b)(1)~~, and 45(d)~~, a deposition taken by ~~telephone~~ *such means* is taken in the district and at the place where the deponent is to answer questions ~~propounded to the deponent~~.

92 **(c) Examination and Cross-Examination; Record of Examination; Oath;**
93 **Objections.** Examination and cross-examination of witnesses may proceed as
94 permitted at the trial under the provisions of the Federal Rules of Evidence *except*
95 *Rules 103 and 615*. The officer before whom the deposition is to be taken shall put
96 the witness on oath *or affirmation* and shall personally, or by someone acting under the
97 officer's direction and in the officer's presence, record the testimony of the witness.
98 The testimony shall be taken stenographically or recorded by any other ~~means ordered~~
99 ~~in accordance with~~ *method authorized by* subdivision (b)(~~4~~2) of this rule. ~~If requested~~
100 ~~by one of the parties the testimony shall be transcribed.~~ All objections made at the
101 time of the examination to the qualifications of the officer taking the deposition, ~~or~~
102 to the manner of taking it, ~~or~~ to the evidence presented, ~~or~~ to the conduct of any
103 party, ~~and any other objection to~~ *or to any other aspect of* the proceedings~~,~~ shall be
104 noted by the officer upon *the record of* the deposition~~. Evidence objected to shall be~~
105 *; but the examination shall proceed, with the testimony being* taken subject to the
106 objections. In lieu of participating in the oral examination, parties may serve written
107 questions in a sealed envelope on the party taking the deposition and the party taking
108 the deposition shall transmit them to the officer, who shall propound them to the
109 witness and record the answers verbatim.

110 **(d)** *Schedule and Duration;* **Motion to Terminate or Limit Examination.**
111 *(1) Any objection to evidence during a deposition shall be stated concisely*
112 *and in a non-argumentative and non-suggestive manner. A party may instruct a*
113 *deponent not to answer only when necessary to preserve a privilege, to enforce a*
114 *limitation on evidence directed by the court, or to present a motion under paragraph*

115 *(3).*

116 *(2) By order or local rule, the court may limit the time permitted for the*
117 *conduct of a deposition, but shall allow additional time consistently with Rule*
118 *26(b)(2) if needed for a fair examination of the deponent or if the deponent or*
119 *another party impedes or delays the examination. If the court finds such an*
120 *impediment, delay, or other conduct that has frustrated the fair examination of the*
121 *deponent, it may impose upon the persons responsible an appropriate sanction,*
122 *including the reasonable costs and attorney's fees incurred by any parties as a result*
123 *thereof.*

124 *(3)* At any time during ~~the taking of the~~ *a* deposition, on motion of a
125 party or of the deponent and upon a showing that the examination is being
126 conducted in bad faith or in such manner as unreasonably to annoy, embarrass,
127 or oppress the deponent or party, the court in which the action is pending or the
128 court in the district where the deposition is being taken may order the officer
129 conducting the examination to cease forthwith from taking the deposition, or may
130 limit the scope and manner of the taking of the deposition as provided in Rule
131 26(c). If the order made terminates the examination, it shall be resumed
132 thereafter only upon the order of the court in which the action is pending. Upon
133 demand of the objecting party or deponent, the taking of the deposition shall be
134 suspended for the time necessary to make a motion for an order. The provisions
135 of Rule 37(a)(4) apply to the award of expenses incurred in relation to the
136 motion.

137 (e) **~~Submission to~~ *Review by* Witness; Changes; Signing.** ~~When the testimony~~

138 ~~is fully transcribed, the deposition shall be submitted to the witness for examination~~
139 ~~and shall be read to or by the witness, unless such examination and reading are waived~~
140 ~~by the witness and by the parties. Any changes in form or substance which the witness~~
141 ~~desires to make shall be entered upon the deposition by the officer with a statement~~
142 ~~of the reasons given by the witness for making them. The deposition shall then be~~
143 ~~signed by the witness, unless the parties by stipulation waive the signing or the witness~~
144 ~~is ill or cannot be found or refuses to sign. If the deposition is not signed by the~~
145 ~~witness within 30 days of its submission to the witness, the officer shall sign it and state~~
146 ~~on the record the fact of the waiver or of the illness or absence of the witness or the~~
147 ~~fact of the refusal to sign, together with the reason, if any, given therefor; and the~~
148 ~~deposition may then be used as fully as though signed unless on a motion to suppress~~
149 ~~under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign~~
150 ~~require rejection of the deposition in whole or in part.~~ *If requested by the deponent or*
151 *a party before completion of the deposition, the deponent shall have 30 days after being*
152 *notified by the officer that the transcript or recording is available in which to review the*
153 *transcript or recording and, if there are changes in form or substance, to sign a statement*
154 *reciting such changes and the reasons given by the deponent for making them. The officer*
155 *shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was*
156 *requested and, if so, shall append any changes made by the deponent during the period*
157 *allowed.*

158 **(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing.**

159 (1) The officer shall certify ~~on the deposition~~ that the witness was duly
160 sworn by the officer and that the deposition is a true record of the testimony

161 given by the witness. *This certificate shall be in writing and accompany the record*
162 *of the deposition.* Unless otherwise ordered by the court, the officer shall ~~then~~
163 securely seal the deposition in an envelope *or package* indorsed with the title of
164 the action and marked "Deposition of [here insert name of witness]" and shall
165 promptly file it with the court in which the action is pending ~~or send it by~~
166 ~~registered or certified mail to the clerk thereof for filing~~ *or send it to the attorney*
167 *who arranged for the transcript or recording, who shall store it under conditions that*
168 *will protect it against loss, destruction, tampering, or deterioration.* Documents and
169 things produced for inspection during the examination of the witness, shall, upon
170 the request of a party, be marked for identification and annexed to the
171 deposition and may be inspected and copied by any party, except that if the
172 person producing the materials desires to retain them the person may (A) offer
173 copies to be marked for identification and annexed to the deposition and to
174 serve thereafter as originals if the person affords to all parties fair opportunity
175 to verify the copies by comparison with the originals, or (B) offer the originals
176 to be marked for identification, after giving to each party an opportunity to
177 inspect and copy them, in which event the materials may then be used in the
178 same manner as if annexed to the deposition. Any party may move for an order
179 that the original be annexed to and returned with the deposition to the court,
180 pending final disposition of the case.

181 (2) *Unless otherwise ordered by the court or agreed by the parties, the officer*
182 *shall retain stenographic notes of any deposition taken stenographically or a copy of*
183 *the recording of any deposition taken by another method.* Upon payment of

184 reasonable charges therefor, the officer shall furnish a copy of the *transcript or*

185 *other recording of the* deposition to any party or to the deponent.

186 * * * *

187 * * * *

COMMITTEE NOTES

Subdivision (a). Paragraph (1) retains the first and third sentences from the former subdivision (a) without significant modification. The second and fourth sentences are relocated.

Paragraph (2) collects all provisions bearing on requirements of leave of court to take a deposition.

Paragraph (2)(A) is new. It provides a limit on the number of depositions the parties may take, absent leave of court or stipulation with the other parties. One aim of this revision is to assure judicial review under the standards stated in Rule 26(b)(2) before any side will be allowed to take more than ten depositions in a case without agreement of the other parties. A second objective is to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case. Leave to take additional depositions should be granted when consistent with the principles of Rule 26(b)(2), and in some cases the ten-per-side limit should be reduced in accordance with those same principles. Consideration should ordinarily be given at the planning meeting of the parties under Rule 26(f) and at the time of a scheduling conference under Rule 16(b) as to enlargements or reductions in the number of depositions, eliminating the need for special motions.

A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify.

In multi-party cases, the parties on any side are expected to confer and agree as to which depositions are most needed, given the presumptive limit on the number of depositions they can take without leave of court. If these disputes cannot be amicably resolved, the court can be requested to resolve the dispute or permit additional depositions.

Paragraph (2)(B) is new. It requires leave of court if any witness is to be deposed in the action more than once. This requirement does not apply when a deposition is temporarily recessed for convenience of counsel or the deponent or to enable additional materials to be gathered before resuming the deposition. If significant travel costs would be incurred to resume the deposition, the parties should consider the feasibility of conducting the balance of the examination by telephonic means.

Paragraph (2)(C) revises the second sentence of the former subdivision (a) as to when

depositions may be taken. Consistent with the changes made in Rule 26(d), providing that formal discovery ordinarily not commence until after the litigants have met and conferred as directed in revised Rule 26(f), the rule requires leave of court or agreement of the parties if a deposition is to be taken before that time (except when a witness is about to leave the country).

Subdivision (b). The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel.

Former subdivision (b)(2) is partly relocated in subdivision (a)(2)(C) of this rule. The latter two sentences of the first paragraph are deleted, in part because they are redundant to Rule 26(g) and in part because Rule 11 no longer applies to discovery requests. The second paragraph of the former subdivision (b)(2), relating to use of depositions at trial where a party was unable to obtain counsel in time for an accelerated deposition, is relocated in Rule 32.

New paragraph (2) confers on the party taking the deposition the choice of the method of recording, without the need to obtain prior court approval for one taken other than stenographically. A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial or on a dispositive motion under Rule 56. Objections to the nonstenographic recording of a deposition, when warranted by the circumstances, can be presented to the court under Rule 26(c).

Paragraph (3) provides that other parties may arrange, at their own expense, for the recording of a deposition by a means (stenographic, visual, or sound) in addition to the method designated by the person noticing the deposition. The former provisions of this paragraph, relating to the court's power to change the date of a deposition, have been eliminated as redundant in view of Rule 26(c)(2).

Revised paragraph (4) requires that all depositions be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically.

Paragraph (7) is revised to authorize the taking of a deposition not only by telephone but also by other remote electronic means, such as satellite television, when agreed to by the parties or authorized by the court.

Subdivision (c). Minor changes are made in this subdivision to reflect those made in subdivision (b) and to complement the new provisions of subdivision (d)(1), aimed at reducing the number of interruptions during depositions.

In addition, the revision addresses a recurring problem as to whether other potential deponents can attend a deposition. Courts have disagreed, some holding that witnesses

should be excluded through invocation of Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. The revision addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press.

Subdivision (d). The first sentence of new paragraph (1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, i.e., objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called "usual stipulation" preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition.

Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) prohibits such directions except in the three circumstances indicated: to claim a privilege or protection against disclosure (e.g., as work product), to enforce a court directive limiting the scope or length of permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph (3).

Paragraph (2) is added to this subdivision to dispel any doubts regarding the power of the court by order or local rule to establish limits on the length of depositions. The rule also explicitly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorney, but is otherwise congruent with Rule 26(g).

It is anticipated that limits on the length of depositions prescribed by local rules would be presumptive only, subject to modification by the court or by agreement of the parties. Such modifications typically should be discussed by the parties in their meeting under Rule 26(f) and included in the scheduling order required by Rule 16(b). Additional time, moreover, should be allowed under the revised rule when justified under the principles stated in Rule 26(b)(2). To reduce the number of special motions, local rules should ordinarily permit--and indeed encourage--the parties to agree to additional time, as when, during the taking of a deposition, it becomes clear that some additional examination is needed.

Paragraph (3) authorizes appropriate sanctions not only when a deposition is

unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1). In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct, as may the refusal of an attorney to agree with other counsel on a fair apportionment of the time allowed for examination of a deponent or a refusal to agree to a reasonable request for some additional time to complete a deposition, when that is permitted by the local rule or order.

Subdivision (e). Various changes are made in this subdivision to reduce problems sometimes encountered when depositions are taken stenographically. Reporters frequently have difficulties obtaining signatures--and the return of depositions--from deponents. Under the revision pre-filing review by the deponent is required only if requested before the deposition is completed. If review is requested, the deponent will be allowed 30 days to review the transcript or recording and to indicate any changes in form or substance. Signature of the deponent will be required only if review is requested and changes are made.

Subdivision (f). Minor changes are made in this subdivision to reflect those made in subdivision (b). In courts which direct that depositions not be automatically filed, the reporter can transmit the transcript or recording to the attorney taking the deposition (or ordering the transcript or record), who then becomes custodian for the court of the original record of the deposition. Pursuant to subdivision (f)(2), as under the prior rule, any other party is entitled to secure a copy of the deposition from the officer designated to take the deposition; accordingly, unless ordered or agreed, the officer must retain a copy of the recording or the stenographic notes.

Rule 31. Depositions Upon Written Questions

1 **(a) Serving Questions; Notice.**

2 *(1)* ~~After commencement of the action, any~~ party may take the testimony

3 of any person, including a party, by deposition upon written questions *without*

4 *leave of court except as provided in paragraph (2)*. The attendance of witnesses

5 may be compelled by the use of subpoena as provided in Rule 45. ~~The~~

6 ~~deposition of a person confined in prison may be taken only by leave of court on~~

7 ~~such terms as the court prescribes.~~

8 *(2) A party must obtain leave of court, which shall be granted to the extent*

9 *consistent with the principles stated in Rule 26(b)(2), if the person to be examined*

10 *is confined in prison or if, without the written stipulation of the parties,*

11 *(A) a proposed deposition would result in more than ten depositions*

12 *being taken under this rule or Rule 30 by the plaintiffs, or by the defendants,*

13 *or by third-party defendants;*

14 *(B) the person to be examined has already been deposed in the case;*

15 *or*

16 *(C) a party seeks to take a deposition before the time specified in Rule*

17 *26(d).*

18 *(3)* A party desiring to take a deposition upon written questions shall serve

19 them upon every other party with a notice stating (1) the name and address of

20 the person who is to answer them, if known, and if the name is not known, a

21 general description sufficient to identify the person or the particular class or

22 group to which the person belongs, and (2) the name or descriptive title and

23 address of the officer before whom the deposition is to be taken. A deposition
24 upon written questions may be taken of a public or private corporation or a
25 partnership or association or governmental agency in accordance with the
26 provisions of Rule 30(b)(6).

27 *(4)* Within ~~30~~*14* days after the notice and written questions are served, a
28 party may serve cross questions upon all other parties. Within ~~10~~*7* days after
29 being served with cross questions, a party may serve redirect questions upon all
30 other parties. Within ~~10~~*7* days after being served with redirect questions, a party
31 may serve recross questions upon all other parties. The court may for cause
32 shown enlarge or shorten the time.

33 * * * *

COMMITTEE NOTES

Subdivision (a). The first paragraph of subdivision (a) is divided into two subparagraphs, with provisions comparable to those made in the revision of Rule 30. Changes are made in the former third paragraph, numbered in the revision as paragraph (4), to reduce the total time for developing cross-examination, redirect, and recross questions from 50 days to 28 days.

Rule 32. Use of Depositions in Court Proceedings

1 **(a) Use of Depositions.**

2 * * * *

3 (3) The deposition of a witness, whether or not a party, may be used by

4 any party for any purpose if the court finds:

5 **(A)** that the witness is dead; or

6 **(B)** that the witness is at a greater distance than 100 miles from the

7 place of trial or hearing, or is out of the United States, unless it appears

8 that the absence of the witness was procured by the party offering the

9 deposition; or

10 **(C)** that the witness is unable to attend or testify because of age,

11 illness, infirmity, or imprisonment; or

12 **(D)** that the party offering the deposition has been unable to procure

13 the attendance of the witness by subpoena; or

14 **(E)** upon application and notice, that such exceptional circumstances

15 exist as to make it desirable, in the interest of justice and with due regard

16 to the importance of presenting the testimony of witnesses orally in open

17 court, to allow the deposition to be used.

18 *A deposition taken without leave of court pursuant to a notice under Rule*

19 *30(a)(2)(C) shall not be used against a party who demonstrates that, when served*

20 *with the notice, it was unable through the exercise of diligence to obtain counsel to*

21 *represent it at the taking of the deposition; nor shall a deposition be used against a*

22 *party who, having received less than 11 days notice of a deposition, has promptly*

23 *upon receiving such notice filed a motion for a protective order under Rule 26(c)(2)*

24 *requesting that the deposition not be held or be held at a different time or place and*

25 *such motion is pending at the time the deposition is held.*

26 * * * *

27 *(c) Form of Presentation. Except as otherwise directed by the court, a party*

28 *offering deposition testimony pursuant to this rule may offer it in stenographic or*

29 *nonstenographic form, but, if in nonstenographic form, the party shall also provide the*

30 *court with a transcript of the portions so offered. On request of any party in a case tried*

31 *before a jury, deposition testimony offered other than for impeachment purposes shall be*

32 *presented in nonstenographic form, if available, unless the court for good cause orders*

33 *otherwise.*

34 * * * *

35 * * * *

COMMITTEE NOTES

Subdivision (a). The last sentence of revised subdivision (a) not only includes the substance of the provisions formerly contained in the second paragraph of Rule 30(b)(2), but adds a provision to deal with the situation when a party, receiving minimal notice of a proposed deposition, is unable to obtain a court ruling on its motion for a protective order seeking to delay or change the place of the deposition. Ordinarily a party does not obtain protection merely by the filing of a motion for a protective order under Rule 26(c); any protection is dependent upon the court's ruling. Under the revision, a party receiving less than 11 days notice of a deposition can, provided its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon. Although the revision of Rule 32(a) covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when the proposed deponent is the movant, the deponent would have "just cause" for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

Subdivision (c). This new subdivision, inserted at the location of a subdivision previously abrogated, is included in view of the increased opportunities for video-recording

and audio-recording of depositions under revised Rule 30(b). Under this rule a party may offer deposition testimony in any of the forms authorized under Rule 30(b) but, if offering it in a nonstenographic form, must provide the court with a transcript of the portions so offered. On request of any party in a jury trial, deposition testimony offered other than for impeachment purposes is to be presented in a nonstenographic form if available, unless the court directs otherwise. Note that under Rule 26(a)(3)(B) a party expecting to use nonstenographic deposition testimony as substantive evidence is required to provide other parties with a transcript in advance of trial.

Rule 33. Interrogatories to Parties

(a) Availability~~; Procedures for Use~~. *Without leave of court or written stipulation, a*~~A~~ny party may serve upon any other party written interrogatories*, not exceeding 25 in number including all discrete subparts,* to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. *Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, i*~~I~~nterrogatories may~~, without leave of court,~~ *not* be served ~~upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party~~ *before the time specified in Rule 26(d)*.

(b) Answers and Objections.

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event *the objecting party shall state* the reasons for objection ~~shall be stated in lieu of an answer~~ *and shall answer to the extent the interrogatory is not objectionable*.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories~~, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant~~.

23 ~~The court may allow a~~*A* shorter or longer time *may be directed by the court or,*
24 *in the absence of such an order, agreed to in writing by the parties subject to Rule*
25 *29*.

26 *(4) All grounds for an objection to an interrogatory shall be stated with*
27 *specificity. Any ground not stated in a timely objection is waived unless the party's*
28 *failure to object is excused by the court for good cause shown.*

29 *(5)* The party submitting the interrogatories may move for an order under
30 Rule 37(a) with respect to any objection to or other failure to answer an
31 interrogatory.

32 (~~b~~*c*) **Scope; Use at Trial.** Interrogatories may relate to any matters which can
33 be inquired into under Rule 26(b)*(1)*, and the answers may be used to the extent
34 permitted by the rules of evidence.

35 An interrogatory otherwise proper is not necessarily objectionable merely
36 because an answer to the interrogatory involves an opinion or contention that relates
37 to fact or the application of law to fact, but the court may order that such an
38 interrogatory need not be answered until after designated discovery has been
39 completed or until a pre-trial conference or other later time.

40 (~~c~~*d*) **Option to Produce Business Records.** * * * *

COMMITTEE NOTES

Purpose of Revision. The purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice. The revision is based on experience with local rules. For ease of reference, subdivision (a) is divided into two subdivisions and the remaining subdivisions renumbered.

Subdivision (a). Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this

form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries.

Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.

As with the number of depositions authorized by Rule 30, leave to serve additional interrogatories is to be allowed when consistent with Rule 26(b)(2). The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device. In many cases it will be appropriate for the court to permit a larger number of interrogatories in the scheduling order entered under Rule 16(b).

Unless leave of court is obtained, interrogatories may not be served prior to the meeting of the parties under Rule 26(f).

When a case with outstanding interrogatories exceeding the number permitted by this rule is removed to federal court, the interrogating party must seek leave allowing the additional interrogatories, specify which twenty-five are to be answered, or resubmit interrogatories that comply with the rule. Moreover, under Rule 26(d), the time for response would be measured from the date of the parties' meeting under Rule 26(f). See Rule 81(c), providing that these rules govern procedures after removal.

Subdivision (b). A separate subdivision is made of the former second paragraph of subdivision (a). Language is added to paragraph (1) of this subdivision to emphasize the duty of the responding party to provide full answers to the extent not objectionable. If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products. Similarly, the fact that additional time may be needed to respond to some questions (or to some aspects of questions) should not justify a delay in responding to those questions (or other aspects of questions) that can be answered within the prescribed time.

Paragraph (4) is added to make clear that objections must be specifically justified, and that unstated or untimely grounds for objection ordinarily are waived. Note also the

provisions of revised Rule 26(b)(5), which require a responding party to indicate when it is withholding information under a claim of privilege or as trial preparation materials.

These provisions should be read in light of Rule 26(g), authorizing the court to impose sanctions on a party and attorney making an unfounded objection to an interrogatory.

Subdivisions (c) and (d). The provisions of former subdivisions (b) and (c) are renumbered.

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

* * * *

(b) **Procedure.** ~~The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.~~ The request shall set forth, *either by individual item or by category,* the items to be inspected ~~either by individual item or by category~~, and describe each ~~item and category~~ with reasonable particularity. The request shall 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 serve a written response within 30 days after the service of the request~~, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant~~. ~~The court may allow a~~ *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 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 be stated. If objection is made to part of an item or category, the part shall 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.

A party who produces documents for inspection shall produce them as they are

23 kept in the usual course of business or shall organize and label them to correspond

24 with the categories in the request.

25 * * * *

COMMITTEE NOTES

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery prior to the meeting of the parties required by Rule 26(f). Also, like a change made in Rule 33, the rule is modified to make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions.

When a case with outstanding requests for production is removed to federal court, the time for response would be measured from the date of the parties' meeting. See Rule 81(c), providing that these rules govern procedures after removal.

Rule 36. Requests for Admission

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)*(1)* set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. ~~The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.~~ *Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).*

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow *or as the parties may agree to in writing, subject to Rule 29*, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney~~, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant~~. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the

23 requested admission, and when good faith requires that a party qualify an answer or
24 deny only a part of the matter of which an admission is requested, the party shall
25 specify so much of it as is true and qualify or deny the remainder. An answering party
26 may not give lack of information or knowledge as a reason for failure to admit or deny
27 unless the party states that the party has made reasonable inquiry and that the
28 information known or readily obtainable by the party is insufficient to enable the party
29 to admit or deny. A party who considers that a matter of which an admission has
30 been requested presents a genuine issue for trial may not, on that ground alone, object
31 to the request; the party may, subject to the provisions of Rule 37(c), deny the matter
32 or set forth reasons why the party cannot admit or deny it.

33 * * * *

34 * * * *

COMMITTEE NOTES

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery until after the meeting of the parties required by Rule 26(f).

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

1 **(a) Motion For Order Compelling *Disclosure or* Discovery.** A party, upon
2 reasonable notice to other parties and all persons affected thereby, may apply for an
3 order compelling *disclosure or* discovery as follows:

4 **(1) Appropriate Court.** An application for an order to a party ~~may~~ *shall*
5 be made to the court in which the action is pending~~, or, on matters relating to~~
6 ~~a deposition, to the court in the district where the deposition is being taken~~. An
7 application for an order to a ~~deponent~~ *person* who is not a party shall be made
8 to the court in the district where the ~~deposition is being taken~~ *discovery is being,*
9 *or is to be, taken*.

10 **(2) Motion.**

11 *(A) If a party fails to make a disclosure required by Rule 26(a), any*
12 *other party may move to compel disclosure and for appropriate sanctions. The*
13 *motion must include a certification that the movant has in good faith*
14 *conferred or attempted to confer with the party not making the disclosure in*
15 *an effort to secure the disclosure without court action.*

16 *(B)* If a deponent fails to answer a question propounded or
17 submitted under Rules 30 or 31, or a corporation or other entity fails to
18 make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer
19 an interrogatory submitted under Rule 33, or if a party, in response to a
20 request for inspection submitted under Rule 34, fails to respond that
21 inspection will be permitted as requested or fails to permit inspection as
22 requested, the discovering party may move for an order compelling an

23 answer, or a designation, or an order compelling inspection in accordance
24 with the request. *The motion must include a certification that the movant*
25 *has in good faith conferred or attempted to confer with the person or party*
26 *failing to make the discovery in an effort to secure the information or material*
27 *without court action.* When taking a deposition on oral examination, the
28 proponent of the question may complete or adjourn the examination before
29 applying for an order.

30 ~~If the court denies the motion in whole or in part, it may make such protective~~
31 ~~order as it would have been empowered to make on a motion made pursuant to~~
32 ~~Rule 26(c).~~

33 (3) Evasive or Incomplete *Disclosure,* Answer*, or Response*. For purposes
34 of this subdivision an evasive or incomplete *disclosure,* answer*, or response* is to
35 be treated as a failure to *disclose,* answer*, or respond*.

36 (4) ~~Award of~~ Expenses ~~of Motion~~ *and Sanctions*.

37 *(A)* If the motion is granted *or if the disclosure or requested discovery*
38 *is provided after the motion was filed*, the court shall, after *affording an*
39 opportunity ~~for hearing,~~ *to be heard,* require the party or deponent whose
40 conduct necessitated the motion or the party or attorney advising such
41 conduct or both of them to pay to the moving party the reasonable
42 expenses incurred in ~~obtaining the order~~ *making the motion*, including
43 attorney's fees, unless the court finds that the *motion was filed without the*
44 *movant's first making a good faith effort to obtain the disclosure or discovery*
45 *without court action, or that the* ~~opposition to the motion~~ *opposing party's*

46 *nondisclosure, response, or objection* was substantially justified, or that other

47 circumstances make an award of expenses unjust.

48 *(B)* If the motion is denied, the court *may enter any protective order*

49 *authorized under Rule 26(c) and* shall, after *affording an* opportunity ~~for~~

50 ~~hearing,~~ *to be heard,* require the moving party or the attorney ~~advising~~ *filing*

51 the motion or both of them to pay to the party or deponent who opposed

52 the motion the reasonable expenses incurred in opposing the motion,

53 including attorney's fees, unless the court finds that the making of the

54 motion was substantially justified or that other circumstances make an

55 award of expenses unjust.

56 *(C)* If the motion is granted in part and denied in part, the court *may*

57 *enter any protective order authorized under Rule 26(c) and* may, *after*

58 *affording an opportunity to be heard,* apportion the reasonable expenses

59 incurred in relation to the motion among the parties and persons in a just

60 manner.

61 * * * *

62 (c) ~~Expenses on~~ Failure to *Disclose; False or Misleading Disclosure; Refusal to*

63 **Admit.**

64 *(1) A party that without substantial justification fails to disclose information*

65 *required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be*

66 *permitted to use as evidence at a trial, at a hearing, or on a motion any witness or*

67 *information not so disclosed. In addition to or in lieu of this sanction, the court, on*

68 *motion and after affording an opportunity to be heard, may impose other*

69 *appropriate sanctions. In addition to requiring payment of reasonable expenses,*
70 *including attorney's fees, caused by the failure, these sanctions may include any of*
71 *the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2)*
72 *of this rule and may include informing the jury of the failure to make the disclosure.*
73 *(2)* If a party fails to admit the genuineness of any document or the truth
74 of any matter as requested under Rule 36, and if the party requesting the
75 admissions thereafter proves the genuineness of the document or the truth of the
76 matter, the requesting party may apply to the court for an order requiring the
77 other party to pay the reasonable expenses incurred in making that proof,
78 including reasonable attorney's fees. The court shall make the order unless it
79 finds that (~~1~~*A*) the request was held objectionable pursuant to Rule 36(a), or
80 (~~2~~*B*) the admission sought was of no substantial importance, or (~~3~~*C*) the party
81 failing to admit had reasonable ground to believe that the party might prevail on
82 the matter, or (~~4~~*D*) there was other good reason for the failure to admit.
83 (d) **Failure of Party to Attend at Own Deposition or Serve Answers to**
84 **Interrogatories or Respond to Request for Inspection.** If a party or an officer,
85 director, or managing agent of a party or a person designated under Rule 30(b)(6) or
86 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take
87 the deposition, after being served with a proper notice, or (2) to serve answers or
88 objections to interrogatories submitted under Rule 33, after proper service of the
89 interrogatories, or (3) to serve a written response to a request for inspection submitted
90 under Rule 34, after proper service of the request, the court in which the action is
91 pending on motion may make such orders in regard to the failure as are just, and

92 among others it may take any action authorized under *sub*paragraphs (A), (B), and (C)

93 of subdivision (b)(2) of this rule. *Any motion specifying a failure under clause (2) or (3)*

94 *of this subdivision shall include a certification that the movant has in good faith conferred*

95 *or attempted to confer with the party failing to answer or respond in an effort to obtain*

96 *such answer or response without court action.* In lieu of any order or in addition

97 thereto, the court shall require the party failing to act or the attorney advising that

98 party or both to pay the reasonable expenses, including attorney's fees, caused by the

99 failure unless the court finds that the failure was substantially justified or that other

100 circumstances make an award of expenses unjust.

101 The failure to act described in this subdivision may not be excused on the ground

102 that the discovery sought is objectionable unless the party failing to act has ~~applied~~ *a*

103 *pending motion* for a protective order as provided by Rule 26(c).

104 * * * *

105 (g) **Failure to Participate in the Framing of a Discovery Plan.** If a party or a

106 party's attorney fails to participate in the *development and submission* ~~framing~~ of a

107 *proposed* discovery plan ~~by agreement~~ as ~~is~~ required by Rule 26(f), the court may, after

108 opportunity for hearing, require such party or attorney to pay to any other party the

109 reasonable expenses, including attorney's fees, caused by the failure.

COMMITTEE NOTES

Subdivision (a). This subdivision is revised to reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to answer particular interrogatories. Such a motion may be needed

when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

Language is included in the new paragraph and added to the subparagraph (B) that requires litigants to seek to resolve discovery disputes by informal means before filing a motion with the court. This requirement is based on successful experience with similar local rules of court promulgated pursuant to Rule 83.

The last sentence of paragraph (2) is moved into paragraph (4).

Under revised paragraph (3), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a).

Revised paragraph (4) is divided into three subparagraphs for ease of reference, and in each the phrase "after opportunity for hearing" is changed to "after affording an opportunity to be heard" to make clear that the court can consider such questions on written submissions as well as on oral hearings.

Subparagraph (A) is revised to cover the situation where information that should have been produced without a motion to compel is produced after the motion is filed but before it is brought on for hearing. The rule also is revised to provide that a party should not be awarded its expenses for filing a motion that could have been avoided by conferring with opposing counsel.

Subparagraph (C) is revised to include the provision that formerly was contained in subdivision (a)(2) and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Subdivision (c). The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).

Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.

Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions--such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure--that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

Subdivision (d). This subdivision is revised to require that, where a party fails to file any response to interrogatories or a Rule 34 request, the discovering party should informally seek to obtain such responses before filing a motion for sanctions.

The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d). If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing--the relief authorized under that rule depends on obtaining the court's order to that effect.

Subdivision (g). This subdivision is modified to conform to the revision of Rule 26(f).

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

1 (a) **Judgment as a Matter of Law.**

2 (1) If during a trial by jury a party has been fully heard *on* ~~with respect to~~
3 an issue and there is no legally sufficient evidentiary basis for a reasonable jury
4 to ~~have found~~ *find* for that party *on* ~~with respect to~~ that issue, the court may
5 *determine the issue against that party and may* grant a motion for judgment as a
6 matter of law against that party ~~on any~~ *with respect to a* claim~~, counterclaim,~~
7 ~~cross-claim, or third-party claim~~ *or defense* that cannot under the controlling law
8 be maintained *or defeated* without a favorable finding on that issue.

9 * * * *

10 * * * *

COMMITTEE NOTES

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, which, as indicated in the Notes, was not intended to change the existing standards under which "directed verdicts" could be granted. This amendment makes clear that judgments as a matter of law in jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

Rule 52. Findings by the Court; Judgment on Partial Findings

1 * * * *

2 (c) **Judgment on Partial Findings.** If during a trial without a jury a party has
3 been fully heard *on* ~~with respect to~~ an issue and the court finds against the party on
4 that issue, the court may enter judgment as a matter of law against that party ~~on any~~
5 *with respect to a* claim~~, counterclaim, cross-claim, or third-party claim~~ *or defense* that
6 cannot under the controlling law be maintained or defeated without a favorable
7 finding on that issue, or the court may decline to render any judgment until the close
8 of all the evidence. Such a judgment shall be supported by findings of fact and
9 conclusions of law as required by subdivision (a) of this rule.

COMMITTEE NOTES

This technical amendment corrects an ambiguity in the text of the 1991 revision of the rule, similar to the revision being made to Rule 50. This amendment makes clear that judgments as a matter of law in nonjury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

Rule 54. Judgments; Costs

1 * * * *

2 **(d) Costs*; Attorneys' Fees*.**

3 *(1) Costs Other than Attorneys' Fees.* Except when express provision

4 therefor is made either in a statute of the United States or in these rules, costs

5 *other than attorneys' fees* shall be allowed as of course to the prevailing party

6 unless the court otherwise directs; but costs against the United States, its officers,

7 and agencies shall be imposed only to the extent permitted by law. *Such c*~~C~~osts

8 may be taxed by the clerk on one day's notice. On motion served within 5 days

9 thereafter, the action of the clerk may be reviewed by the court.

10 *(2) Attorneys' Fees.*

11 *(A) Claims for attorneys' fees and related nontaxable expenses shall be*

12 *made by motion unless the substantive law governing the action provides for*

13 *the recovery of such fees as an element of damages to be proved at trial.*

14 *(B) Unless otherwise provided by statute or order of the court, the*

15 *motion must be filed and served no later than 14 days after entry of judgment;*

16 *must specify the judgment and the statute, rule, or other grounds entitling the*

17 *moving party to the award; and must state the amount or provide a fair*

18 *estimate of the amount sought. If directed by the court, the motion shall also*

19 *disclose the terms of any agreement with respect to fees to be paid for the*

20 *services for which claim is made.*

21 *(C) On request of a party or class member, the court shall afford an*

22 *opportunity for adversary submissions with respect to the motion in accordance*

23 *with Rule 43(e) or Rule 78. The court may determine issues of liability for*
24 *fees before receiving submissions bearing on issues of evaluation of services for*
25 *which liability is imposed by the court. The court shall find the facts and state*
26 *its conclusions of law as provided in Rule 52(a), and a judgment shall be set*
27 *forth in a separate document as provided in Rule 58.*
28 *(D) By local rule the court may establish special procedures by which*
29 *issues relating to such fees may be resolved without extensive evidentiary*
30 *hearings. In addition, the court may refer issues relating to the value of*
31 *services to a special master under Rule 53 without regard to the provisions of*
32 *subdivision (b) thereof and may refer a motion for attorneys' fees to a*
33 *magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.*
34 *(E) The provisions of subparagraphs (A) through (D) do not apply to*
35 *claims for fees and expenses as sanctions for violations of these rules or under*
36 *28 U.S.C. § 1927.*

COMMITTEE NOTES

Subdivision (d). This revision adds paragraph (2) to this subdivision to provide for a frequently recurring form of litigation not initially contemplated by the rules--disputes over the amount of attorneys' fees to be awarded in the large number of actions in which prevailing parties may be entitled to such awards or in which the court must determine a fees to be paid from a common fund. This revision seeks to harmonize and clarify procedures that have been developed through case law and local rules.

Paragraph (1). Former subdivision (d), providing for taxation of costs by the clerk, is renumbered as paragraph (1) and revised to exclude applications for attorneys' fees.

Paragraph (2). This new paragraph establishes a procedure for presenting claims for attorneys' fees, whether or not denominated as "costs." It applies also to requests for reimbursement of expenses, not taxable as costs, when recoverable under governing law incident to the award of fees. Cf. West Virginia Univ. Hosp. v. Casey, ___ U.S. ___ (1991), holding, prior to the Civil Rights Act of 1991, that expert witness fees were not recoverable

under 42 U.S.C. § 1988. As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Nor, as provided in subparagraph (E), does it apply to awards of fees as sanctions authorized or mandated under these rules or under 28 U.S.C. § 1927.

Subparagraph (B) provides a deadline for motions for attorneys' fees--14 days after final judgment unless the court or a statute specifies some other time. One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. Prior law did not prescribe any specific time limit on claims for attorneys' fees. White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982). In many nonjury cases the court will want to consider attorneys' fee issues immediately after rendering its judgment on the merits of the case. Note that the time for making claims is specifically stated in some legislation, such as the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B) (30-day filing period).

Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. It also enables the court in appropriate circumstances to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case.

Filing a motion for fees under this subdivision does not affect the finality or the appealability of a judgment, though revised Rule 58 provides a mechanism by which prior to appeal the court can suspend the finality to resolve a motion for fees. If an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court under subdivision (d)(2)(B) may effectively extend the period by permitting claims to be filed after resolution of the appeal. A new period for filing will automatically begin if a new judgment is entered following a reversal or remand by the appellate court or the granting of a motion under Rule 59.

The rule does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees. This material must of course be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees and the amount of such fees (or a fair estimate).

If directed by the court, the moving party is also required to disclose any fee agreement, including those between attorney and client, between attorneys sharing a fee to be awarded, and between adversaries made in partial settlement of a dispute where the settlement must be implemented by court action as may be required by Rules 23(e) and 23.1 or other like provisions. With respect to the fee arrangements requiring court approval, the court may also by local rule require disclosure immediately after such arrangements are

agreed to. E.g., Rule 5 of United States District Court for the Eastern District of New York; cf. In re "Agent Orange" Product Liability Litigation (MDL 381), 611 F. Supp. 1452, 1464 (E.D.N.Y. 1985).

In the settlement of class actions resulting in a common fund from which fees will be sought, courts frequently have required that claims for fees be presented in advance of hearings to consider approval of the proposed settlement. The rule does not affect this practice, as it permits the court to require submissions of fee claims in advance of entry of judgment.

Subparagraph (C) assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services. In some cases, an evidentiary hearing may be needed, but this is not required in every case. The amount of time to be allowed for the preparation of submissions both in support of and in opposition to awards should be tailored to the particular case.

The court is explicitly authorized to make a determination of the liability for fees before receiving submissions by the parties bearing on the amount of an award. This option may be appropriate in actions in which the liability issue is doubtful and the evaluation issues are numerous and complex.

The court may order disclosure of additional information, such as that bearing on prevailing local rates or on the appropriateness of particular services for which compensation is sought.

On rare occasion, the court may determine that discovery under Rules 26-37 would be useful to the parties. Compare Rules Governing Section 2254 Cases in the U.S. District Courts, Rule 6. See Note, Determining the Reasonableness of Attorneys' Fees--the Discoverability of Billing Records, 64 B.U.L. Rev. 241 (1984). In complex fee disputes, the court may use case management techniques to limit the scope of the dispute or to facilitate the settlement of fee award disputes.

Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to review in the court of appeals. To facilitate review, the paragraph provides that the court set forth its findings and conclusions as under Rule 52(a), though in most cases this explanation could be quite brief.

Subparagraph (D) explicitly authorizes the court to establish procedures facilitating the efficient and fair resolution of fee claims. A local rule, for example, might call for matters to be presented through affidavits, or might provide for issuance of proposed findings by the court, which would be treated as accepted by the parties unless objected to within a specified time. A court might also consider establishing a schedule reflecting customary fees or factors affecting fees within the community, as implicitly suggested by Justice O'Conner in Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 733 (1987) (O'Conner, J., concurring) (how particular markets compensate for contingency). Cf. Thompson v. Kennickell, 710 F. Supp. 1 (D.D.C. 1989) (use of findings in other cases to promote

consistency). The parties, of course, should be permitted to show that in the circumstances of the case such a schedule should not be applied or that different hourly rates would be appropriate.

The rule also explicitly permits, without need for a local rule, the court to refer issues regarding the amount of a fee award in a particular case to a master under Rule 53. The district judge may designate a magistrate judge to act as a master for this purpose or may refer a motion for attorneys' fees to a magistrate judge for proposed findings and recommendations under Rule 72(b). This authorization eliminates any controversy as to whether such references are permitted under Rule 53(b) as "matters of account and of difficult computation of damages" and whether motions for attorneys' fees can be treated as the equivalent of a dispositive pretrial matter that can be referred to a magistrate judge. For consistency and efficiency, all such matters might be referred to the same magistrate judge.

Subparagraph (E) excludes from this rule the award of fees as sanctions under these rules or under 28 U.S.C. § 1927.

Rule 56. Summary Judgment

(a) ~~**For Claimant**~~*Of Claims, Defenses, and Issues*.~~—A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.~~ *The court without a trial may enter summary judgment for or against a claimant with respect to a claim, counterclaim, cross-claim, or third-party claim, may summarily determine a defense, or may summarily determine an issue substantially affecting but not wholly dispositive of a claim or defense if summary adjudication as to the claim, defense, or issue is warranted as a matter of law because of facts not genuinely in dispute. In its order, or by separate opinion, the court shall recite the law and facts on which the summary adjudication is based.*

~~(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~

(b) Facts Not Genuinely in Dispute. A fact is not genuinely in dispute if it is stipulated or admitted by the parties who may be adversely affected thereby or if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50.

23 **(c) Motion and Proceedings Thereon.** ~~The motion shall be served at least 10~~
24 ~~days before the time fixed for the hearing. The adverse party prior to the day of~~
25 ~~hearing may serve opposing affidavits. The judgment sought shall be rendered~~
26 ~~forthwith if the pleadings, depositions, answers to interrogatories, and admissions on~~
27 ~~file, together with the affidavits, if any, show that there is no genuine issue as to any~~
28 ~~material fact and that the moving party is entitled to a judgment as a matter of law.~~
29 ~~A summary judgment, interlocutory in character, may be rendered on the issue of~~
30 ~~liability alone although there is a genuine issue as to the amount of damages.~~ *A party*
31 *may move for summary adjudication at any time after the parties to be affected have*
32 *made an appearance in the case and have had a reasonable opportunity to discover*
33 *relevant evidence pertinent thereto that is not in their possession or under their control.*
34 *Within 30 days after the motion is served, any other party may serve and file a response.*
35 *(1) Without argument, the motion shall (A) describe the claims, defenses,*
36 *or issues as to which summary adjudication is warranted, specifying the judgment*
37 *or determination sought; and (B) recite in separately numbered paragraphs the*
38 *specific facts asserted to be not genuinely in dispute and on the basis of which the*
39 *judgment or determination should be granted, citing the particular pages or*
40 *paragraphs of stipulations, admissions, interrogatory answers, depositions, documents,*
41 *affidavits, or other materials supporting those assertions.*
42 *(2) Without argument, a response shall (A) state the extent, if any, to which*
43 *the party agrees that summary adjudication is warranted, specifying the judgment or*
44 *determination that should be entered; (B) indicate the extent to which the asserted*
45 *facts recited in the motion are claimed to be false or in genuine dispute, citing the*

46 *particular pages or paragraphs of any stipulations, admissions, interrogatory answers,*
47 *depositions, documents, affidavits, or other materials supporting that contention; and*
48 *(C) recite in separately numbered paragraphs any additional facts that preclude*
49 *summary adjudication, citing the materials evidencing those facts. To the extent a*
50 *party does not timely comply with clause (B) in challenging an asserted fact, it may*
51 *be treated as having admitted that fact.*
52 *(3) If a motion for summary adjudication or response is based to any extent*
53 *on depositions, interrogatory answers, documents, affidavits, or other materials that*
54 *have not been previously filed, the party shall append to its motion or response the*
55 *pertinent portions of such materials. Only with leave of court may a party moving*
56 *for summary adjudication supplement its supporting materials.*
57 *(4) Arguments supporting a party's contentions as to the controlling law or*
58 *the evidence respecting asserted facts shall be submitted by a separate memorandum*
59 *at the time the party files its motion or response or at such other times as the court*
60 *may permit or direct.*
61 (d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule
62 judgment is not rendered upon the whole case or for all the relief asked and a trial
63 is necessary, the court ~~at the hearing of the motion, by examining the pleadings and~~
64 ~~the evidence before it and by interrogating counsel, shall if practicable ascertain what~~
65 ~~material facts exist without substantial controversy and what material facts are actually~~
66 ~~and in good faith controverted. It shall thereupon~~ *may enter* ~~make~~ an order specifying
67 *the controlling law or the* facts that ~~appear without substantial controversy~~ *are not*
68 *genuinely in dispute*, including the extent to which liability or the amount of damages

69 or other relief is not ~~in controversy~~ *a dispute for trial*, and directing such further
70 proceedings in the action as are just. ~~Upon the trial of the action the facts so~~
71 ~~specified shall be deemed established, and the trial shall be conducted accordingly.~~
72 *Unless the order is modified by the court for good cause, the trial shall be conducted in*
73 *accordance with the law so specified and by treating the facts so specified as established.*
74 *An order that does not adjudicate all claims with respect to all parties may be entered as*
75 *a final judgment to the extent permitted by Rule 54(b).*
76 (e) ~~**Form of Affidavits; Further Testimony; Defense Required**~~*Matters to Be*
77 *Considered*. ~~Supporting and opposing affidavits shall be made on personal knowledge,~~
78 ~~shall set forth such facts as would be admissible in evidence, and shall show~~
79 ~~affirmatively that the affiant is competent to testify to the matters stated therein.~~
80 ~~Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall~~
81 ~~be attached thereto or served therewith. The court may permit affidavits to be~~
82 ~~supplemented or opposed by depositions, answers to interrogatories, or further~~
83 ~~affidavits. When a motion for summary judgment is made and supported as provided~~
84 ~~in this rule, an adverse party may not rest upon the mere allegations or denials of the~~
85 ~~adverse party's pleading, but the adverse party's response by affidavits or as otherwise~~
86 ~~provided in this rule, must set forth specific facts showing that there is a genuine issue~~
87 ~~for trial. If the adverse party does not so respond, summary judgment, if appropriate,~~
88 ~~shall be entered against the adverse party.~~
89 *(1) Subject to paragraph (2), the court, in deciding whether an asserted fact*
90 *is genuinely in dispute, shall consider stipulations, admissions, and, to the extent*
91 *filed, the following: (A) depositions, interrogatory answers, and affidavits to the*

92 *extent such evidence would be admissible if the deponent, person answering the*
93 *interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it*
94 *affirmatively shows that the affiant would be competent to testify to the matters*
95 *stated therein; and (B) documentary evidence to the extent such evidence would, if*
96 *authenticated and shown to be an accurate copy of original documents, be*
97 *admissible at trial in the light of other evidence. A party may rely upon its own*
98 *pleadings, even if verified, only to the extent of allegations therein that are admitted*
99 *by other parties.*

100 *(2) The court is required to consider only those evidentiary materials called*
101 *to its attention pursuant to subdivision (c)(1) or (c)(2).*

102 **(f) When** *Evidence* ~~**Affidavits are**~~ **Unavailable.** Should it appear from the
103 affidavits of a party opposing ~~the~~ *a* motion *for summary adjudication* that the party
104 cannot for ~~reasons stated present by affidavit facts essential to justify the party's~~
105 ~~opposition~~ *good cause shown present materials needed to support that opposition*, the
106 court may ~~refuse the application for judgment or~~ *deny the motion, may permit an offer*
107 *of proof,* may order a continuance to permit affidavits to be obtained or depositions
108 to be taken or discovery to be had, or may make such other order as is just.

109 **(g)** ~~**Affidavits Made in Bad Faith**~~*Conduct of Proceedings*. ~~Should it appear to~~
110 ~~the satisfaction of the court at any time that any of the affidavits presented pursuant~~
111 ~~to this rule are presented in bad faith or solely for the purpose of delay, the court shall~~
112 ~~forthwith order the party employing them to pay to the other party the amount of the~~
113 ~~reasonable expenses which the filing of the affidavits caused the other party to incur,~~
114 ~~including reasonable attorney's fees, and any offending party or attorney may be~~

115 ~~adjudged guilty of contempt.~~ *The court (1) may specify the period for filing motions for*
116 *summary adjudication with respect to particular claims, defenses, or issues; (2) may*
117 *enlarge or shorten the time for responding to motions for summary adjudication, after*
118 *considering the opportunity for discovery and the time reasonably needed to obtain or*
119 *submit pertinent materials; (3) may on its own initiative direct the parties to show cause*
120 *within a reasonable period why summary adjudication based on specified facts should not*
121 *be entered; and (4) may conduct a hearing to consider further arguments, rule on the*
122 *admissibility of evidence, or receive oral testimony to clarify whether an asserted fact is*
123 *genuinely in dispute.*

COMMITTEE NOTES

Purpose of Revision. This revision is intended to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that, considering the evidence to be presented and received at trial, can have but one outcome--while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters.

The current caption, "Summary Judgment," is retained. However, the revised rule, like the former rule, also covers decisions that, by resolving only defenses or issues not dispositive of a claim, are more properly viewed as "summary determinations." The text of the revised rule adds language to clarify that it applies to both types of "summary adjudications."

In various parts, the revision (1) eliminates ambiguities and inconsistencies within the rule; (2) expresses a single and consistent standard, as has been developed through case law, for determining when summary adjudication is permitted; (3) establishes national procedures to facilitate fair consideration of motions for summary adjudication, with the purpose of eliminating the need for local rules on this subject; and (4) addresses various gaps in the rule that have sometimes frustrated its intended purposes.

Subdivision (a). This subdivision combines the provisions previously contained in subdivisions (a) and (b). It adds third-party claims to the list of claims subject to disposition by summary judgment, but deletes (as surplusage) the specific reference to declaratory judgments. The former provisions allowed motions for "summary judgment" as to "any part" of a claim; the revision permits summary determination of an "issue substantially affecting but not wholly dispositive" of a claim or defense--the point being that motions affecting only part of a claim or defense should not be filed unless summary adjudication would have some

significant impact on discovery, trial, or settlement.

The revised language makes clear at the outset of the rule that summary adjudication--whether as summary judgment or as a summary determination of a defense or issue--is permissible only when warranted as a matter of law, and not when it would involve deciding genuine factual disputes. When so warranted, the judgment or determination may be entered as to all affected parties, not just those who may have filed the motion or responses. When the court has concluded as the result of one motion that certain facts are not genuinely in dispute, there is no reason to require additional motions by or with respect to other parties who have had the opportunity to support or oppose that motion and whose rights depend on those same facts.

When these standards are met, the court should ordinarily enter the appropriate summary disposition. However, the court is not always required to enter a summary adjudication that would be permissible under the rule. Despite the apparently mandatory language of the former rule, case law has recognized a measure of discretion in the trial court to deny summary judgments in a variety of circumstances. See 10A Wright, Miller & Kane, Federal Practice and Procedure § 2728 (1983). The purpose of the revision is not to discourage summary judgment, but to bring the language of the rule into conformity with this practice.

The extent of this discretion to deny summary adjudication is affected by many factors and will vary from case to case. The court has broad discretion to reject summary resolution of non-dispositive issues or defenses that will not significantly affect the scope of discovery, the potential for settlement, or the length and complexity of trial. The court has less discretion when the requested summary judgment would resolve all claims made by or against a party. And there are some situations in which, typically because of substantive policies, the court may have little or no discretion to deny summary adjudication that satisfies the standards of this rule. For example, persons protected by official or qualified immunity are to be relieved from the burdens of trial and pretrial proceedings as soon as such defenses can be fairly established, and a denial of summary judgment in such cases is immediately appealable under current law. See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985) (denial of qualified immunity defense). Similar policies with respect to certain First Amendment issues may also effectively preclude the court from justifying its denial of summary judgment as an exercise of discretion.

The court is directed to indicate the factual and legal basis if it grants summary judgment or summarily determines a defense or issue. A lengthy recital is not required, but a brief explanation is needed to inform the parties (and potentially an appellate court) what are the critical facts not in genuine dispute, on the basis of which summary adjudication is appropriate. An opinion should also be prepared if the court's denial of summary judgment would be immediately appealable, as when denying the qualified immunity defense. The determination that a fact is or is not in genuine dispute is, when reviewed on appeal, treated as a question of law.

Subdivision (b). The standards stated in this subdivision for determining whether a

fact is genuinely in dispute are essentially those developed over time, culminating in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). While no change in these standards is intended by the revision, the rule clarifies that the obligation to consider only matters potentially admissible at trial applies not just to affidavits, but also to other evidentiary materials submitted in support of or opposition to summary adjudication. The rule adopts the standard prescribed in revised Rule 50 for judgments as a matter of law (formerly known as directed verdicts) in jury trials to emphasize that, even in nonjury cases, the court is not permitted under Rule 56 to make credibility choices among conflicting items of evidence about which reasonable persons might disagree.

Subdivision (c). Revised subdivision (c) provides a structure for presentation and consideration of motions for summary adjudication, and should displace in large part the numerous local rules spawned by deficiencies in the former rule. Adoption of this structure is not intended to create procedural pitfalls to deprive parties of trial with respect to facts in genuine dispute, but rather to provide a framework enabling the courts to discharge more effectively their responsibility in deciding whether such controversies exist.

A primary benefit of summary adjudication is elimination of ultimately wasteful discovery and other preparation for trial. For this reason, early filing of a motion for summary adjudication may be desirable in many cases. However, if a party will need evidence from other persons in order to show that a fact is in genuine dispute, it should have a reasonable opportunity for discovery respecting those matters before being confronted with a motion for summary judgment or summary determination. It should also have a sufficient time--ordinarily more than the 10 days specified in the prior rule--to marshal and present its evidentiary materials to the court. The times specified in the revised rule for filing motions for summary adjudication and responses to such motions incorporate these principles.

Paragraphs (1) and (2) prescribe a format for motions for summary adjudication and responses thereto. They are to be non-argumentative, for arguments are to be presented in separate memorandums under paragraph (4). They must be specific, particularly with respect to the facts asserted to be not in genuine dispute. They must provide a reference to the specific portions of any evidentiary materials relied upon to support a contention that a fact is or is not in genuine dispute; failure to do so will, under revised subdivision (e), relieve the court of the obligation to consider such materials.

Pertinent portions of evidentiary materials not previously filed or subject to judicial notice must be attached to the motion or response. As under the prior rule, a movant must obtain leave of court to supplement its supporting materials because late filing may prejudice other parties or merit an extension of time for responses. The requirement to obtain leave of court applies only to evidentiary materials, and not to supplemental or reply memorandums and arguments filed under paragraph (4).

The requirement that motions for summary adjudication contain cross-references to evidentiary materials and be accompanied by pertinent portions of such materials not

previously filed is not directly applicable when the movant contends that there is no admissible evidence to support a fact as to which another party has the burden of proof. In such situations the motion should recite and, to the extent feasible demonstrate, that there is no such evidentiary support for that fact, and the opposing parties will have the obligation to show in their responses the existence of such evidence.

A response to a motion for summary adjudication--formally recognized for the first time in this revision--can be filed by any party and can take several forms. In multiple-party cases a party similarly situated to the movant may merely wish to adopt the position of the movant in its response. The parties to be adversely affected by the judgment or determination sought in the motion may agree that the asserted facts, or some of them, are true but claim that, because of a different view regarding the controlling law, summary judgment or summary determination in their favor is warranted. Frequently, of course, the parties to be adversely affected by the judgment or determination sought in the motion will oppose the grant of any summary adjudication, either because of a different view of the law or because some of the asserted facts are believed to be false or at least in genuine dispute or because there are additional facts rendering the asserted facts not dispositive of the claim, defense, or issue. Subdivision (c)(2) is written to accommodate any of these possibilities. Of course, a party may also file a separate cross motion for summary adjudication if there are other facts asserted to be not in genuine dispute on the basis of which it is entitled to a favorable judgment or determination as a matter of law.

A party is not required to file a response to a summary adjudication motion. The failure to make a timely response, however, may be deemed an admission of the asserted facts specified in the motion (though not an admission as to the controlling law). If it contests an asserted fact specified in the motion either because it is false or at least in genuine dispute, the party must file a timely response that indicates the extent of disagreement with the movant's statement of the fact and provides reference to any evidentiary materials supporting its position not cited by the moving party. Failure to do so may result in the fact being deemed admitted for purposes of the pending action. As under Rule 36, if only a portion of an asserted fact (or the precise wording of the fact) is denied, the responding party must indicate the nature of the disagreement.

The substance of the last sentence of former subdivision (c), relating to partial summary judgments on issues of liability, has been incorporated into the revision of subdivision (d).

Subdivision (d). The revision provides that, when a court denies summary adjudication in the form sought by a movant, it may--but is no longer required to--enter an order specifying which facts are without genuine dispute and accordingly are thereafter to be treated as established. The revision also permits a court to enter rulings as to legal propositions to control further proceedings, subject to its power to modify the ruling for good cause. Finally, the revision makes explicit that "partial summary judgments" may be entered as final judgments to the extent permitted by Rule 54(b). Although not explicitly addressed in the rule, denial of summary adjudication (or granting of partial summary judgment) is ordinarily an interlocutory order not subject to the law-of-the-case doctrine;

and the court is not precluded from reconsidering its ruling or considering a new motion, as may be appropriate because of developments in the case or changes of law. The rule is not intended to alter case law that permits immediate appeal of the denial of summary judgment in limited circumstances. See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985) (denial of qualified immunity defense).

Confusion was caused by the reference in the former provisions to a "hearing on the motion." While oral argument on a motion for summary adjudication is often desirable--and is explicitly authorized in subdivision (g)(4)--the court is not precluded from considering such motions solely on the basis of written submissions.

Subdivision (e). Implementing the principle stated in subdivision (b) that the court should consider (in addition to facts stipulated or admitted) only matters that would be admissible at trial, this subdivision prescribes rules for determining the potential admissibility of materials submitted in support of or opposition to summary adjudication. Facts are admitted for purposes of Rule 56 not only as provided in Rule 36, but also if stated, acknowledged, or conceded by a party in pleadings, motions, or briefs, or in statements when appearing before the court, as during a conference under Rule 16.

The admissibility of depositions, answers to interrogatories, and affidavits should be determined as if the deponent, person answering interrogatories, or affiant were testifying in person, with the proviso that an affidavit must affirmatively show that the affiant would be competent (e.g., have personal knowledge) to testify. For purposes of Rule 56 a declaration under penalty of perjury signed in the manner authorized by 28 U.S.C. § 1746 should be treated the same as a notarized affidavit.

Independent authentication of documentary evidence is not required--submission of the materials under the rule should be treated as sufficient authentication. Similarly, independent evidence that the materials submitted are accurate copies of the originals is not required. However, if other evidence would be required at trial to establish admissibility--such as the foundation for business records--the party presenting such records should provide the supporting evidence through deposition, interrogatory answers, or affidavits. As permitted under Rule 1006 of the Federal Rules of Evidence, voluminous data should be submitted by means of an affidavit summarizing the data and offering, if not previously provided, access to the underlying data.

Subdivision (e)(2) provides that the court is required to consider only the materials called to its attention by the parties. Subdivisions (c)(1) and (c)(2) impose a duty on the litigants to identify support for their contentions regarding the evidence; this provision prevents a party from identifying a potential conflict in evidence for the first time on appeal. The failure of a movant to provide such references would justify denial of the motion.

Subdivision (f). Extensions of time to oppose summary adjudication should be less frequent than under the former rule because of new restrictions as to when such motions can be filed and the longer time allowed for the response. A request should be presented by an affidavit which, under the revised rule, must reflect good cause for the inability to

comply with the stated time requirements. The revised rule also permits the court to accept an offer of proof where a party shows in its affidavit that it is currently unable to procure supporting materials in a form that would satisfy the requirements of subdivision (e).

Subdivision (g). The new provisions of subdivision (g) give explicit recognition to powers of the court in conducting proceedings to resolve motions under Rule 56 that were probably implicit prior to the revision.

Subdivision (g)(1) recognizes the power of the court to fix schedules for the filing of motions for summary adjudication. At a scheduling conference the court may wish to consider establishing such a schedule to preclude premature or tardy motions and to focus early discovery on potentially dispositive matters.

Subdivision (g)(2) recognizes the court's power to change the time within which parties may respond to motions for summary judgment or summary determinations. Depending on the circumstances, particularly the extent to which discovery has or has not been afforded or available, the extent to which the facts have been stipulated or admitted, and the imminence of trial, the 30-day period prescribed in subdivision (c) may be lengthened or shortened.

Subdivision (g)(3) permits the court to initiate an inquiry into the appropriateness of summary adjudication. Such an inquiry may be initiated in an order setting a conference under Rule 16 or might arise as a result of discussions during such a conference. In any event, the parties must be afforded a reasonable opportunity to marshal and submit evidentiary materials if they assert facts are in genuine dispute and to present legal arguments bearing on the appropriateness of summary adjudication.

Subdivision (g)(4) addresses the power of the court to conduct hearings relating to summary adjudications. One such purpose would be to hear oral arguments supplementing the written submissions. Another would be to make determinations under Federal Rule of Evidence 104(a) regarding the admissibility of materials submitted on a Rule 56 motion. A third purpose would be to hear testimony, as under Rule 43(e), to clarify ambiguities in the submitted materials--for example, to clarify inconsistencies within a person's deposition or between an affidavit and the affiant's deposition testimony. In such circumstances, the evidentiary hearing is held not to allow credibility choices between conflicting evidence but simply to determine just what the person's testimony is. Explicit authorization for this type of evidentiary hearing is not intended to supplant the court's power to schedule separate trials under Rule 42(b) on issues that involve credibility and weight of evidence.

The former provisions of subdivision (g), providing sanctions when "affidavits . . . are presented in bad faith or solely for the purpose of delay," have been eliminated as unnecessary in view of the amendments to Rule 11. The provisions of revised Rule 11 apply not only to affidavits but also to motions, responses, briefs, and other supporting materials submitted under Rule 56. Motions for summary adjudication should not be filed merely to "educate" the court or as a discovery device intended to flush out the evidence of an opposing party.

Rule 58. Entry of Judgment

1 Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or
2 upon a decision by the court that a party shall recover only a sum certain or costs or
3 that all relief shall be denied, the clerk, unless the court otherwise orders, shall
4 forthwith prepare, sign, and enter the judgment without awaiting any direction by the
5 court; (2) upon a decision by the court granting other relief, or upon a special verdict
6 or a general verdict accompanied by answers to interrogatories, the court shall
7 promptly approve the form of the judgment, and the clerk shall thereupon enter it.
8 Every judgment shall be set forth on a separate document. A judgment is effective
9 only when so set forth and when entered as provided in Rule 79(a). Entry of the
10 judgment shall not be delayed ~~for the taxing of costs~~, *nor the time for appeal extended,*
11 *in order to tax costs or award fees, except that, when a timely motion for attorneys' fees*
12 *is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has*
13 *become effective, may order that the motion have the same effect under Rule 4(a)(4) of*
14 *the Federal Rules of Appellate Procedure as a timely motion under Rule 59*. Attorneys
15 shall not submit forms of judgment except upon the direction of the court, and these
16 directions shall not be given as a matter of course.

COMMITTEE NOTES

Ordinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment. See Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988). Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision permits, but does not require, the court to delay the finality of the judgment for appellate purposes until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal

becomes effective for appellate purposes. If the order is entered, the motion for attorney's fees is treated in the same manner as a timely motion under Rule 59.

Rule 71A. Condemnation Of Property

1 * * * *

2 **(d) Process.**

3 * * * *

4 **(3) Service of Notice.**

5 (~~i~~*A*) **Personal service.** Personal service of the notice (but without
6 copies of the complaint) shall be made in accordance with Rule 4~~(c) and~~
7 ~~(d)~~ upon a defendant *whose residence is known and* who resides within the
8 United States or ~~its territories or insular possessions and whose residence~~
9 ~~is known~~ *a territory subject to the administrative or judicial jurisdiction of the*
10 *United States*.

11 (~~ii~~*B*) **Service by Publication.** * * * *

12 **(4) Return; Amendment.** Proof of service of the notice shall be made and
13 amendment of the notice or proof of its service allowed in the manner provided
14 for the return and amendment of the summons under Rule 4~~(g) and (h)~~.

15 * * * *

COMMITTEE NOTES

The references to the subdivisions of Rule 4 are deleted in light of the revision of that rule.

Rule 83. Rules by District Courts*; Orders*

1 *(a) Local Rules.* Each district court by action of a majority of the judges
2 thereof may from time to time, after giving appropriate public notice and an
3 opportunity to comment, make and amend rules governing its practice ~~not in~~consistent
4 with *Acts of Congress and consistent with, but not duplicative of,* ~~these~~ rules *adopted*
5 *under 28 U.S.C. §§ 2072 and 2075*. A local rule so adopted shall *conform to any*
6 *uniform numbering system prescribed by the Judicial Conference of the United States and*
7 *shall* take effect upon the date specified by the district court and shall remain in effect
8 unless amended by the district court or abrogated by the judicial council of the circuit
9 in which the district is located. Copies of rules and amendments so made by any
10 district court shall upon their promulgation be furnished to the judicial council and the
11 Administrative Office of the United States Courts and be made available to the public.
12 *(b) Experimental Rules. With the approval of the Judicial Conference of the*
13 *United States, a district court may adopt an experimental local rule inconsistent with rules*
14 *adopted under 28 U.S.C. §§ 2072 and 2075 if it is otherwise consistent with Acts of*
15 *Congress and is limited in its period of effectiveness to five years or less.*
16 *(c) Orders.* In all cases not provided for by rule, the district judges and
17 magistrate~~s~~ *judges* may regulate their practice in any manner ~~not in~~consistent with *Acts*
18 *of Congress, with* ~~these~~ rules ~~or~~ *adopted under 28 U.S.C. §§ 2072 and 2075, and with*
19 *local rules* ~~those~~ of the district in which they act.
20 *(d) Enforcement. Rules and orders pursuant to this rule shall be enforced in a*
21 *manner that protects all parties against forfeiture of rights as a result of negligent failure*
22 *to comply with a requirement of form imposed by such a local rule or order.*

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (b). Should this limited authorization for adoption of rules inconsistent with national rules without Supreme Court and Congressional approval be rejected, the Committee nevertheless recommends adoption of the balance of the rule, with subdivisions (c) and (d) being renumbered. The Committee Notes would be revised to eliminate references to experimental rules.

Purpose of Revision. A major goal of the Rules Enabling Act was to achieve national uniformity in the procedures employed in federal courts. The primary purpose of this revision is to encourage district courts to consider with special care the possibility of conflict between their local rules and practices and the nationally-promulgated rules. At various places within these rules (e.g., Rule 16), district courts are specifically authorized, if not encouraged, to adopt local rules to implement the purposes of Rule 1 in the light of local conditions. The omission of a similar explicit authorization in other rules should not be viewed as precluding by implication the adoption of other local rules subject to the constraints of this Rule 83.

Subdivision (a). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071 and also provides that local district court rules should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. Particularly in light of statutory and rules changes that may encourage experimentation through local rules as to such matters as disclosure requirements and limitations on discovery, it is important that, to facilitate awareness within a bar that is increasingly national in scope, these rules be numbered or identified in conformity with any uniform system for such rules that may be prescribed from time to time by the Judicial Conference. Revised Rule 83(a) prohibits local rules that are merely duplicative or a restatement of national rules; this restriction is designed to prevent possible conflicting interpretations arising from minor inconsistencies between the wording of national and local rules, as well as to lessen the risk that significant local practices may be overlooked by inclusion in local rules that are unnecessarily long.

Subdivision (b). This subdivision is new. Its aim is to enable experimentation by district courts with variants on these rules to better achieve the objectives expressed in Rule 1. District courts in recent years have experimented usefully with court-annexed arbitration and are now encouraged by the Judicial Improvements Act of 1990 to find new methods of resolving disputes with dispatch and reduced costs. These rules need not be an impediment to the search for new methods provided that the experimentation is suitably monitored as a learning opportunity.

Experimentation with local rules inconsistent with the national rules should be permitted only with approval of the Judicial Conference of the United States, and then only

for a limited period of time and if not contrary to applicable statutes. It is anticipated that any request would be accompanied by a plan for evaluation of the experiment and that the requests for approval of experimental rules would be reviewed by the Standing Committee on Rules of Practice and Procedure before submission to the Judicial Conference.

Subdivision (c). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071, and also provides that a judge's orders should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. The rule continues to authorize--without encouraging--individual judges to enter orders that establish standard procedures in cases assigned to them (e.g., through a "standing order") if the procedures are consistent with these rules and with any local rules. In such circumstances, however, it is important to assure that litigants are adequately informed about any such requirements or expectations, as by providing them with a copy of the procedures.

Subdivision (d). This provision is new. Its aim is to protect against loss of rights in the enforcement of local rules and standing orders against by who may be unfamiliar with their provisions.

Local rules and standing orders have become quite voluminous in some courts. Even diligent counsel can on occasion fail to learn of an applicable rule or order. In such circumstances, the court must be careful to protect the interests of the parties. Elaborate local rules enforced so rigorously as to sacrifice the merits of the claims and defenses of litigants may be unjust.

Moreover, the Federal Rules of Civil Procedure are often forgiving of inadvertent lapses of counsel. In part, this reflects the policy of the Rules Enabling Act, 28 U.S.C. § 2071, which aims to establish a uniform national procedure familiar to attorneys in all districts. That policy might be endangered by proliferation of local rules and standing orders enforced so rigorously that attorneys might be reluctant to hazard an appearance or parties might be reluctant to proceed without local counsel fully familiar with the intricacies of local practice. Cf. Kinder v. Carson, 127 F.R.D. 543 (S.D. Fla. 1989).

This constraint on the enforcement of local directives poses no problem for court administration, for useful and effective local rules and standing orders can be enforced with appropriate caution to counsel or by means that do not impair the rights of the parties.

Rule 84. Forms*; Technical Amendments*

1 *(a) Forms.* The forms contained in the Appendix of Forms are sufficient under
2 the rules and are intended to indicate the simplicity and brevity of statement which the
3 rules contemplate. *The Judicial Conference of the United States may authorize*
4 *additional forms and may revise or delete forms.*
5 *(b) Technical Amendments. The Judicial Conference of the United States may*
6 *amend these rules or the explanatory notes to correct errors in grammar, spelling, cross-*
7 *references, or typography, and to make other similar technical changes of form or style.*

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to these changes, which would eliminate the requirement of Supreme Court and Congressional approval in the limited circumstances indicated. The changes in subdivisions (a) and (b) are severable from each other, and from other proposed amendments to the rules.

The revision contained in subdivision (a) is intended to relieve the Supreme Court and Congress from the burden of reviewing changes in the forms prescribed for use in civil cases, which, by the terms of the rule, are merely illustrative and not mandatory. Rule 9009 of the Federal Rules of Bankruptcy Procedure similarly permits the adoption and revision of bankruptcy forms without need for review by the Supreme Court and Congress.

Similarly, the addition of subdivision (b) will enable the Judicial Conference, acting through its established procedures and after consideration by the appropriate Committees, to make technical amendments to these rules without having to burden the Supreme Court and Congress with such changes. This delegation of authority, not unlike that given to Code Commissions with respect to legislation, will lessen the delay and administrative burdens that can unnecessarily encumber the rule-making process on non-controversial non-substantive matters, at the risk of diverting attention from items meriting more detailed study and consideration. As examples of situations where this authority would have been useful, one might cite the numerous amendments that were required to make the rules "gender-neutral," section 11(a) of P.L. 102-198 (correcting a cross-reference contained in the 1991 revision of Rule 15), and the various changes contained in the current proposals in recognition of the new title of "Magistrate Judge" pursuant to a statutory change.

APPENDIX OF FORMS

Form 1A. Notice of Lawsuit and Request for Waiver of Service of Summons

TO: ____________(A)____________
[as ______(B)______ of ______(C)______]

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the ______(D)______ and has been assigned docket number __(E)______.

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within _(F)_ days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, as authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth on the reverse side (or at the foot) of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this ____ day of ___________, _____.

____
Signature of Plaintiff's Attorney or Unrepresented Plaintiff

Notes:
A--Name of individual defendant (or name of officer or agent of corporate defendant)
B--Title, or other relationship of individual to corporate defendant
C--Name of corporate defendant, if any
D--District
E--Docket number of action
F--Addressee must be given at least 30 days (60 days if located in foreign country) in which to return waiver

Form 1B. Waiver of Service of Summons

TO: ______ (name of plaintiff's attorney or unrepresented plaintiff) ______

I acknowledge receipt of your request that I waive service of a summons in the action of ______ (caption of action) ______, which is case number (docket number) in the United States District Court for the ______ (district) ______. I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after (date request was sent), or within 90 days after that date if the request was sent outside the United States.

Date: ______

______
Signature
Printed/typed name: ______
[as ______
of ______]

To be printed on reverse side of the waiver form or set forth at the foot of the form:
Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant who, after being notified of an action and asked to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

COMMITTEE NOTES

Forms 1A and 1B reflect the revision of Rule 4. They replace Form 18-A.

Form 18-A. [Abrogated]

COMMITTEE NOTES

This form is superseded by Forms 1A and 1B in view of the revision of Rule 4.

Form 35. Report of Parties' Planning Meeting

[Caption and Names of Parties]

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on ____(date)________ at ______(place)______ and was attended by:
__________(name)__________ on behalf of plaintiff(s)
__________(name)__________ on behalf of defendant(s) _____(party name)______
__________(name)__________ on behalf of defendant(s) _____(party name)______

2. **Pre-Discovery Disclosures.** The parties [have exchanged] [will exchange by _ (date)___] the information required by [Fed. R. Civ. P. 26(a)(1)] [local rule ___].

3. **Discovery Plan.** The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: _(brief description of subjects on which discovery will be needed)_
All discovery commenced in time to be completed by ___(date)___. [Discovery on ______(issue for early discovery)___ to be completed by __(date)__.]
Maximum of ___interrogatories by each party to any other party. [Responses due ___ days after service.]
Maximum of ___requests for admission by each party to any other party. [Responses due __ days after service.]
Maximum of ___ depositions by plaintiff(s) and ___ by defendant(s).
Each deposition [other than of __________] limited to maximum of ___ hours unless extended by agreement of parties.
Reports from retained experts under Rule 26(a)(2) due:
from plaintiff(s) by ____(date)_____
from defendant(s) by ____(date)____.
Supplementations under Rule 26(e) due ___[time(s) or interval(s)]___.

4. **Other Items.** [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

The parties [request] [do not request] a conference with the court before entry of the scheduling order.
The parties request a pretrial conference in ___(month and year)____.
Plaintiff(s) should be allowed until __(date)__ to join additional parties and until __(date)__ to amend the pleadings.
Defendant(s) should be allowed until __(date)__ to join additional parties and until __(date)__ to amend the pleadings.
All potentially dispositive motions should be filed by ____(date)___.
Settlement [is likely] [is unlikely] [cannot be evaluated prior to ____(date)___]
[may be enhanced by use of the following alternative dispute resolution

procedure: ____________].

Final lists of witnesses and exhibits under Rule 26(a)(3) should be due
from plaintiff(s) by ____(date)______
from defendant(s) by ____(date)______

Parties should have ___ days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).

The case should be ready for trial by ___(date)___ [and at this time is expected to take approximately ___(length of time)___].

[Other matters.]

Date: ________________________

COMMITTEE NOTES

This form illustrates the type of report the parties are expected to submit to the court under revised Rule 26(f) and may be useful as a checklist of items to be discussed at the meeting.

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE

Rule 702. Testimony by Experts

1 ~~If~~ *Testimony providing* scientific, technical, or other specialized ~~knowledge~~
2 *information, in the form of an opinion or otherwise, may be received if (1) it is reasonably*
3 *reliable and* will*, if credited, substantially* assist the trier of fact to understand the
4 evidence or to determine a fact in issue~~,~~ *and (2) the* witness *is* qualified as an expert
5 *with respect thereto* by knowledge, skill, experience, training, or education~~, may testify~~
6 ~~thereto in the form of an opinion or otherwise~~. *Except with leave of court for good*
7 *cause shown, the witness shall not testify on direct examination in any civil action to any*
8 *opinion or inference, or reason or basis therefor, that has not been disclosed as required*
9 *by Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure.*

COMMITTEE NOTES

The use of opinion testimony on technical subjects has increased greatly since enactment of the Federal Rules of Evidence. This result was intended by the drafters of the rules, who were responding to concerns that the restraints previously imposed on expert testimony were artificial and an impediment to the illumination of technical issues in dispute. See, e.g., McCormick on Evidence § 203 (3d ed. 1984).

Nevertheless, while much expert testimony now presented is useful, much is not. Virtually all is expensive, if not to the proponent then to adversaries. Particularly in civil litigation with high financial stakes, large expenditures for marginally useful expert testimony have become commonplace, with the procurement of expert testimony occasionally used as a trial technique to wear down adversaries. Although testimony from experts may be desirable if not crucial in many cases, excesses can hardly be doubted and there are significant problems regarding the reliability of much of this evidence. See Elliott, Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence, 69 B. U. L. Rev. 487 (1989); Kreitling, Scientific Evidence: Toward Providing the Lay Trier with the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence, 32 Ariz. L. Rev. 915 (1990).

Concern about the quality and even integrity of hired testimony is not new. Winans v. New York & Erie R.R., 62 U.S. 88, 101 (1859); Hand, Historical and Practical

Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40 (1901). However, as the number of cases involving technical issues and the number of forensic experts seeking employment have increased, so has the potential for "junk science" and for other untrustworthy opinion testimony that is more likely to confuse or mislead a jury than to be of assistance. Some screening by the trial judge of this testimony--which involves more than merely the abstract "qualification" of the witness as an expert--will help to assure the continued vitality of the jury system in complex cases, civil and criminal.

The revision permits expert testimony that is "reasonably reliable" and will, if credited, "substantially" assist the fact-finder. These changes, deliberately worded as flexible standards, highlight the authority of the judge under Rule 104(a) when faced with an objection to expert testimony, particularly in jury trials. While admissibility of such evidence is, and remains, subject to the general principles of Rule 403, the revision can be viewed as a special formulation of some of those concerns when opinions on technical subjects are offered through witnesses with seemingly impressive credentials.

The insistence that expert opinions be reasonably reliable represents a special application of concerns expressed in Rule 403. Expert opinions that are not reasonably reliable present to a greater degree than lay testimony the danger of confusing or misleading the jury. The standard is a flexible one. Factors that may affect the reliability of an opinion to be expressed by an automotive mechanic about the functioning of a carburetor will differ markedly from those involving opinions of an epidemiologist based on experiments conducted by the witness. For the former, the inquiry likely will focus on the experience of the mechanic and whether an appropriate inspection of the carburetor occurred. For the latter, scrutiny may be appropriate regarding the specialized education and training of the witness, and perhaps the recognition and standing of the witness among other epidemiologists; whether recognized standards, protocols, techniques, procedures, and methods were followed in conducting the experiments and drawing conclusions therefrom; whether the study was conducted solely for use in litigation; whether the experiments have been replicated, verified, or subjected to peer review; and the extent to which the opinions and experiments would be viewed as acceptable by other experts in the field. In short, the same kinds of questions that may be asked under Rule 703 when an expert has relied on studies conducted by others may also be appropriate under revised Rule 702 with respect to studies conducted by the testifying expert, as well as with respect to the methodology followed by the expert in drawing conclusions from either type of study.

The concept that, when determining the admissibility of scientific studies or conclusions drawn therefrom, courts should look to the standards recognized and the degree of acceptance within the particular scientific field can be traced to Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923). The revision of Rule 702 does not attempt to resolve all conflicts that have arisen among the circuits in utilizing Frye-type standards either as an explicit requirement of Rule 703 or as an implicit requirement under former Rule 702. See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128 (9th Cir. 1991); Christophersen v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991) (en banc), cert. denied, ___ U.S. ___ (1992); DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990); Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir. 1988), cert. denied,

493 U.S. 882 (1989). The revision does not attempt to prescribe whether such opinions or studies must be "generally" or "widely" accepted, must have "some substantial" acceptance, or merely must not depart significantly from recognized standards and norms of the particular scientific community. A single bright-line test is not appropriate for all cases and in all circumstances; the more flexible standard of "reasonably reliable" is preferable. It is intended, however, that the degree of acceptability within the field should ordinarily be considered, together with other appropriate factors such as those listed in the preceding paragraph, in determining whether such evidence is sufficiently trustworthy to be submitted to the jurors for their assessment in resolving the case.

The determination whether proposed opinion testimony, if credited, will be of substantial assistance to the fact-finder involves more than merely that the witness possesses greater knowledge about some subject than the ordinary juror. Among the factors that may affect this determination are the following: whether the proposed opinion relates to a matter that is in substantial dispute and of major consequence to the outcome of the case; whether other evidence in the case, including testimony from other experts, will provide an adequate basis for the jury to reach an informed decision regarding the matter; whether the opinion involves a highly technical subject or one with which most persons will have had some experience and knowledge; whether, if the opinion testimony is received, rebuttal testimony will be offered through other experts; and whether the person will be called as a witness only to present such opinion testimony, or will be testifying to personal observations regarding the facts of the case, with the opinions offered primarily to explain such testimony. The rule does not limit forensic experts to those whose testimony is essential, but does call for elimination of those whose testimony would be only marginally helpful at most.

Of course, experts frequently disagree, even when drawing conclusions from the same data. In many cases there will be admissible opinions from different experts which are in direct or partial conflict, and it will be for the jury to decide questions of credibility and what weight to give to competing opinions. In determining admissibility under the revised rule, the trial judge is not to usurp these functions of the jury but, by weeding out testimony that could not be reasonably relied upon or would be only marginally helpful, is to assure that the jury is in a better position to perform its traditional responsibilities.

Whether proposed opinion testimony is reasonably reliable and will, if credited, be of substantial assistance is, like the inquiry into the expertise of the witness, a preliminary question that, when an objection is made, is determined under Rule 104(a). The court is not bound by the rules of evidence other than those involving privileges. When appropriate, consideration can be given to trustworthy hearsay, such as the findings made by judges in other cases in which the same testimony has been offered. This opportunity can ease the potential burden on a court when faced with an objection to expert testimony which has been carefully considered in earlier litigation.

The rule also is revised to complement changes in the Federal Rules of Civil Procedure requiring, unless otherwise ordered or stipulated, that forensic experts prepare detailed reports as to the testimony to be presented at trial. The second sentence of revised

Rule 702 precludes the offering on direct examination in civil actions of expert opinions, or the reasons or bases for opinions, that have not been disclosed in advance of trial. The restriction applies only to experts subject to the requirement of a written report under Fed. R. Civ. P. 26(a)(2)(B)--typically, those retained or specially employed to provide expert testimony at trial or whose duties as an employee of a party regularly involve the giving of such testimony.

It has not been unusual for testimony given at trial by an expert to vary substantially from that provided in answers to interrogatories under former Fed. R. Civ. P. 26(b)(4)(A)(i) or at a deposition of the expert. Any significant changes in an expert's expected testimony should, to the extent feasible, be disclosed before trial, and this revision of Rule 702 provides an appropriate incentive for such disclosure in addition to those contained in the Rules of Civil Procedure. Under revised Fed. R. Civ. P. 26(e)(1), material changes in the opinions of an expert from whom a written report is required are to be disclosed by the time the proponent is required to disclose the evidence it may use at trial. Unless the court has specified another time, these changes are to be disclosed at least 30 days before trial.

For good cause shown, the judge can permit the witness to testify with respect to matters not so disclosed. A significant study in the field may not have become available until after the cutoff date. The final report of another expert may contain new matters that were not previously considered. There may be testimony given during the trial that should be taken into account. The revision provides the court with discretion to deal with the variety of circumstances in which a timely pretrial disclosure could not have been made.

The situation may arise where the matters disclosed in the report or in a deposition no longer represent the expert's opinions at the time of trial and yet good cause cannot be shown for a failure to disclose these changes. Of course, a witness should not be required to testify contrary to the person's oath or affirmation. If the witness is unable to testify in a manner consistent with the earlier disclosure, then--unless the court grants leave to deviate from the earlier testimony--the witness should not testify.

By its terms the new sentence applies only in civil cases. The consequences of the failure to make disclosures of expert testimony which may be required under new Fed. R. Crim. P. 16(a)(1)(E) and 16(b)(1)(C) will be determined in accordance with the principles that govern enforcement of the requirements of Fed. R. Crim. P. 16.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

1 The expert may testify in terms of opinion or inference and give reasons therefor
2 without ~~prior disclosure of~~ *first testifying to* the underlying facts or data, unless the
3 court requires otherwise. The expert may in any event be required to disclose the
4 underlying facts or data on cross-examination.

COMMITTEE NOTES

This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised Rule 702 and with revised Rules 26(a)(2)(B) and 26(e)(1) of the Federal Rules of Civil Procedure or with revised Rule 16 of the Federal Rules of Criminal Procedure, which require disclosure in advance of trial of the facts and data on which an expert's opinions are based.

If a serious question is raised under Rule 702 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify. This rule does not preclude such an inquiry.

ISSUES AND CHANGES

Fed. R. Civ. P. 1. (Draft published August 1991)

Relatively non-controversial. A few expressed concern that the proposed amendment would increase judicial discretion and perhaps be misused by some judges. Some concern was also expressed that the Committee Notes, stating that attorneys share responsibility with the court for seeing that the rules are administered to secure the objectives stated in Rule 1, may infringe on the obligations of attorneys towards their clients.

The Advisory Committee is unanimous in recommending adoption of the rule, which is unchanged from the language published in August 1991.

Fed. R. Civ. P. 4. (Draft published October 1989)

Non-controversial except with respect to sending requests for waiver of service into foreign countries. This issue was presumably the reason why the proposed amendment was returned by the Supreme Court for further study.

While the rule was pending before the Supreme Court, the British Embassy had expressed two concerns: first, that extra-territorial mailing of requests under subdivision (d), coupled with the potential for cost-shifting if the request was declined, would contravene the letter or spirit of the Hague Convention; and second, that, at least by omission, the rule appeared to be inconsistent with 28 U.S.C. § 1608 with respect to service on agencies and instrumentalities of foreign states. The Department of Justice, which had expressed no comment when the rule was originally proposed, has subsequently taken the position, essentially echoing concerns of the Department of State, that, to avoid possible offense to other governments, it would be preferable for the rule to restrict the request-for-waiver procedure to defendants located within this country.

After further study, the Advisory Committee has concluded that the potential benefits to litigants--both plaintiffs and defendants--justify use of the request-for-waiver procedure in cases involving foreign defendants but has made changes to the text and Committee Notes, as well as in proposed new Forms 1A and 1B, in an attempt to ameliorate the types of concerns expressed by the British Embassy and the Department of Justice. The proposed revision makes clear that the request for waiver of service--which, in fact, affords significant potential benefits to a defendant residing in a foreign country, both through elimination of potential costs and additional time to respond--is a private, nonjudicial act that does not purport to effect service or constitute any directive from a court. The criticism that a declination, pursuant to foreign law, to waive service when requested by mail could result in unfair cost-shifting is dealt with in the Notes, which explain that cost-shifting would be inappropriate if a refusal is based upon a policy of the foreign government prohibiting all waivers of service.

A change in the language of subdivision (j)(1) corrects the other concern expressed by the British Embassy, relating to agencies and instrumentalities of foreign states. During its study the Committee discovered several other minor drafting errors contained in the text or Notes, such as the language used when making cross-references to other subdivisions, paragraphs, and subparagraphs of the rule. These corrections have been incorporated into the proposed amendment.

While one member would prefer to exclude foreign defendants from the request-for-waiver procedure, the Committee is unanimous in recommending that revised Rule 4 be adopted to replace current Rule 4. The changes in language from the text and Notes published in October 1989 prior to its earlier submission to the Supreme Court are not substantial, but are technical in nature; and, accordingly, the Advisory Committee believes that an additional period for public notice and comment is unnecessary.

Special Note: If the Committee's proposal to make the request-for-waiver procedure available

with respect to defendants located outside the United States is disapproved, Rule 4 need not be rejected in its entirety. Rather, one of two approaches could be adopted: (1) eliminate the cost-shifting feature that is the principal objection raised by the British Embassy (by adding a clause in the last sentence of Rule 4(d)(2) that excludes foreign defendants from the cost-shifting sanction), or (2) limit the Rule 4(d) procedure to domestic defendants (by eliminating the reference to subdivision (f) in the first sentence of Rule 4(d) and eliminating subdivision (a)(1)(B) of Rule 12). The Committee Notes and Forms 1A and 1B would also need to be revised to conform to these changes.

Fed. R. Civ. P. 4.1 (Draft published October 1989)

Non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4. There are no changes needed in language as previously submitted to the Supreme Court.

The Advisory Committee is unanimous in recommending adoption of Rule 4.1, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 5 (Not previously published)

Non-controversial. This is a technical amendment, using the broader language of recently revised Fed. R. App. P. 25 to make clear that district courts--and, more importantly at the present time, bankruptcy courts--may permit, to the extent authorized by the Judicial Conference, filing not only by facsimile transmission but also by other electronic means.

The Advisory Committee is unanimous in recommending adoption of Rule 5. Although this has not been published as a proposed change to the Fed. R. Civ. P., the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Civ. P. 11. (Draft published August 1991)

The proposed amendment of Rule 11 is controversial. It has provoked extensive comment from the bench, bar, and public.

It is appropriate to begin with a brief discussion of the special procedures followed by the Advisory Committee with respect to Rule 11. The Committee had received various requests, formal and informal, for further amendment or abrogation of Rule 11, which had been revised in 1983. The Committee was also aware of several studies of the rule undertaken by various individuals, bar associations, and courts. Whether to propose any change--and, if so, what type of change--was, however, far from clear. The Committee started by publishing a notice that solicited comments about the several aspects of the operation of Rule 11 and by requesting that the Federal Judicial Center conduct certain studies and surveys. The Committee then held a public meeting and heard from various judges, attorneys, and academics who were known to have strong views about Rule 11.

There was no consensus about whether--or how--the rule should be amended. Some urged that the 1983 revision be retained with little or no change. Some urged that any amendment was premature and should be deferred until more experience had been gained. Some suggested various changes to deal with specific problems that had arisen. Others urged that it be restored, in essence, to its pre-1983 form or, indeed, be eliminated altogether.

After considering these comments and the FJC studies and survey, the Committee concluded that the widespread criticisms of the 1983 version of the rule, though frequently exaggerated or premised on faulty assumptions, were not without some merit. The goal of the 1983 version remains a proper and legitimate one, and its insistence that litigants "stop-and-think" before filing pleadings, motions, and other papers should, in the opinion of the Committee, be retained. Many of the initial difficulties have been resolved through case law over the past nine years. Nevertheless, there was support for the following propositions: (1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel. In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.

The Committee then drafted a proposed amendment with the objective of increasing the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while also reducing the frequency of Rule 11 motions. The proposed amendment was published in August 1991 and has generated many comments, written and oral.

Summarized below are the principal criticisms and suggestions that the Committee has received. Several of these, it may be noted, are embodied in an alternative proposal for amendment of Rule 11 sponsored by Attorney John Frank and others, which has gained significant support from various judges, lawyers, and organizations.

Opposition to this revision as "weakening" the rule. It is correct that, given the "safe harbor" provisions and those affecting the type of sanction to be imposed, the amendment should reduce the number of Rule 11 motions and the severity of some sanctions. The Advisory Committee is unanimous that, to the extent these changes may be viewed as "weakening" the rule, they are nevertheless desirable.

Opposition to any amendment as "premature." While several problem areas encountered under the 1983 version of Rule 11 have been corrected by case law, others remain and cannot be cured by greater experience within the bench and bar. By the time the new amendments can become effective, a period of ten years will have elapsed since the prior revision. The Advisory Committee is unanimous that changes should not be deferred for additional time and study.

Application to discovery documents. Notes to the published draft asked for comments on whether Rule 11 should be made explicitly inapplicable to discovery documents, and indicated that the Advisory Committee would be considering such a change without additional publication. The comments received support this change. The Advisory Committee is unanimous that this change should be made and has done so through the addition of subdivision (d).

Continuing duty to withdraw unsupportable contentions. The published draft abandoned the "signer snapshot" approach of the current rule that imposes obligations solely on the persons signing a paper and measures those obligations solely as of the time the paper is filed. It provided that litigants have a duty not to maintain a contention that, though perhaps initially believed to be meritorious, is no longer supportable in fact or law. Several comments expressed concern that, at least as drafted, the revision might lead to disruptive and wasteful activities based on a mere failure to re-read and amend previously filed pleadings, motions, or briefs. The Advisory Committee believes that this latter criticism is well taken and has made several modifications to the published language of the text and limited the expansion to non-signers to persons who "pursues" a previously filed paper. These changes, coupled with the "safe harbor" provisions, should minimize these concerns.

Duty to conduct pre-filing investigation. Some critics express skepticism regarding the obligation to conduct an appropriate pre-filing investigation in view of the provisions allowing pleading on "information and belief" and affording a "safe harbor" against the filing of Rule 11 motions if unsupportable contentions are withdrawn. The basic requirement for pre-filing investigation is retained in the text of the rule, and, as the Committee Notes make clear, pleading on information and belief must be preceded by an inquiry reasonable under the circumstances. The revision is not a license to join parties, make claims, or present defenses without any factual basis or justification. However, it must be acknowledged that, with these changes, some litigants may be tempted to conduct less of a pre-filing investigation than under the current rule. The Advisory Committee believes that this risk is justified, on balance, by the benefits from the changes.

Pleading "as a whole." Several comments urged that the revision of Rule 11 incorporate the approach adopted in some decisions, permitting sanctions only if, taken "as a whole," the paper violated the standards of the rule. The Advisory Committee continues to believe that the "stop-and-think" obligations apply to all of the allegations and assertions, not just to a majority of them. Nevertheless, the language of the published draft might have inappropriately encouraged an excessive number of Rule 11 motions premised upon a detailed parsing of pleadings and motions. The Advisory Committee has changed the text of subdivision (b) to eliminate the specific reference to a "claim, defense, request, demand, objection, contention, or argument" and has also modified the accompanying Notes to emphasize that Rule 11 motions should not be prepared--or threatened--for minor, inconsequential violations or as a substitute for traditional motions specifically designed to enable parties to challenge the sufficiency of pleadings. These changes, coupled with the opportunity to correct allegations under the "safe harbor" provisions, should eliminate the need for court consideration of Rule 11 motions directed at insignificant aspects of a complaint or answer.

"Mandatory" sanctions. The most frequent criticism has been that the revision leaves in place the current mandate that some sanction be imposed if the court determines that the rule has been violated. The suggestion is that, even if a violation is found, the district court should have discretion not to impose any sanction. Two members of the Advisory Committee prefer this approach, though do not request that this view be expressed as a formal minority view in the Committee Notes. The other members of the Advisory Committee believe that, particularly given the opportunity through the "safe harbor" provisions to withdraw an unsupportable contention before a Rule 11 motion is even filed, some sanction should be imposed if the court is called upon to determine, and does determine, that the rule has been violated. As under the current rule, the court retains discretion as to the particular sanction to be imposed, subject however to the principle that it not be more severe than needed for effective deterrence, and the court's decision whether a violation has occurred is reviewed on appeal for abuse of discretion.

Payment of monetary sanctions to an adversary. Another frequent criticism is that the draft continues to permit a monetary award to be paid to an adversary for damages resulting from a Rule 11 violation, rather than limiting monetary awards to penalties paid into court. The Advisory Committee agrees with the premise that cost-shifting has created the incentive for many unnecessary Rule 11 motions, has too frequently been selected as the sanction, and, indeed, has led to the large awards most often cited by critics of the 1983 rule. Both in the text and the Committee Notes, the published draft contained language that, while continuing to permit cost-shifting awards, explicitly recited the deterrent purpose of Rule 11 sanctions and the potential for non-monetary sanctions. The Advisory Committee remains convinced that there are situations--particularly when unsupportable contentions are filed to harass or intimidate an adversary in some cases involving litigants with greatly disparate financial resources--in which cost-shifting may be needed for effective deterrence. The Committee has, however, made a further change in the text of subdivision (c)(2) to emphasize that cost-shifting awards should be the exception, rather than the norm, for sanctions. As to the expenses incurred in presenting or opposing a Rule 11 motion, the published draft provides the court with discretion to award fees to the prevailing party: this is needed to discourage non-meritorious Rule 11 motions without creating a disincentive to

the presentation of motions that should be filed.

Protection of represented parties (as distinguished from attorneys) from sanctions. The current rule permits the court to impose a sanction upon the person who signed the paper, "a represented party, or both." The published draft would have restricted the imposition of monetary sanctions upon a represented party to situations in which the party was responsible for a violation of Rule 11(b)(1) (papers filed to harass or for other improper purpose). Comments have been mixed: some opposing any such restriction; others opposing any monetary sanctions on represented parties; others suggesting variants on the language in the draft. Upon further reflection and consideration of the comments, the Advisory Committee believes that the prohibition of monetary sanctions against a represented party should be limited to violations of Rule 11(b)(2) (frivolous legal arguments), and has changed the language of subdivision (c)(2)(A) accordingly.

Sanctions against law firms. The published draft contained provisions designed to remove the restrictions of the current rule respecting sanctions upon law firms. See Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint). While many comments supported this change, others opposed it, urging that sanctions be imposed only on the individual attorney found to have violated the rule. The Advisory Committee believes that, consistent with general principles of agency, it is often appropriate for a law firm to be held jointly responsible for violations by its partners, associates, and employees. Given the opportunity under the "safe harbor" provisions to avoid sanctions imposed on a motion, coupled with the changes designed to reduce the frequency of "fee-shifting" sanctions that have produced the largest monetary sanctions, the Committee has added to the published draft in subdivision (c)(1)(A) language clarifying that a law firm should ordinarily be held jointly accountable in such circumstances.

Court-initiated sanctions after case dismissed. Several groups have suggested that the safe harbor provisions, which under the published draft apply only to motions filed by other litigants, should apply also to show cause orders issued at the court's own initiative. The Advisory Committee continues to believe that court-initiated show cause orders--which typically relate to matters that are akin to contempt of court--are properly treated somewhat differently from party-initiated motions. The published draft does, however, contain provisions in subdivision (c)(2)(B) protecting a litigant from monetary sanctions imposed under a show cause order not issued until after the claims made by or against it have been voluntarily dismissed or settled.

Standards for appellate review. Some of the comments have urged that the revision contain language modifying the standard for appellate review announced in Cooter & Gell v. Hartmarx Corp., ___ U.S. ___ (1990). The Advisory Committee concludes that the arguments are not sufficiently compelling to justify a deviation from the principle that ordinarily the rules should not attempt to prescribe standards for appellate review.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. Ultimately the only disagreement within the Committee related, as noted above, to whether imposition of sanctions should be mandatory or discretionary. The two members who favored the discretionary standard nevertheless believe that proposed amendment is preferable to the current rule, and accordingly the Committee is unanimous in recommending adoption of the proposed amendment of Rule 11. As noted above, several changes have been made to the language of the amendment as published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 11 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 12. (Draft published in October 1989)

Relatively non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4. The only changes from the language previously submitted to the Supreme Court are technical, stylistic improvements.

The Advisory Committee is unanimous in recommending adoption of Rule 12, which, except for stylistic improvements, is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 15. (Draft published in October 1989)

Non-controversial. This rule was actually adopted by the Supreme Court on April 30, 1991, and forwarded to Congress. It contained, however, a cross-reference to Rule 4 that, with the Court's deferral of action on Rule 4, was in error. The error was corrected in P.L 102-198. This proposed amendment will restate the cross-reference to conform to the proposed amendment of Rule 4 that is to be resubmitted.

The Advisory Committee is unanimous in recommending adoption of Rule 15, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 16. (Draft published in August 1991)

Controversial in part. Most of the proposed amendments involve technical or clarifying changes that were generally supported as desirable. A few questioned the need for the amendments and were concerned about the increasing length and potential complexity of the rule. A few expressed opposition to "managerial judging," while some others preferred that the rule mandate more personal involvement by a judicial officer.

A few of the changes, however, provoked strong criticisms and are discussed below.

Compulsory attendance and participation by parties in settlement procedures. The published draft would have authorized the court to require that parties, or their insurers, attend a settlement conference and participate in special procedures (ADR) designed to foster settlement. Several of the comments opposed any form of mandatory (albeit non-binding) ADR and were fearful that explicit authority to require party attendance at settlement conferences would be misused by some judges to coerce settlements. The Advisory Committee is also aware of the strong feelings of many that this authority is needed and, indeed, already within the court's inherent powers. On review, the Committee concluded that, given the mandate for local experimentation under the Civil Justice Reform Act, the explicit authorization provided in the published draft for mandatory attendance and participation should be deleted. The changes made in the last sentence of proposed subdivision (c) do, however, contain a provision, comparable to 28 U.S.C. § 473(b)(5), with respect to party representatives being accessible by telephone during settlement conferences with the court. The rule does not attempt to address the extent to which a court by exercise of its inherent powers can compel parties to attend conferences or participate in alternative dispute resolution procedures and does not limit the powers of court to compel participation when authorized to do so by statute.

Potential for summary judgment at Rule 16 conferences. Several comments opposed the language in proposed subdivision (c)(5) that would permit a court at a pretrial conference to enter summary judgments. This opposition was based upon fears that courts might precipitously grant summary judgments at a conference without affording the procedural safeguards built into Rule 56. On reflection, the Advisory Committee has concluded that subdivision (c)(5) should be modified to eliminate those concerns. However, a court can still under subdivision (c)(11) act at a pretrial conference on a motion for summary judgment that is ripe for decision at that time and is also empowered to enter a show cause order under Rule 56(g)(3).

Pretrial limitations on extent of evidence. Several opposed the proposed amendment of subdivision (c)(15) authorizing the court, after meeting with counsel, to enter "an order establishing a reasonable limit on the length of time allowed for the presentation of evidence or on the number of witnesses or documents that may be presented." The opposition reflects, in part, a concern about managerial judging or about infringing on counsels' ability to control the trial process, and in part a fear that many judges will misuse this discretion. The Advisory Committee has modified the language of this subdivision, but remains convinced that a reasonable limit on the length of trial is desirable in some cases, that such a limitation can be fairer to the parties when determined in advance of trial than when imposed during trial, and that abuses can be corrected through appellate review.

Timing of scheduling orders. The published draft changed the date by which a scheduling order should be entered from 120 days after the complaint is filed to 60 days after a defendant has appeared. Several suggest that this deadline may come too early, particularly in multi-party cases. The Advisory Committee concludes that the language from the published draft should be changed to provide that the order be entered within 90 days after a defendant has appeared or within 120 days after the complaint has been served on a defendant. Of course, courts can and frequently should enter scheduling orders before such deadlines.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 16. As noted above, several changes have been made to the language of the amendment as originally published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 16 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 26. (Drafts published October 1989 and August 1991)

Controversial. The last sentence in subdivision (a)(5) was contained in the draft published in October 1989. The other proposed changes were contained in the draft published in August 1991 and, particularly with respect to proposed subdivision (a)(1), have provoked the most intense division within the bench and bar of any of the proposed amendments. However, as discussed below, the Advisory Committee has made changes to the language contained in the published drafts which should eliminate many of the concerns expressed. The principal criticisms and suggestions are as follows:

Mandatory early pre-discovery disclosures. Subdivision (a)(1) of the August 1991 published draft required litigants to disclose specified core information about the case; namely, potential witnesses, documentary evidence, damage claims, and insurance. The objectives were to eliminate the time and expense of preparing formal discovery requests with respect to that information and to enable the parties to plan more effectively for the discovery that would be needed. Critics attacked the timing and scope of the disclosure requirements, as well as the related penalty provisions for noncompliance, viewing them as both impractical, counterproductive, and disruptive of the attorney-client relationship. On further consideration, the Advisory Committee has made certain changes with respect to the scope of the disclosures and provisions for sanctions that, coupled with the provisions mandating an early meeting of the parties, should alleviate some of these concerns. One Committee member preferred, as suggested by many critics, that initial disclosures be limited to potential witnesses and documents supporting the party's contentions; the other members, however, remained of the view that the obligation should relate to all such witnesses and documents. Many critics also urged that early disclosure requirements not be adopted until after the studies of the experience of courts under the Civil Justice Reform Act. To delay consideration of rules changes until completion of those studies would effectively postpone the effective date of any national standards until December 1998, a delay the Advisory Committee believed unwise. However, the proposed rule is written in a manner that permits district courts during the period of experimentation to depart from the national standards and determine whether and to what extent pre-discovery disclosures should be required.

Pre-discovery planning meeting of parties. The August 1991 published draft contemplated that the exchange of pre-discovery disclosures under subdivision (a)(1) should preferably occur at a meeting of the parties, but did not require that such a meeting take place. The most severe critics of the disclosure requirement supported the concept of an early meeting of the parties to explore and clarify the issues in the case as a prelude to conduct of discovery and, indeed, generally urged that such a meeting be mandatory, whether or not early disclosures were required. Complementing the changes made in subdivision (a)(1), the Advisory Committee has changed the published draft so that subdivision (f), rather than being deleted, is modified to require that the parties meet and attempt to agree on a proposed discovery plan for incorporation in the scheduling order and to facilitate the exchange of required disclosures.

"Notice pleading" and scope of discovery. Many comments suggested that reductions in the time and expense of discovery and other pretrial proceedings require a reconsideration of "notice pleading" and discovery relevant to the "subject matter" or "reasonably calculated to lead to the discovery of admissible evidence." While these suggestions may have merit, they could not, in the opinion of the Advisory Committee, be effected incident to the present publication notice and are ones that should be given careful study and consideration in the future.

Expert reports. The August 1991 published draft required that detailed written reports of parties' experts be exchanged during the discovery period and generally limits the direct testimony of such experts to the matters contained in those reports as may have been seasonably supplemented prior to trial. Several comments argued that this requirement would cause unnecessary additional expenses, discourage "real" experts from agreeing to testify, and create problems at trial. Requirements such as these have, however, been beneficially used in several courts for many years, and the Advisory Committee remains convinced that the concept is sound. However, the Committee has changed the language in subdivision (a)(2) to make clear that it applies only to specially retained or employed experts--and not, for example, to treating physicians. It has also made changes in the text of subdivision (e) to lessen the burden of supplementation and in the Notes to proposed FRE Rule 702 in recognition that intervening events may sometimes justify a change in expert testimony.

Discovery in a foreign country. The last sentence in proposed subdivision (a)(5) is drawn from language published in October 1989 and later submitted to the Supreme Court, which, like Rule 4, was subsequently returned by the Supreme Court for further consideration. While the amendment was pending before the Court, the British Embassy had expressed its concern that, particularly with respect to the Committee Notes, the provisions relating to discovery in foreign countries were inconsistent with the Hague Convention. A similar concern was more recently expressed by Switzerland. On the other hand, the Department of Justice believes the change unnecessarily restricts discovery from foreign litigants and has urged that the Rule not contain any language relating to foreign discovery. The Committee has made minor changes in the text of the rule and more significant changes in the Notes that, in the Committee's view, represent an appropriate balance between the competing considerations that affect foreign discovery. The proposed revision does not, however, attempt to overturn Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987), which, no doubt, is what some foreign litigants would prefer.

> Special Note: If the Committee's proposal regarding foreign discovery is disapproved, the remainder of Rule 26 need not be rejected. The last sentence of proposed Rule 26(a)(5) could be deleted, together with introductory clause to Rule 28(b). The Committee Notes would be modified for conformity with those changes.

Claims of privilege. The August 1991 published draft contains, like Rule 45 as became effective in December 1991, provisions requiring that notice be given when information is withheld on a claim of privilege or work product. Based upon suggestions made in several comments, the Advisory Committee has changed the language of the draft to make clear that the obligation to describe items withheld does not require disclosure of matters that are themselves privileged and only relates to items that are otherwise discoverable (and hence not when unreasonably burdensome requests are made).

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those

comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 26. As noted above, several changes have been made to the language of the amendment as originally published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 26 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 28. (Draft published October 1989)

Non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4. There are no changes needed in language as previously submitted to the Supreme Court.

The Advisory Committee is unanimous in recommending adoption of Rule 28, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 29. (Draft published August 1991)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 29, which, except for stylistic improvements, is unchanged from the language published in August 1991.

Fed. R. Civ. P. 30. (Draft published August 1991)

Controversial. The aspects of the proposed amendment receiving the most attention in the comments received are discussed below.

Limits on number and length of depositions. As published, the draft imposed presumptive limits on the number (10 per side, including depositions under Rule 31) and on the length (6 hours per deposition). While many of the comments supported these limits, many opposed any limits, many opposed any presumptive limits (asserting that limits should be imposed only by the court on a case-by-case analysis), and many opposed either or both of the limits as too restrictive, particularly in certain types of cases. The Advisory Committee continues to believe that the presumptive limit on the number of depositions--which can, and in many case should, be changed by the court in the scheduling order or by written stipulation of the parties--is workable and desirable as a means for forcing litigants to be more selective in their deposition practice. A majority of the Committee, however, concluded that any presumptive limit on the length of depositions is a matter more properly left at this time for experimentation under the Civil Justice Reform Act, and the draft has been changed to effect this result.

Non-stenographic depositions. None of the published amendments has received a larger number of objections than the proposal relieving parties from the necessity of obtaining court approval or agreement of other parties as a condition to taking depositions by non-stenographic means. Many of these comments came from court reporters, but many members of the bar made similar comments. This opposition urges that video and audio recordings are unreliable and difficult to use at trial. The Advisory Committee is, however, unanimous that these concerns are adequately dealt with in the proposed amendments, which permit other parties to arrange for a stenographic transcription if they choose to do so and which require a party proposing to use video or audio recordings at trial to prepare and furnish to adversaries and the court a transcript of the portions to be offered.

Objections and directions not to answer. The text of the published draft authorized sanctions upon a finding that an attorney had impeded, delayed, or engaged in other conduct frustrating the fair examination of

the deponent. As illustrations of conduct subject to such sanctions, the Notes referred to "speaking" objections or otherwise coaching the deponent, and improper directions not to answer. There has been no substantial disagreement with this concept, but several suggested that it would be preferable to move some of the language from the Notes into the text of the rule, where it would be more obvious. The Advisory Committee believes that this suggestion has merit and has modified the language of subdivision (d)(1) accordingly.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 30. As noted above, several changes have been made to the language of the amendment as originally published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 30 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 31. (Draft published August 1991)

Moderately controversial.

The only aspect of this proposed amendment that has received any substantial criticism is the provision, paralleling the provision in Rule 30, that places a presumptive limit on the number of persons who may be deposed on written questions (10 per side, including depositions under Rule 30). The Advisory Committee continues to believe that this limitation--which can be modified by the court or by stipulation of the parties--is workable and desirable.

The Advisory Committee is unanimous in recommending adoption of the rule, which is essentially unchanged from the language published in August 1991.

Fed. R. Civ. P. 32. (Draft published August 1991)

Relatively non-controversial.

The only aspect of this proposed amendment that received any substantial opposition was the proposal to permit use at trial of depositions of expert witnesses without having to establish their unavailability. On further consideration, the Committee has decided to eliminate this proposed change.

The Advisory Committee is unanimous in recommending adoption of the rule as modified.

Fed. R. Civ. P. 33. (Draft published August 1991)

Moderately controversial.

As published, the draft set a presumptive limit on interrogatories--"15 in number including all subparts" propounded by any party to another. Many oppose any limitation other than on a special case-by-case analysis, while others say that the number is too low or that the language relating to subparts will generate controversy. After considering the comments, the Advisory Committee has concluded that the presumptive limit--which can be changed by court directive or stipulation--should be raised to 25 and has made minor changes in the text and Notes to address the problems presented by subparts.

The Advisory Committee is unanimous in recommending adoption of the rule, which, except for minor changes in the text and Notes, is the same as contained in the published draft.

Fed. R. Civ. P. 34. (Draft published August 1991)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 34, which, except for stylistic improvements, is essentially unchanged from the language published in August 1991.

Fed. R. Civ. P. 36. (Draft published August 1991)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 36, which, except for stylistic improvements, is essentially unchanged from the language published in August 1991.

Fed. R. Civ. P. 37. (Draft published August 1991)

Moderately controversial.

Several of those opposed to mandatory pre-discovery disclosures under Rule 26(a)(1) echoed their position by expressing opposition to the nature and severity of sanctions under Rule 37 for failure to comply with these requirements. In part these objections are muted by the Committee's action in eliminating any national requirements for such disclosures. In addition, the Advisory Committee has made some minor changes in the published text and Notes to Rule 37(c)(1) and has revised (rather than abrogated) the provisions of Rule 37(g) for conformity with revised Rule 26(f).

The Advisory Committee is unanimous in recommending adoption of Rule 37, which, except for the changes noted above and a few stylistic improvements, is the same language published in August 1991.

Fed. R. Civ. P. 50. (Not previously published)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 50. Although this has not been published, the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Civ. P. 52. (Not previously published)

Non-controversial.

The Advisory Committee is unanimous in recommending adoption of Rule 52. Although this has not been published, the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Civ. P. 54. (Draft published August 1991)

Relatively non-controversial.

The principal criticism of this proposed amendment involved subdivision (d)(2)(D)(i), authorizing adoption of schedules by which the value of legal services in a district will ordinarily be measured. After further consideration, the Advisory Committee has deleted this language, concluding that inclusion of this explicit authorization may result in more problems than benefits. The Committee's action, however, should not be viewed as implying that district courts lack the authority to adopt such schedules as local rules.

The Advisory Committee is unanimous in recommending adoption of Rule 54, which, except for deletion of subdivision (d)(2)(D)(i), is essentially unchanged from the published draft.

Fed. R. Civ. P. 56. (Draft published August 1991)

Moderately controversial.

While there is substantial support for this revision, many question say that it is unnecessary or unduly complex, and are apprehensive that any change in the rule might diminish the utility of summary judgment procedures. Some oppose the amendment because it incorporates into the rule the principles enunciated in Supreme Court decisions that they believe were wrongly decided.

Timing; offers of proof. The Advisory Committee continues to believe that summary judgment should not be granted against a party before it has had a reasonable opportunity to obtain discovery on matters not within its control and possession which are needed to oppose the motion. The current rule provides that, upon a showing that a party cannot within the prescribed time obtain affidavits justifying its opposition to summary judgment, the court may deny the motion or may allow additional time; the Committee believes that, in such circumstances, the court should also have the option to receive an offer of proof.

Discretion; preclusion of motions. Some object to the language affording the trial court with some discretion not to enter a summary adjudication that might be permitted under the rule. The revision, however, merely brings the language of the rule (currently worded as mandatory) into conformity with court decisions. These decisions recognize the need for some discretion, particularly with respect to issues that are not wholly dispositive of the claims made by or against a party. The Committee Notes have been changed to explain the reasons for, and limitations on, this discretion. The published draft provided in subdivision (g)(1) that the court could preclude Rule 56 motions on particular issues; on further consideration, the Committee has concluded that this language should be deleted.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. While one member would have preferred that the text of the rule indicate that summary judgment is mandatory when warranted, the Committee is unanimous in recommending adoption of the proposed amendment of Rule 56, which, with the exception of the minor change in subdivision (g)(1) explained above, is the same as the published draft. Various clarifying changes have been made in the Committee Notes.

Fed. R. Civ. P. 58. (Draft published August 1991)

Relatively non-controversial.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 58, which is essentially unchanged from the language in the published draft.

Fed. R. Civ. P. 71A. (Draft published October 1989)

Non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4.

The Advisory Committee is unanimous in recommending adoption of Rule 71A, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 83. (Draft published August 1991)

Moderately controversial.

Several of the comments expressed concern over the proliferation of local rules, a concern shared by the Advisory Committee. The Committee believes, however, that the proposed amendments of Rule 83--with the exception of subdivision (b)--will serve to reduce, rather than aggravate, the problems associated with local rules and standing orders. At the suggestion of the Standing Committee, moreover, the Advisory Committee has revised the text of the published draft to require that local rules be consistent with, but not duplicative of, the various national rules and conform to any uniform numbering system prescribed by the Judicial Conference.

The primary criticisms were directed to subdivision (b), which authorizes experimental local rules inconsistent with the national rules. The Committee believes, however, that with the limitations written into the text--(1) they must be approved by the Judicial Conference and (2) they must be limited in duration to a period of five years--the revision provides a sound basis for potentially useful experimentation.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 83, which incorporates into the published draft minor stylistic changes and the changes recommended by the Standing Committee.

Fed. R. Civ. P. 84. (Draft published August 1991)

Non-controversial.

No criticism was expressed to the published draft, which contained only the provisions found in subdivision (a).

Subdivision (b), similarly delegating to the Judicial Conference the authority to make technical changes, has been added at the suggestion of the Standing Committee and has not been published for comment.

The Advisory Committee is unanimous in recommending adoption of Rule 84. Although subdivision (b) has not been published, the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Forms 1A and 1B; Abrogation of Form 18-A. (Draft published October 1989)

Non-controversial.

Forms 1A and 1B, with minor stylistic improvements, that were previously approved and submitted to complement the proposed changes in Rule 4. The Advisory Committee is unanimous in recommending

(contingent upon adoption of Rule 4) adoption of these forms and abrogation of Form 18-A.

Form 35. (Not previously published.)

Non-controversial.

This is a new form designed to illustrate the type of report contemplated under Rule 26(f) and to serve as a checklist for litigants conducting the pre-discovery planning meeting. It complements the change in Rule 26(f). Although it has not been published, the Advisory Committee believes that, as a technical amendment which is merely illustrative, public notice and comment can and should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Evid. 702. (Draft published August 1991)

Controversial.

Many support the proposed amendment; many do not. The primary criticisms can be summarized as follows: (1) reliability and usefulness of expert testimony should be left to the jury; (2) increased judicial scrutiny respecting expert testimony should apply only in civil cases; (3) the Notes mischaracterize the Frye test and fail to give sufficient guidance with respect to the new standards; and (4) a separate advisory committee should be formed to consider amendments to the evidence rules in a more comprehensive manner.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. With one member dissenting, the Committee recommends adoption of the proposed amendment of Rule 702, which incorporates into the published draft minor stylistic changes. The Committee Notes have, however, been significantly expanded and clarified. The Committee expresses no view as to whether a separate advisory committee on evidence rules should be established, but believes that adoption of the proposed revision of Rule 702 should not be deferred.

Fed. R. Evid. 705. (Draft published August 1991)

Relatively non-controversial.

The Advisory Committee is unanimous in recommending adoption of the rule, which is essentially unchanged from the language published in August 1991.

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May 20, 1992

COMMENTS RECEIVED ON PROPOSED AMENDMENTS PUBLISHED FOR COMMENT IN AUGUST, 1991 AS OF MAY 15, 1992

The following notes summarize reactions of citizens commenting on the drafts published in August, 1991. The purpose of this memorandum is to provide members of the Standing Committee on Rules or others who may be interested with manageable access to the communications received by the Civil Rules Committee, which in total suffice to fill a whole file drawer of standard dimensions.

This is a scan, not a summary, of the contents of that file drawer. Thus, the notes are not comprehensive and do not include many details and arguments set forth in the written comments. With respect to those comments received late in the comment period, and especially those comments received after the period was closed, they are notably cryptic. Much of what is omitted is redundant, but no warranty is provided that all is.

Readers interested in the views of a particular individual or organization should consult the actual communication of the individual or organization in question. Those communications are on file with the Secretary of the Civil Rules Committee at the Administrative Office of the United States Courts.

The proposed drafts that were the subject of the following comments were the subject of revision by the Civil Rules Committee at its April meeting. In a number of instances, changes were made in the proposals that were responsive to some of the following comments.

Not covered by this memorandum are the few comments received on those provisions of Rules 4 and 26 that were published in 1989. Those rules are also before the Standing Committee in 1992, in slightly revised form. Changes were made in light of late comments received from the British and Swiss Embassies and from the Department of Justice.

RULE 1

The American Civil Liberties Union supports this revision.

ATLA opposes this revision as incompatible with the aims of the Rules by increasing judicial discretion.

The Assn of the Bar of the City of New York (ABCNY) committee approves this change.

The Beverly Hills Bar Association supports this revision.

The California Bar supports this revision.

The Los Angeles County Bar favors the proposed revision.

The Philadelphia Bar regards this as a fitting amendment.

The Washington TLA opposes this revision as intended to deny justice to the poor and powerless.

RULE 4

Eric Rothschild of Philadelphia supports the position of the British Embassy.

RULE 11

Alliance for Justice opposes any revision of the rule and would restore the 1982 text. In the alternative, they prefer the Frank draft.

The Admiralty and Maritime Litigation Committee of the ABA opposes this revision, expressing support for the present rule.

The ABA Section on Antitrust favors this revision, especially the safe harbor provision.

Theodore R. Tetzlaff, Chair of the Section of Litigation has submitted extensive comments said to "endeavor to reflect a consensus of the deliberations of the Council." His positions are generally consistent with the ABA Blueprint for Improving the Civil Justice System and are offered as representative of the Section. They may be compared to the views expressed by his predecessors, Loren Kieve and Michael Tigar. The Tetzlaff paper is hereinafter referred to as the position of Theodore Tetzlaff, Chair, and should be understood to be more than a personal statement by him. With respect to Rule 11, Chairman Tetzlaff is generally supportive of the proposed revision. He would extend the frivolousness standard to cover all aspects of the rule. He also urges that the moving party be required to move "at the earliest practicable opportunity" upon pain of waiver, and that the safe harbor apply to sua sponte proceedings. He would also make it clear that a withdrawal is not an admission, and favors the "paper taken as a whole" notion of the Frank draft. And he reports the Section's view that liability should be personal to the signer and should not be extended to the firm. Appended to his paper are comments of other Section members on Rule 11, and the results of a survey of member opinions on the rule.

The Torts and Insurance Section of ABA reports that its members by a small margin prefer the proposed draft to the Frank draft.

The American Civil Liberties Union prefers the proposed revision to the 1983 draft, but urges that it does not go far enough. It opposes the extension of the certification period beyond the occasion of signing the pleading, and opposes "argument identification" requirements that would re-establish the rule of the famous district court decision in *Golden Eagle*. It also notes that the safe-harbor will not protect litigants who in good faith believe that their positions are not unfounded. For these reasons, the ACLU favors the John Frank proposal.

The American College of Trial Lawyers continues to prefer its draft revision of Rule 11, finding the published proposal "will not get the job done." They regard Rule 11 as a disaster area requiring radical relief. They praise the safe harbor provision and the procedural requirements, but would continue to prefer that sanctions be paid to the court, that they be supported by clear and convincing evidence, and be discretionary with the trial court.

American Corporate Counsel Assn opposes any weakening of this rule and therefore opposes the revision.

The American Council of Life Insurance favors the proposed revision, but suggests that (b)(3) needs further clarification. They emphasize support for law firm liability and to the safe harbor provision.

American Insurance Association opposes this revision; it favors the present rule. It opposes the safe harbor. It urges also that the rule should be applicable to discovery practice as well as other pleadings and motions.

The American Judicature Society has published its latest study of Rule 11. It reports the following data of particular interest:

(a) 45% of the sanctions imposed were for less that $1500. 68% were less than $5000.

(b) Discovery abuse is a prominent cause of Rule 11 activity.

(c) Civil rights cases are particularly prominent among cases in which these activities occur. These data appear to include §1983 cases where, as was known, activity is relatively high.

(d) More than half of the reported Rule 11 activity occurred outside litigation in the form of threats, but the level of activity "does not seem to rise to the level of a cottage industry as sometimes alleged."

(e) Of lawyers reporting activity, 60% represented defendants, and they reported more sanctions on adversaries than on themselves.

(f) 60% of the lawyers reported changing their behavior in response to the 1983 amendment, almost 40% reporting that they are more careful in reviewing what they file. This was most common among commercial litigators. Lawyers do sometimes use Rule 11 to "cool out" their clients; this is more likely to happen among plaintiffs lawyers and big firm lawyers. Almost no lawyer reported that he or she had not asserted a claim or defense because of Rule 11, but some cases may have been declined.

(g) The responses are not very different from one circuit to another among the four circuits examined.

While generally applauding the proposed revision, the ABCNY committee is troubled by the continuing duty imposed by the draft revision. They urge that lawyers cannot keep looking over their shoulders to avoid sanctions, and that the proposed rule offers an incentive to blunderbuss pleadings. They resist an obligation to amend formal pleadings that may have been abandoned in the course of discovery. They also question the clarity of the "argument identification" requirement as it would be imposed by the draft. They favor, along with the 1988 ABA report, an imposition of sanctions for pleadings filed with an improper purpose even though not objectively defective. They especially applaud the replacement of the term "good faith argument" with "nonfrivolous" and the recognition that discovery may be needed for the establishment of many claims. They continue to favor discretionary rather than a mandatory rule. They approve of the safe harbor and of the provisions of subdivision (c), but with the modification that outrageous conduct should be sanctionable even if the pleading is withdrawn. They also point to the need to impose procedural requirements for sanctions imposed in the exercise of inherent powers, e.g. *Chambers v. Nasco*. They disagree that sanctions on a party should be limited to improper purpose cases. Acknowledging that this limits the conflict of interest problem, they urge that it provides inadequate incentive to clients not to mislead their lawyers. They urge a subjective bad faith test for client liability, the test rejected by the Court in *Business Guides*. They favor a requirement of written findings and conclusions in sanctions cases, as a "stop and think" requirement for the court. They approve the linkage of Rule 11 to Rule 56 in the proposed committee Notes.

ATLA favors the Frank draft.

The Professional Responsibility Committee of ABCNY endorses most of this revision. It opposes the continuing duty feature, favors making the provision permissive rather than mandatory, urges adoption of a more stringent frivolousness standard, and urges that the procedural protections be extended to all sanctions powers, including inherent powers are those imposed pursuant to §1927.

The Arkansas Bar Association favors the safe-harbor, but would otherwise prefer the Frank draft.

The Committee has received a "Bench-Bar Proposal" from certain lawyers and judges. Its major feature is that sanctions would be paid into court, not to the opposing side. Advocates of this proposal are John Frank, Pat Higginbotham, Leon Higginbotham, Mary Schroeder, Jerold Solovy, Laura Kaster, Bill Wagner, Francis Fox, and Hugh Jones. It is hereafter referred to as the Frank draft, which has drawn noticeable support as an alternative to that published by the Committee.

The California Bar is concerned that the revision eliminates the need for prefiling inquiry; it opposes the safe harbor. It also expresses concern that consideration of the financial resources of offenders will lead to inequitable results and encourage impecunious litigants to violate the rule. It supports the other features of the revision, particularly the requirement of findings.

The California Trials Lawyers Association opposes this revision.

A committee of the bar of C.D.Cal. oppose this revision. They do not believe that it will solve problems with the present rule and will give rise to more new litigation. A substantial minority favors the safe harbor idea.

The Chicago Bar Association favors this revision, but urges that the certification should not be continuing, that the party should not be required to designate those allegations for which there is evidentiary support, that local counsel aiding counsel from elsewhere should not be subject to sanctions except in extraordinary circumstances, that the conclusion of the case should not bar a Rule 11 filing, that the safe harbor should apply to sua sponte sanction proceedings, and that sanctions should be imposed upon parties for allegations lacking evidentiary support.

The Colorado Bar Association prefers "may" to "shall."

The Connecticut Bar Association prefers the Frank draft, but would add the safe harbor provision to it.

The Delaware Bar favors the Frank proposal.

The Department of Justice favors the revision, but opposes the continuing duty feature, urges that it be made more clear that rule applies to allegations, etc. and not merely to the paper as a whole, suggests that a sanction for government lawyers might be a reference to the AG or department head, and makes numerous suggestions with respect to the Committee Notes.

The Federal Bar Association endorses this revision with two qualifications - that the safe harbor should apply in sua sponte proceedings and that (c) should limit sanctions to those who are knowingly responsible for violations.

The Federal Judicial Center Study made at the request of the Committee has been circulated. This study was a close examination of Rule 11 disputes in five district courts and a survey of district judges.

In the 5 districts, fewer than 3% of cases filed resulted in Rule 11 activity; only a small fraction of the more than 1000 Rule 11 matters discovered had resulted in a published opinion. Opposition papers were filed in a substantial majority of the cases. Dispositions may be postponed to the end of the case when the ruling on the issue is often subsumed in the disposition of the case. 72% of judges responded that the time taken to rule on motions was outweighed by the benefits of the rule.

There was substantial variation among individual judges in the use of the rule. 27% of the judges responding had not used the rule at all in the period studied, and 3% had used it eleven or more times. 1 judge per 100 had proceeded with sanctions sua sponte on six or more occasions, while 70% had never proceeded sua sponte. The sample of cases from the five districts generated 85 appeals in which Rule 11 rulings were challenged; almost half were still pending; no case denying sanctions had been reversed, but four sanctions orders had been.

While there was generally an opportunity to file opposition papers, there may have been inadequate opportunity to respond in some cases in which the court was action sua sponte.

Most sanctions were monetary, the medians varying in the districts between $1000 and $3776; the largest sanction in the sample was $50,000. 76% of the judges had never employed a non-monetary sanction. More plaintiff lawyers than defense lawyers were sanctioned, but in four of the five districts, the difference was not great. Across the five districts, between 34% and 54% of the Rule 11 matters targeted complaints, and only 4% involved answers, but the post-pleading sanctions may have been more frequently imposed in defendants. More than half the judges warned lawyers about the possibility of sanctions being imposed on particular filings in at least a few cases.

The sanctions activity was concentrated in contract, tort, and civil rights cases. There were more motions in civil rights cases. In four of the five districts, the imposition rate was in line with that for other types of cases, but in N.D.Ga., the rate was slightly higher in civil rights cases than in contract or tort cases.

In civil rights cases, the most common reason for imposition of a sanction was inadequate legal inquiry. Willging, after reading all the civil rights cases in which sanctions were imposed, concluded that there was not a reasonable basis in that data for an attorney to

fear sanctions. Nevertheless, 25 of the 503 judges thought that the rule has impeded the development of the law.

65% of the judges responding thought that groundless litigation was a small problem, 22 % rated it as moderate, and only 10% said that it is not a problem. Only 4% thought that it was a large problem. 41% thought the problem to have been alleviated somewhat by the 1983 rule.

Most judges find that some or many Rule 11 motions are groundless. Two thirds of the judges regarded the conflict of interest issue arising when a sanctions motion is filed as a significant problem. Half the judges responding thought that Rule 11 motions elevate hard feelings. Feelings were mixed among judges as to whether Rule 11 makes it harder or easier to settle a case. The data is quite inconclusive on the reality.

"The findings presented so far do not suggest a strong judicial endorsement for amended Rule 11. Although only a minority of judges see a negative impact on the conduct of litigation, it is a sizeable minority and suggests that at least some problem exists. In addition, .. our study of case files in five districts documented significant costs and burdens associated with ruling on Rule 11 matters. On the positive side, judges have found the rule moderately effective as a deterrent to groundless litigation. ... Despite the misgivings many judges have about Rule 11's costs and its impact on litigation, a great majority believe the rule has had a positive impact overall and should be retained in its present form." This opinion was expressed before publication of the present proposal.

A Committee of the DC Bar suggests that the kind of notice required by the safe harbor provision needs to be more specific. They believe that a requirement of a detailed memorandum of law would have too great a deterrent effect on the use of the rule. They assert that the proposal is ambiguous as to whether a party receiving a show cause order under (c)(1)(B) may withdraw. They also express concern that the frequent amendments of pleadings could be very onerous.

Fisher & Phillips of Atlanta generally favors the present rule and specifically disapproves of the safe harbor.

The Georgia Bar supports the Frank draft.

The Georgia Trial Lawyers Association prefers the Frank draft or the present rule to the proposed revision.

Hunton & Williams of Richmond favor the Frank draft with respect to treatment of the paper "as a whole", but approve the safe harbor. It favors the elimination of overlap of Rule 11 with discovery.

The Illinois Bar favors the Frank draft.

The Kentucky Bar favors the Frank draft.

Kincaid Gianunzio Caudle & Hubert of Oakland CA favor the 1983 revision of the rule and seem to disfavor any revision at this time.

Lawyers for Civil Justice approves the retention of the overlap between Rules 11 and 37 as a means of providing courts with greater flexibility. They also favor determination before trial of the issue of expert qualifications and need for expert testimony.

The Los Angeles County Bar favors the proposed revision.

The Los Angeles Chapter of the Federal Bar Association generally favors this revision. They oppose any overlap with the discovery sanctions provision. They suggest that any continuing certification should be limited to claims or defenses presented by a party in its pleadings. They suggest non-deletion of the certification that the signer has read the paper.

The Michigan Bar opposes any revision of the present rule.

The Mississippi Defense Lawyers Assn prefers a subjective good faith standard for this rule.

The Montana Bar opposes the safe harbor.

The NAACP Legal Defense Fund favors the 1982 version of the rule, or the Frank draft. It urges the committee to limit the certification to the pleading or motion signed, and that it be judged as a whole for sanctions purposes. It also opposes the argument identification provision. It favors the safe harbor.

National Assn of Securities and Commercial Law Attorneys prefers the Frank draft.

The Nevada Bar favors the Frank proposal.

The New Jersey Bar opposes the extension of the rule to create a continuing duty with respect to all papers. It applauds the safe harbor and agrees with the revision regarding responsibility of partners and parties.

A committee of the New York County Bar favors the extension of the rule to law firms, but opposes imposition of monetary fines on represented parties. It favors the safe harbor provision, but would add that withdrawal should not be used against a party in any way, and would not require that a full motion be prepared to institute the 21-day period. They would also preclude filing the motion until the court has ruled on the underlying contention. It also favors the "paper as a whole" approach.

The New York State Bar Committee would prefer the "Bench-Bar Proposal" and specifically urge that the triggering event should be a signature of counsel, that each paper should be viewed as a whole, and that the sanction be made discretionary. They oppose the duty of candor provision and find the safe harbor procedure unduly complex, but otherwise favor changes proposed.

Ogletree Deakins Nash Smoak & Stewart of Greenville SC oppose any weakening of Rule 11 as proposed.

A Committee of the Orange County (Cal) bar urges that sanctions be discretionary with the court. They find the safe harbor provision too cumbersome and possibly an inducement to file harassing papers that can be safely withdrawn. They suggest a meet-and-confer requirement. They also favor a requirement that the demand set forth any cases or documents that would be used in support of the Rule 11 motion. They also favor a right to oral argument on the motion.

The Pacific Legal Foundation opposes this revision, particularly those provisions that extend the availability of sanctions and the provision for fees on the motion for sanction. They especially oppose law firm liability as the "most radical change."

The Philadelphia Bar favors that Rule 11 be eliminated.

The Public Citizen Litigation Group opposes any overlap use of Rule 11 in discovery matters. It generally favors the revision as an improvement on the present rule. They commend the safe harbor, but urge that it should not be necessary to prepare the motion as long as adequate notice of the defect is provided. They also question the clarity of the timing provisions in the safe harbor. They suggest that

"either on motion or on the court's initiative" can be stricken from lines 65-66. They oppose the requirement that a party identify allegations lacking evidentiary support. They generally oppose sua sponte sanctions and urge that the Notes emphasize that this course should be pursued only in instances of serious misconduct. They also question the need of a request for reasons.

Rowan Companies, Inc. opposes this revision as a weakening of the rule.

The Southern District of Iowa supports this revision.

Trial Lawyers for Public Justice favor the Frank draft.

Victoria E. Ullmann of Columbus OH writes an account of her experience with Rule 11; she urges that its use should be precluded in cases in which the court attempts to mediate the dispute.

The Washington Legal Foundation opposes revision of the present rule, and especially opposes the safe harbor provision as one that would impair the effectiveness of the rule.

The Washington State Bar favors a return to the 1982 version of this rule.

The Washington TLA opposes this revision as an instrument to increase the level of Rule 11 activity.

The Wichita Bar Assn. supports the proposed revision.

The Wisconsin Bar opposes revision of Rule 11.

J. Francis Allain, Esq., of New Orleans, offers comments congruent with the current proposal.

Hon. Francis J. Boyle suggests that Rule 11 require the disclosure of FAX numbers as well as telephone numbers.

T. Mack Brabham and fourteen other lawyers in McComb MS oppose Rule 11 as a weapon used only against plaintiffs.

James E. Carbine, Esq., of Baltimore, endorses all the recommendations of Frank, Napolitano and Resnik.

Prof. Margaret Chon of Syracuse suggests that the safe harbor provision does not mesh with Rule 41(a). She also expresses concern about sanctions being imposed long after the event, as in *Cooter & Gell*; she urges that this is likely to happen sua sponte if it happens at all.

Lawrence B. Clark, Esq., of Birmingham AL argues that the limitation on sanctions against a represented party to improper purpose cases is too restrictive. Clients who lie to their lawyers, he contends, should be sanctioned.

Professor George Cochran of the University of Mississippi published an article critical of the existing Rule 11. He argues that the draft revision does not go far enough in limiting the use of fee-shifting and should require findings of fact in order to support closer appellate review of sanctions. 61 MISS. L. REV. 5.

Mary Coffey of Saint Louis finds the safe harbor provision an improvement but urges the use of a subjective standard.

Roy B. Dalton, Esq. of Orlando opposes the provision entitling the party resisting sanctions to

attorneys' fees for success. He argues that this will chill Rule 11 motions.

Winslow Drummond, Esq. of Little Rock regards the revision as an improvement.

Ms. Rita Fellers of Chapel Hill NC urges that the nature of a frivolous suit be made explicit. "The selective use of this rule against lawyers who represent disenfranchised people in their attempts to obtain legal remedies is a threat to the civil rights of all citizens."

In addition to supporting the Bench-Bar Proposal, John Frank, Janet Napolitano and Professor Judith Resnik urge that Rule 11 should be made explicitly applicable only to sanctions for pleadings and writings in support of or in opposition to them, and that Rules 16, 26, and 37 should control pretrial and discovery.

William C. Fuerste, Esq, of Dubuque, expresses opposition to Rule 11 as a means of making lawyer sanctions part of everyday life at the bar.

Keith Gerrard, Esq., of Seattle opposes the loosening of the standard imposed by the present rule. He finds the reasons stated in the Notes unpersuasive. He opposes a safe harbor, but would allow the court to consider a withdrawal in mitigation of the sanction.

Hugh Q. Gottschalk, Esq., of Denver, opposes the provision that permits a party identify allegations not supported by evidence but may be supported by discovery. He disfavors any weakening of the rule.

Hon John F Grady, ND Ill, expresses discomfort about "likely to bear." He doubts the need for the word "direct" as a restriction on fees. He argues that the signer should be responsible always; he is not sure its worth the candle to impose sanctions on represented parties who don't sign. If client is to be covered, then the standard should be the same, he urges. He points to a particular example suggesting that the existence of "improper purpose" may be difficult to distinguish from mere groundlessness. Judge Grady He suggests that sanctions should be explained without need of a request for an explanation. He is also unclear as to the utility of the phrase "similarly situated." He also expresses concern that the "race to the courthouse" created by the timing of the voluntary dismissal or settlement, fearing that this will produce factual disputes as to whether timely action was taken to avoid sanctions.

Harold A. Haddon of New York, Loren Kieve of Washington, and Prof. Michael Tigar of the University of Texas, former officers of the ABA Litigation Section, jointly endorse the "bench-bar" proposal authored by John P. Frank.

Leland F. Hagen, Esq. of Fargo opposes those aspects of the revision that make the rule more onerous.

Jon L. Heberling, Esq., of Kalispell MT approves this revision "reluctantly."

Prof. Gerald P. Hess of Gonzaga University has published an article on Rule 11 in volume 75 of the Marquette Law Review. He generally finds the revision supported by his data, gathered in the two districts in Washington, but questions the wisdom of expanding the certification.

Laurence R. Jensen, Esq. of San Jose CA believes that this rule should be scrapped.

Greg Joseph, Esq, New York, urges that an insertion be made in the proposed draft to make the rule explicitly applicable to a motion for sanctions under this or any other rule or under any inherent power of the court. He expresses alarm at the opinion of the Court in *Chambers v. Nasco*.

M. J. Keefe, Esq., of Albuquerque, opposes this revision as an undesirable weakening of the rule.

Ernest Lane Esq of Greenville MS favors a subjective test for the imposition of sanctions.

Professor Martin Louis, University of North Carolina, finds in proposed 11(b)(3) an implication that a denial on information and belief avers that acquisition of evidence to disprove the fact is likely. "Otherwise, a defendant who cannot now or in the future disprove an allegation made by plaintiff cannot put plaintiff to her proof, even though plaintiff's proof is not overwhelming." He notes that this would be a material change. Professor Louis also notes the change in extending sanctions to represented parties and suggests that this will multiply the occasions for considering Rule 11 sanctions. And he notes that the safe harbor provision has no safeguard, that an unscrupulous attorney can keep filing and withdrawing without sanction. He also notes that, as under the present rule, the court is not likely to rule on a sanctions motion until it disposes of the merits of the paper challenged by that motion. This "recognizes and formalizes the poker game into which many attorneys have attempted to turn Rule 11." Because litigants with more resources are likely to be better poker players, the safe harbor provision "which appears to the Committee's only concession to critics of Rule 11, in fact may be only an occasional aid to those who are threatened with sanctions, but of substantial use to those who seek sanctions."

Paul A. Manion, Esq. of Pittsburgh generally favors this revision, but opposes that part of (b)(3) requiring a party to identify those allegations for which no evidence is presently available.

Robert Meyer, Esq., of Las Cruces NM favors the return of Rule 11 to its 1982 form.

Hon. J. Frederick Motz, D.Md., on behalf of the Local Rules Committee of his court, expresses the fear that "information and belief" standards in Rule 11 will eviscerate the rule.

Eugene J. Murret, Circuit Executive of 10th cir., suggests that the safe harbor should be available even when court proceeds sua sponte.

Robert W. Powell of Detroit, for the firm of Dickinson, Wright et al favors this revision.

Edward Ronwin, Esq. of Urbandale IA, urges that Rule 11 be restored to its pre-1983 text. If the rule must be kept, he favors a $1000 cap, that there should be no sanction for a mistake of law, and makes ten additional suggestions that have been considered by the Committee.

Robert S. Rosemurgy, Esq., of Escanaba MI expresses support for this revision.

Professor Maurice Rosenberg of Columbia University favors this revision. He questions, however, the provision for continuing certification.

William A. Rossbach, Esq., of Missoula MT supports the Frank draft.

Edwin A. Rothschild, Esq. of Chicago, commends the revision of Rule 11, but takes exception to the substitution of the term "non-frivolous. He perceives that sanctions are now only imposed on parties who have misrepresented the law, and that this is the way it should be. He regrets the deletion of the clause "identified as such" to describe novel legal arguments that are not sanctionable.

Richard T. Ruth, Esq. of Erie urges that Rule 11 be amended simply by replacing "shall" with "may." He asserts that the purpose of the rule was to prevent civil rights litigation and has and will be used for that purpose, and his aim would be to allow judges not to impose sanctions on others.

Donna S. Sears of Lander, WY favors this revision, especially the provision for fees to the prevailing party and the safe harbor provision.

Curtis E. Shirley Esq. of Indianapolis, writes in criticism of the safe harbor provision. He argues that it weakens the message of Rule 11 and will allow lawyers to file sanctionable papers and rely on their adversaries to do the research and investigation. He also contends that 21 days is too long in relation to the shorter period allowed for responses to summary judgment motions.

Christopher C. Skambis, Esq., of Orlando suggests mandatory assessment of costs against a party unsuccessfully moving for sanctions.

Laura D. Stith of Kansas City applauds this revision.

Paul L. Stritmatter, Esq., of Hoquiam WA believes that the proposed amendments make a bad rule worse. He is not specific in his statement of reasons.

Professor Carl Tobias, University of Montana, has published an article reviewing sanctions in civil rights cases. He finds a trend in the appellate cases toward the protection of civil rights plaintiffs, but is uncertain that the improvement is felt in all districts, or beneath the visible surface. 36 VILLANOVA L. REV. 105 (1991). Professor Tobias has also published a substantial article on the proposed revision; it appears in the March, 1992 issue of the Univ of Miami Law Review. He urges that the revision still leaves the district courts with too much discretion, that the continuing duty be stricken, and that good faith not be replaced by "non-friviolous." He regards the safe harbor and other aspects of the proposal as improvements.

Prof. Georgene M. Vairo has published an article in Volume 60 of the Fordham Law Review on Rule 11. It is descriptive of recent cases and proposals.

Hon. H. David Young, E.D. Ark. fears that this revision will produce still more Rule 11 litigation. He does not specify the reasons for that fear.

RULE 16

Theodore Tetzlaff, Chair, expresses concern that the agenda at pretrial conference is becoming overlong; he suggests that the commentary should disapprove truncation of discovery or trials in the absence of compelling reasons. He is also concerned that the parties be provided with flexibility to work out their own discovery schedules.

The American Board of Trial Advocates opposes mandatory ADR and limits on the length of trials as denials of Seventh Amendment rights.

The American Civil Liberties Union favors the revision toward case management, but questions whether an early conference can deal with expert witness and summary judgment questions. It urges that scheduling conferences should not be mandatory for the court. It opposes mandatory ADR. It suggests that Rule 16 conferences should be on the record if any party so requests.

American Insurance Association favors this revision except that it opposes coerced settlement and fears that the Note is not strong enough to prevent that evil. It is also concerned that the scheduling order be made before all parties have been joined.

The American Intellectual Property Assn favors this revision but would require the scheduling conference.

The Arkansas Assn of Defense Counsel oppose mandatory ADR and limits on the length of trials.

The Arkansas Bar Association opposes this revision; it disapproves of managerial judging and "judge-driven" litigation.

The ABCNY Committee generally approves this revision and finds it consistent with the Judicial Reform Act. On the whole, they favor hands-on case management. They suggest extending the time for the initial conference, especially in light of the state of most federal dockets.

The Beverly Hills Bar Assn generally supports this revision. It suggests that show cause order should be served before summary judgment is entered sua sponte. It questions the utility of a scheduling order entered before all parties have been served. It suggests that the Notes reflect that limits on experts should be imposed on a case-by-case basis.

The California Bar opposes mandatory ADR at the expense of the parties, and urge a show cause order before summary judgment is entered sua sponte. It also questions the utility of a scheduling order entered before all parties have been served. It suggests that the Notes reflect that limits on experts should be imposed on a case-by-case basis.

A committee of the bar of C.D.Cal. favors this revision.

The Chicago Bar Assn favors the revision except that it disfavors summary judgment at pretrial without special notice.

The Chicago Council of Lawyers approves the idea of an early scheduling conference that should follow informal exchange of information by the parties.

The Department of Justice expresses concern about (b)(5), noting that it operates on a slower schedule than other parties. The Department opposes mandatory ADR, and expresses concern that the standard for summary judgment stated in this rule is different from that stated in Rule 56.

The Federal Bar Association favors this revision except (b)(4). They suggest further clarification of (b)(6) and the establishment of a timetable for (b)(5).

Hunton & Williams of Richmond favors this revision.

Lawyers for Civil Justice oppose authorizing the court to compel attendance of parties at a settlement conference. They suggest authorizing the court to set a firm trial date, as suggested by the Civil Justice Act. They favor the language suggested by the Brookings group authorizing the court to require attendance by "authorized representatives of the parties, including counsel, with decisionmaking authority." Lawyers for Civil Justice would require a scheduling conference in every case and a requirement that counsel meet and confer prior to the conference.

The Los Angeles Chapter of the Federal Bar Association urge that the scheduling conference should not occur until the case is at issue. They express concern that the trial judge might foreclose expertise that is deemed too expensive. They ask that the Notes be clear that this rule in no way supplants the requirements of Rule 56. They question the Committee Notes regarding mandatory ADR, which they oppose if conducted with costs to the parties.

The Local Rules Committee of D.Md. is concerned that the present rule 16 implies a scheduling conference prior to a scheduling order, an event that generally occurs only in complex cases.

The Los Angeles County Bar favors the revision as proposed.

Kevin F. Maloney Esq of Boston opposes this revision; he reports that there is no problem to which it is addressed.

The Montana Chapter of ABOTA opposes (c)(15) and urges that the length of presentations should be under the control of counsel.

The NAACP Legal Defense Fund urges that the Notes should caution against using powers under this rule to force premature dispositions; their concerns derive from the frequency of their need to conduct extensive discovery.

The New Jersey Bar is concerned that summary judgments may be granted pursuant to (b)(5) without adequate notice.

The New York State Bar Committee favors the additions to Rule 16, urging that they are warranted as clarifications of powers already available to the court.

The Philadelphia Bar favors this revision, except that it opposes (b)(4) and the last sentence of (c)(16).

The Public Citizen Litigation Group opposes (b)(5) as a source of difficulty in multi-defendant cases. The problem is most likely to arise where the US is a defendant because it has longer time to answer than other defendants. Their suggestion is "The order shall enter as soon as practicable but in no event more than 120 days after filing of the complaint, or 60 days after the appearance of a defendant, whichever is later." The Group commends the additions calling attention to the possible rulings at such a conference, including summary judgment, but they question enlargements of the power of the court, particularly compelling parties to participate in extrajudicial proceedings. They oppose pretrial determinations of admissibility of opinion evidence. They do not believe that there is a problem of parties feeling obliged to rebut expert evidence amassed by resourceful adversaries.

The Southern District of Iowa supports this revision.

Trial Lawyers for Public Justice oppose the provision authorizing the court to control the presentation of expert testimony.

The Washington State Bar opposes bifurcation of liability and damage issues in separate trials.

Washington TLA opposes this revision as an increase in the discretion of the court.

S. Paul Battaglia, Esq., of Syracuse, approves of this revision except for mandatory ADR, which he opposes.

T. Mack Brabham and fourteen other lawyers in McComb MS oppose this revision as the most mischievous of all because it grants too much power to the judge.

Mary Coffey of Saint Louis urges that this proposal gives too much control to the court over the conduct of the trial.

Steven J. Cologne, Esq., of San Diego opposes the provision allowing judges to control the length of trials.

Roy Dalton, Esq., of Orlando urges that it is inappropriate for the court to rule on experts at the pretrial stage.

Professor Kim Dayton of the University of Kansas opposes (c)(9) and argues that the Civil Justice Reform Act implicitly rejected its premise. He enclosed his article on *The Myth of Alternative Dispute Resolution in the Federal Courts* published in the Iowa Law Review.

Winslow Drummond Esq of Little Rock opposes mandatory ADR.

Frank, Napolitano & Resnik are troubled by Rule 16. They suggest a sharper distinction be made between scheduling conferences, conferences after discovery, and settlement conferences. They are also concerned that the Committee has shortened the time to the scheduling conference. Many of the matters now suggested as proper agenda items for a pretrial conference cannot be managed until after discovery, such as limitations on evidence to be presented at trial. They also suggest that the rule should be explicit that "An order providing for summary adjudication pursuant to Rule 56, of any claim, defense, or issue may not occur at a Rule 16 conference without prior written notice to the parties and an adequate opportunity to discover an present material pertinent to the adjudication." They regard the endorsement of bifurcation of trial to be overbroad. They note concern about compulsory ADR. They argue that *In re Novak*, 932 F. 2d 1397 (11th cir 1991) goes too far and propose language limiting the power of the court to compel attendance at settlement conferences. They urge the need to require a record of proceedings under Rule 16, and to clarify sanctions, pointing to a number of cases said to demonstrate abuse of Rule 16.

Lee Hagen, Esq. of Fargo opposes any increases in the power of the court to control the extent and content of the trial.

Patrick E. Hollingsworth, Esq., of Little Rock argues that a Rule 16 conference is too late to begin discussions of ADR.

Jack E. Horsley, Esq., of Mt. Vernon, IL, commends the proposed revision of Rule 16.

Paul A. Manion, Esq., of Pittsburgh, favors this revision.

Ms. Paula J. Nelson of Victorville CA opposes limitations on the length of trial or the number of witnesses.

Marc A. Nerenstone, Esq., of Washington DC finds (c)(5) to be unnecessary - the court can schedule a hearing on a Rule 56 motion at the time of pretrial whenever it chooses.

William A. Rossbach, Esq., of Missoula MT argues that some of the items on the agenda for a scheduling conference, such as the limits on expert testimony, cannot be resolved early in the proceeding. He is also troubled about summary judgments being entered without warning. And he opposes mandatory ADR. He suggests that sanctions under 16(f) should be imposed only when necessary and should be the least severe required to effect the purpose of the rule.

Susan Vogel Saladoff of Rockville MD opposes judicial control of the use of experts or on the length of trials.

Samuel M. Shapiro, Esq of Rockville MD opposes pretrial limitation on expert testimony or on the length of trials.

Hon. Donald J. Tobin of San Diego supports the views of Gail Friend.

Thomas A. Tozer, Esq., of Chicago opposes the power to compel attendance of parties at pretrial. His reasons are stated fully in his article in 66 Indiana L. J. 977 He calls attention to the fact that the parties may have interests that conflict with those of the judge desiring settlement to clear the docket. He favors authorizing the judge to communicate directly to clients regarding settlement offers as the means of preventing lawyers from failing to disclose them.

H. Woodruff Turner, David G. Klaber, Robert B. Sommer, and Thomas A. Donavan of Pittsburgh urge that Rule 16 require the trial judge to meet with the parties early in the life of each case.

Hon. Henry Woods, E.D.Ark., opposes mandatory ADR.

Hon. H. David Young, E.D. Ark., opposes mandatory ADR.

RULE 26

The Administrative Office of the United States Courts reports that many districts have adopted "tracking" plans pursuant to CJRA, and that 21 of the plans have adopted some version of (a)(1).

The Alliance of American Insurers opposes (a)(1) as vague and compromising of lawyer-client relations. It argues that it will prolong litigation and increase its expense.

Alliance for Justice opposes the revision of (b)(4) allowing the court to preclude discovery disproportionate to the stakes. It opposes (a)(2) as undercutting the ability of plaintiffs to prove their cases.

The American Association of Railroads opposes (a)(1).

The American Bar Association has resolved that appropriate limitations should be imposed on pre-trial discovery, that discovery beyond limits established by the court should not be permitted, and that protective orders should in appropriate circumstances require the discovering party to bear the costs, including the time of non-legal personnel.

The Admiralty and Maritime Litigation Committee of the ABA is concerned about these proposed revisions. They urge that exigent litigation should be exempt. Their concerns are addressed to (a)(1).

Theodore Tetzlaff, Chair, opposes (a)(1) and supports (a)(2) with the suggestions that (a)(2)(A) should not exclude discovery of earlier testimony of the expert and that the disclosure should be keyed to the discovery period rather than the date set for trial. He recommends abolition of (b)(4)(B) pertaining to nontestifying experts. He also supports other disclosure provisions but questions the term "if the need arises." With respect to (b)(5), he suggests a presumptive cutoff date and an exception for the disclosure of manes of parties to a communication where such disclosure would reveal counsel's mental impressions. Mr. Tetzlaff also noted that many Delay Reduction Plans provide for disclosure; he provided the committee with an overview of the provisions of such plans.

The Torts and Insurance Section of ABA questions (a)(1) and (a)(2).

The Advisory Group for E.D.N.Y. urges a three-year moratorium on national rules affecting the Judicial Reform Act local rules.

The American Board of Trial Advocates generally favors disclosure, but fears the present proposal will increase motion practice especially by lawyers required to bill many hours a year.

The American Civil Liberties Union is concerned about mandatory disclosure as an interference with attorney-client relations. It is also concerned about reliance upon local options; it urges adherence to national standards that should be the same in all districts. It favors the revisions extending the duty to supplement. It is especially concerned about the requirement of expert reports in civil rights cases, especially since the fees of the expert are not taxable. It opposes flexibility through local rules. It suggests that the report should be prepared at the expense of the opposing party. It also opposes the revision of (b)(2) to permit limitations on discovery, arguing that the present language is satisfactory.

The Federal Courts Committee of the American College of Trial Lawyers supports the disclosure requirements. They suggest that disclosure of expert testimony should be staggered, the plaintiff disclosing first. They also disfavor the sanctions provision of Rule 26(g).

ACCA opposes voluntary disclosure as unworkable. Indeed, it opposes continued availability of discovery unless it is amended to provide sharper focus.

American Insurance Association supports the position of Lawyers for Civil Justice.

The American Institute of Certified Public Accountants opposes (a)(1).

The American Intellectual Property Assn opposes (a)(1), but supports (a)(2).

ATLA opposes all provisions for voluntary disclosure as disadvantageous to personal injury plaintiffs. They emphasize the burden of preparing exhibits 90 days in advance of trial. They also specifically object to the failure of (g) to require a party as well as counsel to certify that disclosures are complete.

Arkansas Association of Defense Counsel opposes the changes in the discovery process. They note that the defendant does not know in the first 30 days what its own defenses are. They also note that typically they do not retain an expert until the plaintiff does so; hence they will be burdened by a requirement of simultaneous disclosure.

The Association of the Bar of the City of New York Committee on Federal Courts (ABCNY) commented on the spring draft of Rule 26, but the comments were not received in time to be considered carefully at the May meeting. ABCNY urges postponement of discovery revision pending assimilation of Biden Committee revisions. They argue that there may be no one best system of discovery and that local experimentation and adaptation to local culture may be best. Dissenting members urge that there should be no local rules bearing on discovery, that any one system is better than many. This contention was not renewed in their November comment on the published proposal.

ABCNY does not object to the idea of disclosure if it can be accomplished efficiently. They do not believe, however that "baseline discovery" is much of a problem, or that this reform will effect much economy. They note the difficulty of the phrase "bear significantly." They are concerned that counsel should not be required to identify in advance of a request documents that undercut the client's contentions. They question whether the party must disclose hostile witnesses, stating that the proposed draft is not clear on this point. They urge clarification of the entitlement of a party to a stay of disclosure where the demand has been made by a party having a disclosure burden that is slight. They also wish it to be made clear that a party using an interrogatory redundantly to disclosure is merely wasting an interrogatory and is not exposed to sanctions.

ABCNY endorses the idea of 26(a)(2). They urge that it should be made clear that the opposing party may of right examine the retained expert after receiving the required report. They suggest that

the 30-day rebuttal period is too short where the issue is complex. And they urge that the rule requiring the report should not be subject to local variation.

ABCNY has no objection to 26(a)(3), but urges that the result could be achieved more effectively by requiring a pretrial order and mandating that it be completed 21 days prior to trial. A purpose achieved would be to focus the parties attention on the trial agenda in time to settle earlier than on the courthouse steps.

ABCNY favors the meet-and-confer requirement. ABCNY is divided on the duty to supplement as proposed in 26(e), a majority favoring the proposal.

ABCNY favors retention of part of 26(f) by requiring courts to consider discovery rulings as part of the scheduling conference or order permitted by 16(c)(6). While it is admitted that this may be premature and that the order may need to be amended later in light of unfolding discovery, this would get the court involved at an early point.

The Beverly Hills Bar Association opposes both (a)(1) and (a)(2) and (e)(1).

The California Bar opposes this revision, except for (a)(3). They perceive a conflict between 26(g) and 11. They opposes a due diligence obligation on counsel as an excuse for some firms to bill for independent audits of clients' records.

The California Trials Lawyers Association opposes this revision.

A committee of the bar of C.D.Cal. opposes (a)(1), but favors (a)(2). It opposes (a)(3) on the ground that it is redundant to local rules already in place. They also oppose the revision of (b) to authorize cost-benefit appraisal by the court of proposed discovery.

The Chicago Bar Association favors the revision except that document disclosure should be limited to those documents favoring the disclosing party's contention, and 60-90 days should be allowed

The Chicago Council of Lawyers recommends that the timing for disclosures pursuant to (a)(1) and (a)(2) be set at the scheduling conference. The organization apparently otherwise approves the idea of mutual disclosures.

The Colorado Bar Association recommends a less detailed expert disclosure such as that required by their local rule. It also suggests that the (a)(3) disclosure should be made 80 days before trial.

The Connecticut Bar committee finds it hard to imagine why radical change would be proposed for a discovery system that has worked so effectively. It fears that the revision would require more judicial involvement. It favors retention of (f).

Defense Counsel of Delaware oppose (a)(1).

Defense Research Institute opposes (a)(1).

The Department of Justice favors disclosure requirements, but questions the standard provided in (a)(1). It opposes the accelerated disclosure provision, especially as applied to government litigation. It suggests that (a)(2) should require disclosure of the expert's compensation. It also supports (a)(3), the certification requirement, and the extension of the duty to supplement. And it makes two other suggestions based on the Civil Justice Reform report that are not embraced by the present proposals: requiring parties to connect discovery requests to allegations and precluding discovery pertinent only to an admitted fact.

Dilworth Paxson Kalish & Kauffman of Philadelphia opposes (a); its reasons seem to be addressed to (a)(1).

A Committee of the DC Bar believes that (a)(1) would accomplish little. They find the standard of disclosure vague, the sanctions severe and the potential benefit slight. As to (a)(3), they question the wisdom of distinguishing between witnesses and exhibits that a party expects to present and those whom it may present. They support the requirement of informal resolution of discovery disputes. They support (a)(2) and believe that it will reduce the need for expert depositions, but urge that the rule should specify whether drafts of the reports are discoverable.

The Federal Bar Association opposes (a)(1) and (a)(2).

The Federal Judicial Center, per Joe S. Cecil and Molly Treadway Johnson, surveyed federal judges regarding this revision. 298 district judges, being 96% of those responding, favored the proposed revision of (a)(2).

Fisher & Phillips of Atlanta contends that (a)(1) will increase the cost of litigation; they especially point to the undesirability of allowing a plaintiff to accelerate discovery while a Rule 12 motion is pending. Plaintiffs, they contend, should disclose first.

The Georgia Bar opposes this revision as an aggravation of the problem. It favors narrowing the compass of discovery.

The Hawaii Defense Lawyers Assn oppose (a)(1).

Hunton & Williams of Richmond favors the idea of early disclosure but finds the present draft "a leviathan." They oppose the proposed timing of the exchanges of expert reports, expressing particular concern about the relation to the fast-track scheduling done in E.D.Va.

The Idaho Association of Defense Counsel oppose this revision; their comments seem to be addressed to (a)(1).

The Illinois Association of Defense Counsel oppose (a)(1) as creating ethical problems for attorneys. It urges that (a)(2) should be limited to retained experts. It supports (a)(3) as proposed.

The International Association of Defense Counsel supports the position of the Lawyers for Civil Justice and recommends experimentation with disclosure provisions.

The Iowa Defense Counsel Association opposes (a)(1).

Kincaid Gianunzio Caudle & Hubert of Oakland CA disfavor the extension of Rule 11 into the sphere of discovery. They have no doubt that there is discovery abuse, but find the revision naive. If retained, there should be a staggered time for disclosure.

The Lawyers for Civil Justice oppose pre-discovery disclosures. This group also speaks for the Products Liability Advisory Council. They argue that disclosure will produce more, not less, contention, and would undermine the adversary system. They suggest that the number of 12(e) motions will greatly increase. They prefer Judge Schwarzer's proposal in that it would require disclosure by the plaintiff at the time of filing the complaint, giving defendants a better basis for knowing how to respond.

The Los Angeles County Bar opposes the revisions of both (a)(1) and (a)(2). The former it finds vague and disturbing to attorney-client relations; the latter to be unnecessary and productive of repetitive work.

The Los Angeles Chapter of the Federal Bar Association opposes (a)(1). With respect to (a)(2), they question the term "ready for trial."

The Maritime Law Association urges that the time limits applied to disclosure are unrealistic in many maritime cases. They fear that judges will not have time to hear motions for extensions. They urge that 60 days be substituted for 30.

The Local Rules Committee of D.Md. opposes the restriction of local rules on disclosure required by Rule 26 to "categories of cases."

Mehaffy & Weber of Houston oppose (a)(1).

The Michigan Association of Defense Counsel opposes the proposed revision of (a)(1).

The Montana Bar opposes the requirement of expert reports as applied to unretained experts.

The Montana Chapter of ABOTA objects to (a)(1) as unreasonably vague. They would require experts to provide more information pursuant to (a)(2). They suggest that the 4-year period should explicitly run back from the date of the report, and that the file numbers of the cases should be disclosed. With respect to (a)(3), they object to the concept of "witnesses to be called if the need arises." They are also concerned that a party should not be prevented from disproving evidence offered on an unanticipated issue. They fear that the rule operates to require a party objecting to an impeachment purpose of evidence admissible for non-impeachment purposes to make all possible objections against the chance that evidence will be used for impeachment. They also note that there is a change in language between 26(a)(2) and the supplementation provisions, one speaking of experts who may be presented and the other of experts the party expects to present.

The NAACP Legal Defense Fund urges that civil rights cases should be recognized as special in regard to the duty to disclose, plaintiffs rarely having information other than that regarding their own personal situations. They question the phrase "bears significantly" and fear that the expert witness report will be burdensome to civil rights plaintiffs. They also oppose the cost-benefit language proposed in (b)(2).

The National Association of Independent Insurers opposes (a)(1) as inconsistent with notice pleading.

The National Association of Railroad Trial Counsel fear the disclosure requirements will be difficult to meet in FELA cases and oppose 26(a)(1).

National Assn of Securities and Commercial Law Attorneys suggest that (a)(1) disclosures should be made 30 days after any response is made to the complaint.

The New Jersey Bar opposes what it perceives to be micro-management by rule of the discovery process. It fears that (a)(1) will not work. It supports (a)(2) provided that it is clear that the court can order that such disclosure be made at an earlier time.

New Jersey Defense Association opposes (a)(1).

A committee of the New York County Bar opposes (a)(1).

A section of the New York State Bar oppose the revision of this rule, and offer an alternative draft that restricts the scope of discovery. Their draft does adopt the cost-benefit language of the published proposal and would require a pre-discovery conference of counsel.

A different committee of the New York State Bar opposes (a)(1) and (a)(3).

Ogletree Deakins Nash Smoak & Stewart of Greenville SC favor disclosure and believe that the discovery process will be shortened by the proposed revision.

The Orange County Bar Committee regards the initial disclosure requirements as unrealistic; they would support the CD Cal rule as limited to materials that the party expects to use. They are concerned that 26(a)(2) may be too expensive in smaller cases.

The Philadelphia Bar opposes this change and favors experimentation under the CJRA.

The Product Liability Advisory Council opposes (a)(1), but would support a meet-and-confer rule.

The Public Citizen Litigation Group opposes (a)(1). It is not convinced that excessive discovery is a problem and feels that the 1983 amendments may have been sufficient to deal with any problem that existed. It especially opposes (b)(2). The Group endorses (a)(2), but question the meaning of "the date the case has been directed to be ready for trial." It also endorses (a)(3). It calls attention to a question whether the exclusion of evidence to be used for impeachment only means that such evidence can be excluded under 37(c)(1) if it is offered for multiple purposes. It favors the enlargement of the duty to supplement.

Robinson & Cole of Hartford CT opposes (a)(1).

Rowan Companies, Inc., suggests that (a)(1)(A) conflicts with proposed (a)(3)(A).

The South Carolina Defense Trial Attorneys' Assn opposes (a)(1).

The Southern District of Iowa supports disclosure, but urges that 120 days should be allowed for the early disclosure.

Sutherland Asbill & Brennan of Atlanta opposes (a)(1).

The Embassy of Switzerland urges that the proposed revision bearing on the Hague Convention is not consistent with some of the language in the *Aerospatiale* opinion to the effect that the Convention draws no distinction between evidence obtained from parties subject to the jurisdiction of the court and those that are not. It also objects to any use of discovery to secure information protected from disclosure by Swiss law.

Trial Lawyers for Public Justice oppose voluntary disclosure as an impediment to plaintiffs. They also urge that the changes are premature and preempt the Civil Justice Act.

The Virginia Assn of Defense Attorneys (per Thomas C. Palmer, Esq. of Richmond, opposes (a)(1) as an unreasonable imposition on defendants.

The Washington Defense Trial Lawyers oppose (a)(1) as another layer to a system already burdened with too much discovery.

The Washington State Bar lauds the aim of this revision but expresses concern about the adversary tradition.

Washington TLA opposes voluntary disclosure.

The Wichita Bar Association opposes disclosure requirements that would apply to the opposing party's claims or defenses because such disclosures blur the concept of an adversarial system.

Williams & Ranney of Missoula MT oppose (a)(1).

Wisconsin ATLA opposes 26(a)(1) as creating more problems than it solves.

Robert J. Albair, Esq. of Clayton MO,, opposes the revision of Rule 26. He perceives that (a)(1) will merely produce more paper, and that (a)(2) is ridiculous because most experts do not keep records or put anything in writing, because to do so provides more fodder for cross-examination and thereby weakens their cases.

Robert H. Alexander, Esq. of Oklahoma City opposes (a)(1) and suggests the local rule of WDOkla as an alternative to (a)(2)

Mr. Allain of New Orleans thinks that self-executing discovery is a good idea. He is, however, concerned about the handling of material that comes to light after the disclosure event. He especially applauds the provision on expert disclosure.

Mr. James R. Averitt of Birmingham AL, on behalf of Vulcan Materials Company is "alarmed" at proposed (a)(1) on account of the generality of complaints filed against his company and the resulting burden that would be placed upon it.

Dan H. Ball, Esq., of St. Louis, regards proposed (a)(1) as mischievous. He is also concerned about simultaneous exchange of expert reports and argues that plaintiffs should offer expert reports first.

S. Paul Battaglia, Esq., of Syracuse opposes (a)(1) because it introduces a vague new standard and because party-initiated discovery is satisfactory. He favors (a)(2), but questions the timing of the requirement

William C. Beatty, Esq. of Huntington WV opposes the requirement proposed in Rule 26(a)(1) as a needless burden. The rules should provide lawyers with tools and leave it up to the advocates to use them.

Sheilah L. Birnbaum of New York opposes voluntary disclosure provisions as likely to increase the cost of litigation.

Peter K. Bleakley Esq, Peter T. Grossi Esq. and Robert N. Weiner Esq of Washington DC oppose (a)(1).

Fred L. Borchard and John W. McGraw of Saginaw MI urge that (a)(1) will do nothing but increase incivility among lawyers.

T. Mack Brabham and fourteen other lawyers in McComb MS do not object to mandatory disclosure, but fear that it will be abused by defendants. They question the cost of providing both a report and an expert deposition.

Jason G. Brent Esq. of Tehachapi CA supports the views of Ms. Gail Friend.

Harold N. Bynum, Esq., of Greensboro NC finds the expressing "likely to bear significantly" too opaque, and leaves the defendant to do too much guessing. He urges that the changes are more likely to impede than to speed the process. He also opposes arbitrary limits on the amount of discovery.

John C. Cahalan Esq of Portland OR opposes (a)(1).

J. Richard Caldwell, Esq., of Tampa, urges that proposed 26(a)(1) is prejudicial to manufacturing concerns in the costs it imposes and in the threat to confidential information.

Gordon M. Carver, Esq. of Houston favors the position of the Products Liability Advisory Council.

J. P. Causey Esq of Richmond VA opposes (a)(1).

Gerard Cedrone, Esq., of Philadelphia urges that this proposal creates "a number of practical problems" not enumerated.

Walter Cheifetz, Esq.of Phoenix urges that these changes be the subject of experimentation in pilot districts before being promulgated as national rules.

Douglas C. Chumbley, Esq., of Minneapolis favors the views of the Lawyers for Civil Justice.

Steven J. Cologne, Esq., of San Diego opposes the proposed revision of (a)(1).

Clarence R. Constantakis, Esq., of Dearborn MI favors this revision.

Prof. Laura Cooper of the University of Minnesota is concerned that the draft of subdivision (e) may in some respects narrow the duty to supplement by relieving parties of the duty to make sure that previous responses remain complete and correct, particularly as regards persons having knowledge of events in dispute and expert witnesses. She urges that 26(e) continue, as in the present rule, to require that parties supplement information given with respect to experts if the information previously provided is incorrect, whether or not "the party learns that the information disclosed is not complete and correct."

Philip R. Cosgrove, Esq., of Los Angeles argues that the empirical basis for 26 is inadequate, that it is inconsistent with notice pleading, will lead to overdisclosure, one size does not fit all, is inappropriate to the adversary system, and recommends that the Committee embrace the successful disclosure rule in CD Cal.

Ms. Mary Coffey of St. Louis, urges that (a)(1) is too vague, but she favors (a)(2), but questions the redundant deposition.

Clarence R. Consantakis, Esq. of Dearborn MI supports this revision.

Donald C. Cramer, Esq., of Edmonds WA opposes (a)(1).

James T. Crowley, Esq, of Cleveland, argues that (a)(1) is a trap for the unwary and will result in much disputation over the admission of evidence at trial.

Frank J. Daily, Esq., of Milwaukee, urges that (a)(1) will increase the cost of litigation. He urges with respect to (a)(2) that the party with the burden of proof make first disclosure of expert testimony. He favors the revision of (b)(2).

D. Michael Dale, Esq., of Portland OR urges that disclosure of witnesses should not be required where the witnesses may be subject to intimidation.

Roy B. Dalton, Esq., opposes the disclosure provisions as defeating the rights of parties to prepare their own cases and use experts as they see fit.

Michael J. Danner, Esq., of Long Beach opposes 26(a)(1) as requiring too much of defendants.

Craig M. Daugherty, Esq., of Tyler TX, doubts that Rule 26 will cause defense lawyers to become sheep being led to slaughter, or that opposing counsel will develop their adversaries' cases as the adversaries would.

Ronald M.Davids, Esq. of Cambridge MA opposes the proposed (a)(1) as likely to produce heavy motion practice and injustice to those who guess wrong.

Jeffrey S. Davidson Esq. of Los Angeles reports that CDCal Rule 6 works well in simple cases, but not at all in complex cases. He urges that early meetings are needed to facilitate disclosure. But in complex cases, even this will not prevent multiple disputes, accusations and motion practice.

Donald H. Dawson, Esq., of Detroit opposes (a)(1) but favors (a)(2), but would sequence the exchange of reports, the plaintiff being required to disclose first.

Paul R. Devin, Esq., of Boston, urges that the revision of Rule 26(a) should await experimentation with disclosure rules in sample districts.

John B. Donohue, Esq., of Richmond VA opposes (a)(1). He supports (a)(2) but would require disclosure earlier than 90 days.

Donald K. Dieterly, Esq., of South Bend, opposes (a)(1) as contrary to notice pleading and unjust to products liability defendants.

William L. Dorr Esq of Rochester NY opposes this revision.

John T. Driscoll of Waltco Truck Equipment Co. of Gardena CA opposes Rule 26 as ruinously favorable to plaintiffs.

Winslow Drummond, Esq. of Little Rock opposes disclosure requirements. He urges that the requirement of an expert report will limit expert testimony to hired guns.

Carroll E. Dubac of Los Angeles opposes (a)(1), urging that it is vague, that the timing is not as it should be, and that plaintiffs should disclose first. He urges that disclosure of insurance is not necessary. He also urges that (a)(2) is unfair to defendants who should be informed of their adversaries expert information before disclosing theirs.

M. Richard Dunalp, Esq. of Pittsburgh opposes (a)(1).

Charles R. Dunn, Esq., of Houston, opposes this revision as overbroad and harmful to corporate defendants.

Kevin J. Dunne, Esq., argues that 26(a)(1) is unfair to defendants and will encourage the drafting of broad, vague complaints leading to more discovery, not less.

Richard L. Edwards, Esq. of Cambridge MA opposes (a)(1). He also is critical of (b)(5) as likely to enhance opportunities for discovery abuse.

Dale Ellis, Esq, of Tulsa, opposes Rule 26(a)(1). He fears that it will lead to half-hearted discovery.

John R. Fanone Esq of Chicago opposes (a)(1).

Gennaro A. Filice, Esq. of Oakland CA supports the position of Lawyers for Civil Justice.

David F. Fitzgerald, Esq. of Minneapolis opposes (a)(1).

J. Edward Fowler, Esq., of Fairfax VA, on behalf of Mobil, argues that these revisions do not strike at the heart of the beast but will increase the cost of litigation, especially (a)(1).

Frank, Napolitano & Resnik approve of 26(a)(1) in principle. They share concern about the meaning of "likely to bear significantly." They would limit the disclosure to material known at the time of the disclosure and manifest serious concern about the provision for continuing duties to disclose. They oppose the blanket requirement of 26(a)(2) as too burdensome; they think it would be sufficient to disclose only the identities and opinions. They also suggest that the time limits provided may not be workable. They see no need to authorize local variation on disclosure of experts. They are also concerned that the preclusion of pre-disclosure discovery excessively interferes with autonomy of counsel. They oppose the subordination of discovery sanctions to Rule 11.

Charles F. Freiberger, Esq. of Columbus OH finds that the changes to Rule 26 will lead to more not less litigation.

Gail N. Friend, Esq. of Houston TX finds that the disclosure provisions will increase costs, and that being required to disclose damages and insurance provisions "impinges upon due process rights of discovery."

Eugene O. Gehl, Esq., of Madison WI fears that 26(a)(1) would create more problems than it resolves.

Keith Gerrard, Esq., of Seattle believes that 26(a)(1) will increase the cost of litigation. He urges consideration of the Canadian-UK system which imposes on parties a duty to prepare an affidavit of documents in their possession that are relevant to the lawsuit. It is his experience that it does not work well because of the guesswork entailed. He finds the expert's report unnecessary where a deposition is provided. He recommends that the list required by (a)(3) should be specific, not generic, as " all documents regarding plaintiff's damages." He also suggests that there should be sanction for overlisting. He also opposes expansion of the duty to supplement.

Steven Glickstein, Esq., of New York City, reminds the Committee of the New York State Bar recommendations considered by it in the early stages of its deliberation on the disclosure rule; that report appears at 127 FRD 625 (1989). He urges that the duty to identify known witnesses be extended to persons having knowledge of transactions or occurrences alleged. He finds "bears significantly" too elusive a term. He opposes document exchange in the absence of a request as impossible to police. He supports the other disclosure provisions.

Arthur M. Glover, Esq, of Houston opposes (a)(1).

Catherine A. Gofrank Esq of Southfield MI opposes (a)(1); she supports the views expressed by Brian Johnson Esq in his article in the Product and Safety Law Reporter.

John D. Golden, Esq., of Miami echoes the views of the Lawyers for Civil Justice.

Hugh Q. Gottschalk, Esq. of Denver opposes mutual disclosure. He approves expert information exchange, but urges that it should be earlier. He opposes an enlarged duty to supplement.

Arthur P. Greenfield, Esq. of Phoenix fears that the sanctions proposed in Rule 37 are not adequate to secure compliance with the disclosure requirement. He also questions the meaning of "bear significantly on the claim or defense," and fears that this will produce much litigation.

Jack E. Greer, Esq. of Norfolk opposes voluntary disclosure.

Joseph P. Griffin and Mark N. Bravin of Washington have published an article favoring the revision of this rule with respect to its relation to the Hague Evidence Convention. The article was published in *The International Lawyer.*

Joseph E. Grinnan Esq. of Southfield MI opposes (a)(1) as unfair to defendants who do not know what the dispute is about. He also argues that (a)(2) should distinguish between plaintiffs and defendants.

Gregory A. Gross Esq of Pittsburgh opposes (a)(1).

William D. Grubbs, Esq., of Louisville regards (a)(1) as unrealistic and likely to increase the cost of litigation.

Prof. Stuart Gullickson, University of Wisconsin, favors the proposed changes in Rule 26.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Harold A. Haddon of New York, Loren Kieve of Washington, and Prof. Michael Tigar of the University of Texas, former officers of the ABA Litigation Section, opposes disclosure of communications from attorneys to experts that reflect attorney work-product, supporting the position of the 3rd circuit in *Bogosian*. They argue that the proposals otherwise do not go far enough in restricting the scope of discovery; they continue to support the 1978 proposals. They also argue that an auto mechanic should be able to give expert opinion without preparing a written report.

George N. Hayes, Esq., of Anchorage opposes Rule 26(a)(1), giving an example of a products liability case in which the defendant knows nothing of the events about which there may be a dispute. He notes that plaintiffs in Alaska have a fast-track option based on their full disclosures, and that it does not work well. He urges that plaintiffs' experts can reasonably be expected to prepare reports, but not so for defendants' experts.

Thomas M. Hayes, Esq., of Monroe LA finds it unreasonable that plaintiffs and defendants get the same amount of time to prepare their disclosures, because the plaintiff should be prepared at the time of filing the complaint.

Dennis L. Hays, Esq., Beloit WI, opposes (a)(1).

Jon L. Heberling, Esq. of Kalispell MT approves disclosure as long as it is simultaneous for both parties. He is concerned that (a)(2) may increase the burdens on treating physicians. He urges that the disclosure in (a)(3) should be made at an earlier time, before the pretrial conference. He applauds the enlarged duty to supplement.

John T. Hickey, Jr., Esq, of Chicago opposes the disclosure requirement. He asserts that the present system "works well." The changes will encourage spurious litigation and make discovery more expensive. They would also discourage quick settlements, and would reward lazy lawyers while penalizing smart ones.

Thomas B. High, Esq., Twin Falls ID, opposes disclosure as unfair to defendants.

Jonathan M. Hoffman, Esq. of Portland OR argues that disclosure as proposed is unjust to defendants who must respond to muddled and unclear complaints. He finds 26(a)(1) to be inconsistent with notice pleading.

Raymond L. Hogge, Esq. of Norfolk VA opposes all features of the proposed revision of this rule.

Hon. H. Russell Holland, D. Alaska, supports the views of Judge Panner. He finds the proposals inconsistent with the Civil Justice Reform Act.

Patrick E. Hollingsworth, Esq., of Little Rock believes that lawyers cannot be expected to conform to the expectations expressed in (a)(1).

Charles W. Hosack, Esq. of Couer d'Alene regards (a)(1) as "ridiculously impractical," making it malpractice to file an answer.

Allen W, Howell, Esq., of Montgomery AL, approves most of the changes but is concerned that 26(a)(2) will not work in simple cases. Most "experts" do not keep lists of previous appearances.

David E. Hudson Esq of Augusta GA opposes (a)(1).

Charles A. Janiak Esq of Boston opposes (a)(1).

James H. Jarvis, EDTenn, supports the views of Judge Panner. He favors individual scheduling orders for each case.

Laurence R. Jensen Esq, of San Jose believes that self-executing discovery will be expensive to plaintiffs and a deprivation of privacy to defendants.

Brian N. Johnson, Esq. of Minneapolis has published an article in BNA Toxics Law Reporter criticizing this proposal.

Frank G. Jones, Esq., of Houston argues that the problem with discovery is overbreadth and that this proposal does not address that problem. He urges that experimentation is needed before promulgation of the present proposals.

Gregory P. Joseph Esq., New York City, suggests that "responsive pleading" rather than "answer" should be the triggering event so that the rule covers counterclaims, cross-claims, etc.

M. J. Keefe, Esq. of Albuquerque opposes voluntary disclosure requirements.

Ann Kelly Esq of Santa Monica opposes this revision.

Richard A. Kitch, Esq., of Detroit, opposes the revision of Rule 26, until the problem of notice pleading has been addressed. He notes that in products liability cases, the burden imposed on defendants by the disclosure proposal would be unbearable because of the absence on specificity in the complaints.

Walter G. Knack, Esq., of Grand Rapids supports the position of the Lawyers for Civil Justice and finds the committee draft unfair to both sides.

Harold E. Kohn, Esq. of Philadelphia believes that (a)(2) will engender many requests for exceptions and is not worth the cost.

Kenneth A. Kraus, Esq, of Cleveland, opposes the revision of Rule 26 as unfair to products liability defendants.

Prof. Kenneth R. Kreiling of Vermont Law School supports (a)(2).

Edward M. Kronk, Esq., of Detroit, opposes pre-discovery disclosures.

Ms. Patricia R. Kruger, on behalf of American Standard, Inc, opposes Rule 26(a)(1) as imposing an unmanageable burden on products liability defendants.

Philip A. Lacovara, Esq., of New York urges that (a)(1)(B) be modified to eliminate the description option and require production of documents that "tend significantly to support or undermine any claim or defense. He also urged that there should be a presumption of non-disclosure during the pendency of a Rule 12 motion. He supports the 1978 proposed revision of (b). He urges that the broadened duty to supplement should be limited to material subject to the disclosure requirement.

Ernest Lane Esq finds the disclosure proposals to completely disregard the attorney's need to conduct orderly and concise discovery.

J. D. Ledbetter Esq of Southfield MI opposes (a)(1) and (a)(2). He recommends a local rule for EDMich.

Paul R. Leitner, Esq., of Chatanooga urges that (a)(1) is unjust to products liability defendants.

Lawrence J. Lepidi, Esq., of Pittsburgh, argues that 26(a)(1) would be unfair to defendants and may lead to defense counsel suggesting to plaintiff theories that the plaintiff has not thought of.

Thomas M. Loeb, Esq. of Southfield MI opposes (a)(2) as a burden and expense.

Edwin L. Lowther of Little Rock opposes (a)(1); he supports the views expressed in the article submitted by Brian Johnson Esq.

Jack B. McCowan, Esq. of San Francisco, fears the uncertainty of proposed (a)(1) and believes that it will not work in cases of any size but will produce a lot of gamesmanship. He opposes (a)(2) as an unnecessary expense, although he sees the related revision of 702 as needed.

Hon. Neil P. McCurn, NDNY, supports the views of his colleague, Hon. Owen Panner.

Richard McMillan, Esq., of Washington, favors local experimentation with the disclosure proposals, especially (a)(1). He suggests also a presumptive limit on the period of time allowed for discovery.

Arthur T. McKinney, Esq. of Houston opposes (a)(1); he also disfavors the keeping of score on judges who hustle their cases through the process.

Kevin F. Maloney Esq of Boston opposes this revision; he reports that there is no problem to which it is addressed.

Paul A. Manion, Esq. of Pittsburgh, opposes (a)(1) as unrealistic, but favors (a)(2)

James S. Maxwell, Esq., of Dallas, endorses the views of Ford Motor Company regarding Rule 26(a) as expressed by Joseph Valentine.

Professor Thomas Mengler of the University of Illinois urges the Committee to pull back from 26(a)(1). While supporting the rest of the discovery revision, he urged that games played in interrogatory practice will merely be relocated in the disclosure. He is also concerned that the continuing duty to add to that disclosure will lead to blindsiding and useless contention. And he fears that disclosure by plaintiffs may encourage courts to depart from the philosophy of notice pleading.

Francis Morrison, Esq., of Hartford finds the draft of 26(a)(1) to be "unrealistic, unreasonable, and unfair" to defendants. He predicts a lot of litigation to enforce the rule.

Ronald G. Morrison, Esq., of Spokane urges that (a)(1) requires too much of defense counsel reading notice complaints.

William T. Murphy Esq of Missoula MT opposes (a)(1).

Joseph G. Nassif Esq of St. Louis favors voluntary disclosure.

Ms. Paula J. Nelson of Victorville CA opposes (a)(1) as likely to increase the cost of litigation.

Marc Nerenstone, Esq. of Washington favors the proposal generally, but would also require disclosure of the names of custodians of documents, and of computerized data bases. He suggests with respect to (d) that information not subject to disclosure requirements should be discoverable without delay.

Jack L. Nettles, Esq. of Florence SC reports that the mandatory interrogatories employed in D.SC works well, but acknowledges that the South Carolina state courts employ a pure Field Code and are accustomed to fact pleading.

Richard L. Neumeier, Esq. of Boston opposes (a)(1).

Colvin G. Norwood Esq of New Orleans opposes (a)(1).

Henry J. Oechler, Esq., of New York, expresses the fear that disclosure as required by Rule 26 will "turn the adversary system on its head" and repeal *Hickman*, thereby producing more litigation, not less. If the Committee is to stick with this idea, he urges that something more be required in the pleadings than a short, plain statement. He also urges that the limitation on the number of depositions be by party rather than by side.

Michael E. Oldham, Esq. of Denver, argues that 26(a)(1) will generate much additional disputation at the enforcement stage, and that 180 days after the last pleading is the earliest time at which any disclosure should be required.

Godfrey P. Padberg, Esq. of St. Louis opposes (a)(2) as an increase in the cost of litigation.

Hon. Own Panner, NDNY, argues that the revision of Rule 26(a) and the limits on discovery will increase the cost of litigation, by involving the court more frequently in discovery disputes. The rule will not help in simple cases and will be an impediment in complex ones. He is especially concerned that the increased duty to supplement will be a burden in many cases.

Robert L. Parlette, Esq., of Wenatchee WA is not sure how this reform will play out, but regards it as necessary and worth a try.

Hon. Alexander L. Paskay, M.D.Fla, supports the position of Judge Panner.

Deana Peck of Phoenix opposes the requirement of an expert report as an unnecessary cost. She also objects to the timing of the requirement, for a defendant may have an expert who guesses wrong as to the plaintiff's expert's theory. And she objects to the delay in discovery until disclosure has been completed. She favors broadening 26(e) to cover disclosures, but not as proposed.

Thomas M. Peters Esq of Detroit opposes (a)(1).

G. Keith Phoenix, Esq. of St. Louis, reports that lawyers there are astounded by this proposal. He urges an experimentation in a few districts.

Richard C. Polley Esq of Pittsburgh opposes (a)(1).

Robert W. Powell of Detroit, for the firm of Dickinson, Wright et al opposes all of this revision as unduly expensive and injurious to attorney-client relations.

Clifford A. Rieders, Esq., of Williamsport PA opposes most of this revision. He urges that (a)(1) will give rise to new levels of dispute. He does not regard depositions of experts as often necessary or desirable. He argues that it is unfair to plaintiffs to require disclosure prior to discovery. He finds proposed (e)(2) too vague, and (g)(3) subject to all the objections made to Rule 11.

Robert S. Rosemurgy, Esq., of Escanaba MI finds "it impossible to believe that anyone who is engaged in civil litigation would think that these changes are reasonable." He anticipates difficulty in knowing what information bears significantly on notice pleadings, and he regards the 30-day response period as inadequate. He argues that the exchange required by proposed (a)(3) should occur at least 90 days before trial in order to allow for discovery.

Professor Maurice Rosenberg of Columbia University favors voluntary disclosure but urges that it should be the subject of experiment before a national rule is established. He regards the validity of local rules as doubtful in the absence of some authority in the national rules.

William A. Rossbach, Esq., of Missoula MT urges that the present language of Rule 26 be employed to describe the disclosures required. He finds (a)(2) to be onerous and costly.

Steven J. Rothman, Esq., of West Palm Beach opposes (a)(1) on account of its "patent ambiguity" placing litigators in difficult positions.

Charles Rubendall, Esq. of Harrisburg, urges that the rules are too radical to be adopted before experimentation. He also urges that it is unfair to defendants in light of notice pleading.

Susan Vogel Saladoff of Rockville MD opposes the disclosure provisions.

Hon. Barefoot Sanders, NDTex, supports the views of Judge Panner. He acknowledges that some lawyers seek to overwhelm opponents with discovery, but believes that the revised rule will simply open other avenues of abuse without closing those now in use. He fears much motion practice arising from the limits on discovery.

Walter W. Sapp, Esq., of Houston, on behalf of Tenneco, objects to (a)(1) as incompatible with Rule 8 and unjust to corporate defendants.

Joseph Schleppi, Esq., of Columbus OH urges that (a)(1) would be unjust to corporate defendants, but suggests that it would be acceptable if notice pleading were modified to require specificity in complaints.

Edward C. Schmidt, Esq. of Pittsburgh, on behalf of the firm of Jones Day Reavis & Pogue, finds the revision of (a)(1) inconsistent with the 1938 Rules, which he says, were based on the principle of an inseparable bond between attorney and client. He opposes (a)(2) as a return to trial by ambush and to more trials because summary judgments will be difficult to secure on the basis of expert reports.

Victor E. Schwartz, Esq. and Fred S. Souk, Esq. of Washington DC oppose (a)(1).

Hon. William W. Schwarzer commends the discovery proposals. In a substantial memorandum, he argues inter alia that the cheating likely to be associated with 26(a)(1) now exists in interrogatory responses, and contends that disclosure will make the process more efficient and less costly for all.

Karl E. Seib, Esq. of New York City, opposes (a)(1) and also opposes the revision of (b)(5) as an incitement to unnecessary fishing expeditions. Together these provisions will seriously compromise the role of corporate defense counsel.

William D. Serritella, Esq. of Chicago opposes (a)(1). He also opposes simultaneous exchange of expert reports as provided in proposed (a)(2).

Samuel M. Shapiro, Esq of Rockville MD opposes this revision.

Joseph A. Sherman and E. Wayne Taff of Kansas City MO favor the position of Lawyers for Civil Justice.

Jack N. Sibley Esq of Atlanta opposes (a)(1) as applied to complex cases.

J. Walter Sinclair, Esq. of Twin Falls ID urges that although this rule needs revision, the proposed reform is too weighted against defendants.

Alan C. Stephens, Esq., sees no need for these revisions. In any event, he urges, the 30-day period in (a)(1) is too short.

John D. Stephenson, Esq. of Great Falls MT opposes (a)(1) and is concerned about (a)(2) which he acknowledges to be more workable.

Laura D. Stith of Kansas City believes that (a)(1) would lead to revelation of work product and impair the adversary tradition. She is also concerned that the revision does not assure temporary protection to one who has filed a motion under (c) and failed to secure a ruling on it.

Paul L. Stritmatter, Esq., of Hoquiam WA opposes this revision as not practical.

William H. Sutton Esq. of Little Rock opposes (a)(1).

Richard D. Teeple, Esq., of Findlay OH, on behalf of Cooper Tire opposes (a)(1) as unworkable in light of the vagueness of pleadings in produces liability cases. He urges that (a)(2) be extended to require disclosure of a complete resume, including a list of publications.

Mack L. Thomas, Esq., of Fargo regards (a)(1) as inconsistent with notice pleading.

Robert W. Thomas, Esq. of Lake Charles LA opposes (a)(1); he is particularly concerned about parties' abilities to determine significance of evidence.

Hon. David L. Thompson of Independence KS, a state court judge, urges that discovery abuse is a grave problem, that the proposed changes are salutary, but do not go far enough.

Hon. Donald J. Tobin of San Diego supports the views of Gail Friend.

Thomas F. Tobin, Esq. of Chicago opposes the disclosure provisions; his objections seem to be directed to (a)(1).

Jay H. Tressler, Esq. of Chicago opposes (a)(1).

Harry P. Trueheart III, Esq., of Rochester, on behalf of Bausch & Lomb, Inc., Corning, Inc., and Eastman Kodak Inc., opposes (a)(1) as inconsistent with Rule 8 and unjust to corporate defendants. He also argues that the revision will produce more costly litigation.

Scott J. Tucker, Esq. of Boston opposes this revision.

H. Woodruff Turner, David G. Klaber, Robert B. Sommer, and Thomas A. Donavan of Pittsburgh assert that here is no problem of discovery abuse. They find the proposal for (a)(1) incompatible with notice pleading and with the adversary process, unjust to defendants, and likely to increase legal costs. They support (a)(2) and (a)(3).

Joseph Valentine, Esq. Roslyn NY, on behalf of Ford Motor Company, favors 26(a)(2), but opposes 26(a)(1) in its present form as requiring too much guesswork and subject defendants to second-guessing.

George Vernon, Esq., of Chicago regards (a)(1) as a "disaster" requiring judgment calls that cannot be made.

James D. Vogt, Esq. of Los Angeles opposes the use of electronic recording as likely to create confusion.

Ben L. Weinberg, Esq., of Atlanta, is uncertain of the meaning of "reasonably likely .. to bear significantly" and finds the new text too vague. He is also concerned about the shortness of the time allowed for disclosure.

Hon Jack B. Weinstein, EDNY approves the disclosure proposals bearing on experts, but suggests that 26(b)(3)(A) and (B) should include data bases and records of tests.

Ronald E. Westen Esq., of Troy MI argues that disclosure rules will lead to overproduction, unnecessary expense, and diminished prospects for settlement. He also argues that arbitrary limits on discovery will unduly restrict parties in their investigations, and that the scheme is unfair to defendants.

Robert T. White, Esq. of St. Paul opposes (a)(1).

Stephen M. Wiles, Esq. of New Orleans, an admiralty lawyer opposes pre-discovery disclosure as "absolutely unworkable."

Tybo A. Wilhelms, Esq., fears that (a)(1) will encourage parties to bury their opponents in overdisclosure and may otherwise be unfair to defendants.

Anthony J. Williott, Esq. of Pittsburgh opposes (a)(1).

Stanley P. Wilson Esq of Abilene TX opposes this revision; he favors stronger limitations on the scope of discovery.

Ms. Holly Winger of Hartford CT urges that (a)(1) will not work in large toxic tort cases.

Hon. Henry Woods, E.D.Ark., opposes mandatory disclosure.

Thomas D. Yanucci, Esq., of Washington urges that disclosure is antithetical to the adversary tradition and likely to produce much satellite litigation.

Hon. H. David Young, E.D. Ark., believes that (a)(1) may produce unscrupulous efforts at enforcement under Rule 37, and hence be counterproductive.

Andrew S. Zettle Esq of Huntington WV opposes (a)(1).

The following business corporations have expressed opposition to (a)(1):

Amoco Corp
ARCO
Bethlehem Steel Corp.
Bridgestone-Firestone, Inc.
Caterpillar Inc
The Clorox Company
Coca-Cola Company
Control Datas
Deere & Company
Dow Chemical Company
Duquesne Light Company
E. I. PuPont de Nemours & Co.
Emerson Electric Co.
E-Systems Inc of Dallas
FINA, Inc.
Gates Energy Products, Inc.
Gencorp.
General Motors
Georgia-Pacific Corp.
Harley-Davidson Inc.
Hershey Foods Corp.
Honda North America
Hughes Aircraft Company
International Paper Co.
LTV Steel Co.
McDermott Inc.
McGraw-Hill, Inc.
Mazda Motor of America
Mead
Michelin Tire Corp.
Morton International
Murphy Oil Co., El Dorado AK
Nalco Chemical Company
Nissan North America
Olin Corp.
Oryx Energy Company
Phelps Dodge Corp.
Piper Aircraft Corp.
Ralston Purina Company
Raytheon Company
Rowan Companies,Inc.
Sears Roebuck & Co.
Shell Oil Co
Snap-on Tools Corp.
Sunstrand Corp.
The Timken Company
TRW Inc
Union Carbide Corp.
Uniroyal Goodrich Tire Co
United Technologies

USX
Zurn Industries, Erie PA

RULE 28

Joseph P. Griffin and Mark N. Bravin of Washington have published an article favoring the revision of this rule with respect to its relation to the Hague Evidence Convention. The article was published in *The International Lawyer*.

RULE 29

The American Civil Liberties Union supports this revision.

The Chicago Bar Association suggests that the word "stipulation" be replaced by "agreement."

The Department of Justice supports this revision.

The Los Angeles County Bar favors this revision.

The Philadelphia Bar favors this revision.

The Public Citizen Litigation Group approves this revision.

Roy B. Dalton, Esq., approves the revision of this rule.

Frank, Napolitano & Resnik question whether one can stipulate out of mandatory disclosure. They do not see why one would be sanctioned for conduct that has been stipulated.

Hugh Q. Gottschalk, Esq., of Denver approves this revision and suggests that it apply as well to Rule 12 extensions of time.

RULE 30

The Alliance of American Insurers favors limitations on the length of depositions in cases that are not too complex.

Alliance for Justice finds the limit on the duration of depositions to be reasonable for most cases. It opposes the limit on the number of depositions.

The Admiralty and Maritime Litigation Committee of the ABA opposes the limitation on the number and length of depositions.

The ABA Section on Antitrust favors limitations on discovery, but fears these proposals are too rigid.

Chairman Teztlaff opposes numerical limits on the number and length of depositions. He favors continuing the requirement of a stenographic record of testimony.

The Torts and Insurance Section of ABA opposes numerical limits on depositions.

The American Board of Trial Advocates expresses concern that the limitations on depositions will be productive of motion practice.

The American Civil Liberties Union is opposed to arbitrary limits on the scope of discovery. If the limits are to be retained, it urges that they be raised.

The American College of Trial Lawyers urges that the sentence added to (d)(1) be divided in two.

ACCA favors limits on deposition practice.

The American Institute of Certified Public Accountants opposes limits on deposition practice.

American Insurance Association favors limits on the length of depositions.

The American Intellectual Property Assn opposes limitations on deposition practice.

ATLA opposes this revision, arguing that any limitations on discovery depend on defendants' compliance with Rule 26 which they do not expect to occur.

The Arkansas Association of Defense Counsel opposes arbitrary limits on discovery.

ABCNY supports the alternative methods of recording depositions. With respect to subdivision (c), it urges that Rule 615 should apply to depositions intended for use at trial, and that experts should be permitted to attend depositions of opposing experts. ABCNY opposes the presumptive limits on the length and number of depositions. A minority favor limits, but regard those proposed as too low. They urge that there should be no limit on party-affiliated deponents or on any number of agents or employees who may be significantly involved in the dispute. On the length of depositions, ABCNY predicts that counsel will be tempted to resist discovery to wait and see whether the court will be liberal in allowing more. They are especially concerned that local rules may impose still lower limits on discovery than those provided in the proposed rules and urge that this be precluded. ABCNY favors judicial management and urges that every case should receive tailor-made discovery limits rather than presumptive ones.

The Beverly Hills Bar Assn opposes limits on the number and length of depositions. They also urge that a stenographic record be made of all depositions.

The California Bar opposes this revision. It favors stenographic transcripts of depositions.

A committee of the bar of C.D.Cal. opposes limitation on the number and length of depositions.

The Chicago Bar Association recommends elimination of the limit on the length of depositions. It favors the language in the comments on instructions to deponents not to answer and suggests that this language be placed in the rule.

The Chicago Council of Lawyers does not believe that the number of depositions or their length can be fixed with one size to fit all. They should be fixed at a scheduling conference.

The Connecticut Bar committee offers its view that the six-hour rule is "unfounded." It also finds the ten deposition rule to be unrealistic.

The Delaware Bar Assn favors continued requirement of stenographic recording of depositions.

The Department of Justice favors this revision. It suggests that more discovery should be permitted to a party willing to bear the full cost, and questions the wisdom of limits on the duration of depositions.

A Committee of the DC Bar supports the limitations on the number and length of depositions.

Dilworth Paxson Kalish & Kauffman of Philadelphia oppose limitations on the number and length of depositions.

Duquesne Light Company opposes limitations on the number and length of depositions.

The Federal Bar Association is divided on the wisdom of presumptive limits on depositions.

Fisher & Phillips of Atlanta opposes limits on the number and length of depositions.

Foothill Bar Association, El Monte CA favors the requirement of stenographic transcripts of depositions.

Senator Wyche Fowler urges the committee to study a communication from a constituent who disfavors the use of audio and video recording.

The Georgia Bar opposes the limitations on the number and length of depositions as too rigid.

Georgia Certified Court Reporters Assn favors continued requirement of stenographic recording of depositions.

Georgia Stenomask Reporters Assn favors continued requirement of stenographic recording of depositions.

The Hawaii Shorthand Reporters Assn favors continued requirement of stenographic recording of depositions.

Hunton & Williams of Richmond questions the exclusion of Evidence Rule 615 and opposes limitations on the length of depositions.

The Illinois Assn of Defense Counsel argues that the limits on the number and length of depositions will operate in favor of abusers of the system

The Illinois Shorthand Reporters Assn favors continued requirement of stenographic recording of depositions.

The Iowa Defense Counsel Association oppose limits on depositions.

Kincaid Gianunzio Caudle & Hubert of Oakland CA find the limitations on deposition practice to be undesirable.

Lawyers for Civil Justice find the limit on the number and length of depositions to be too arbitrary.

The Los Angeles County Bar favors this revision except for the limits on the number and length of depositions.

The Los Angeles Chapter of the Federal Bar Association opposes limits on depositions. They suggest that (a)(2)(C) does not adequately provide for situations in which a witness's testimony must be postponed for medical reasons. They also object to the Note stating that anyone can attend a deposition unless the court otherwise orders. They are not convinced that the change in (e) is justified.

The NAACP Legal Defense Fund opposes low limits on depositions.

The National Assn of Independent Insurers opposes rigid limits on deposition practice.

National Assn of Securities and Commercial Law Attorneys opposes limits on depositions except ad hoc.

The National Court Reporters Association favors the availability of videotape but argues for the requirement of a court reporter to make an official transcript. They are especially concerned about the independence of the officer making the transcript. They also suggest that (a)(3) should require identification of those witnesses whose testimony will be presented by deposition. The Association has also submitted to the Committee a review of the NCSC work William E. Hewitt, VIDEOTAPED TRIAL RECORDS: EVALUATION AND GUIDE (1991). The review was prepared by George A. Fulton, Ph.D. of Ann Arbor MI.

National Stenomask Verbatim Reporters Assn favors continued requirement of stenographic recording of depositions.

Nevada Shorthand Reporters Association opposes electronic recording of depositions.

The New Jersey Bar opposes transcripts made without a court reporter present.

A committee of the New York County Bar opposes limits on the number and length of depositions.

The New York State Bar Committee favors the provision for videotape depositions and endorses the other changes proposed for this rule.

Ogletree Deakins Nash Smoak & Stewart of Greenville SC oppose numerical limits on deposition practice.

The Orange County Bar Committee prefers a limit of 14 hours on a deposition. They favor a case-by-case setting of limits.

The Philadelphia Bar opposes limitations on the number of depositions. It expresses concern about the deletion of the first sentence of the present (b). It recommends that the revision not be adopted.

The Public Citizen Litigation Group opposes procrustean limits on depositions.

Rust Armenis & Schwartz, a law firm in Sacramento favors continued requirement of stenographic recording of depositions.

Sands Narwitz Forgie and Leonard of Los Angeles opposes permitting use of audio recording of depositions.

Shell Oil opposes limits on the number and length of depositions.

South Carolina Certified Reporters Assn favors continued requirement of stenographic recording of depositions.

The South Carolina Defense Trial Attorneys' Assn opposes limitations on discovery.

Sutherland Asbill & Brennan of Atlanta reports that the limitation on duration of depositions works well enough in their district, but urge that it should be understood that the limit is no more than presumptive.

Trial Lawyers for Public Justice oppose limitations on deposition practice.

Tri-State Verbatim Reporters Assn (MD, VA, DC) favors continued requirement of stenographic recording of depositions.

The United States Court Reporters Association opposes revision pertaining to the method by which depositions are to be recorded.

The Washington Defense Trial Lawyers opposes limits on the number and length of depositions as arbitrary and unnecessary.

Washington Shorthand Reporters Association opposes electronic recording of depositions.

The Washington State Bar opposes arbitrary limits on discovery.

Washington TLA opposes limitations on discovery as favoring defendants.

The Wichita Bar Association opposes the limitations on the number and length of depositions. It also favors a requirement of stenographic transcripts for depositions.

Wilson & Ranney of Missoula Montana oppose limits on the number and length of depositions.

Dan H. Ball, Esq. of St. Louis urges that the limits on number and length of depositions are too rigid and are in any case inappropriate.

James S. Bianchi, Esq., of Los Angeles doubts that the disclosure rules will save expense, and expects that it would result in massive document control problems.

Sheilah L. Birnbaum of New York opposes limits on the number and length of depositions.

T. Mack Brabham and fourteen other lawyers in McComb MS oppose limitations on depositions as impractical.

John Britton, Esq. of Fort Lauderdale, opposes the limitation on the number of depositions.

Mary Coffey of St. Louis favors the limits on depositions.

Steven J. Cologne, Esq., of San Diego argues that it is a denial of due process to limit the number and length of depositions. He also regards the use of electronic recording as "extremely dangerous." It undermines the fundamental basis of litigation.

Philip R. Cosgrove, Esq., of Los Angeles opposes the changes in deposition practice, finding the limits to be a "one size fits all" approach.

Donald C. Cramer Esq of Edmonds WA opposes limits on the number and length of depositions: "any deponent can lie for six hours."

Richard E. Crow Esq of Sacramento opposes any changes in deposition practice.

James T. Crowley, Esq, of Cleveland, argues that the limits on the number and length of depositions will result in much motion practice, especially in complex cases.

F. Bailey Crowther, Esq., of Palmyra VA opposes limitations on discovery as yet another means of giving advantages to defendants.

Frank J. Daily, Esq., of Milwaukee, opposes the numerical limitations on deposition practice.

Roy B. Dalton, Esq of Orlando approves the limitation on the length of depositions, and also favors the use of videotape depositions.

Jeffrey Davidson, Esq., of Los Angeles opposes presumptive limits on the number and length of depositions; both, he fears, will result in much motion practice.

William L. Dorr Esq of Rochester NY opposes this revision.

Carroll E. Dubac opposes quantitative limits on discovery.

Richard L. Edwards, Esq. of Cambridge MA opposes limits on the number and length of depositions.

John R. Fanone Esq of Chicago opposes limits on the number and length of depositions. He expresses concern for the absence of an allocation of time among lawyers.

David F. Fitzgerald, Esq. of Minneapolis opposes limits on depositions.

Frank, Napolitano and Resnik are concerned that it will require too much involvement of the court to limit deposition practice so severely. They also suggest some possible difficulties with 30(d), finding the term "exclusive of Rule 615 thereof" awkward, oblique and possibly misleading.

Gail N. Friend, Esq, of Houston TX states that limits on discovery violate due process. He also holds that the use of electronic recording as a basis for transcripts is "very dangerous and violative of due process rights." He argues that such methods produce many bad records.

Charles F. Freiberger, Esq. of Columbus OH opposes the limits on discovery except by the court ad hoc.

Keith Gerrard, Esq., of Seattle, fears that the six-hour rule will encourage dilatory tactics by reluctant deponents.

Guy T. Gillespie III, Esq of Oxford MS opposes the six-hour limit on depositions, as likely to encourage dilatory objections.

Arthur M. Glover, Esq, of Houston opposes limits on the number and length of depositions.

Stephen L. Goff Esq of Sacramento opposes this revision.

Hugh Q. Gottschalk, Esq., of Denver favors the revisions of (d)(1).

Jack E. Greer, Esq. of Norfolk opposes limits on depositions.

Joseph E. Grinnan, Esq. of Southfield MI urges that the limits on depositions cannot work in multi-party cases.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Lee Hagen, Esq. of Fargo opposes limitations on deposition practice.

George N. Hayes, Esq. of Anchorage, approves the presumptive limitation on the number and length of depositions.

Jonathan M. Hoffman, Esq. of Portland OR opposes limits on deposition practice.

Raymond L. Hogge of Norfolk VA opposes limits on the number and length of depositions.

Patrick E. Hollingsworth, Esq., of Little Rock believes that the limits on number and length of depositions will spawn more litigation than they will prevent.

John I. Hulse, Esq. of New Orleans, opposes arbitrary limits on the amount of discovery permitted.

Laurence R. Jensen of San Jose CA believes that the cost of depositions is generally a sufficient deterrent to overuse. The revision is hence not necessary.

M. J. Keefe Esq of Albuquerque commends the provision limiting coaching during depositions.

Ann Kelly Esq of Santa Monica opposes this revision.

Harold E. Kohn, Esq. of Philadelphia opposes limitations on deposition practice.

John Koslov, Esq of Los Angeles opposes this revision.

Philip A. Lacovara of New York favors the presumptive limits on depositions.

J. D. Ledbetter, Esq. of Southfield MI opposes limits on depositions.

Jeffrey V. Lusich, Esq. of Stockton CA opposes all aspects of this revision.

Jack B. McCowan, Esq., of San Francisco opposes limits on the number and length of depositions.

Richard A. McMillan, Esq, of Washington opposes numerical limits on the number and length of depositions.

Kevin F. Maloney Esq of Boston opposes this revision; he reports that there is no problem to which it is addressed.

Paul A. Manion, Esq. of Pittsburgh opposes limitations on the number and length of depositions.

Kenneth S. Meyers, Esq., of Los Angeles opposes this revision.

Joseph G. Nassif Esq of St. Louis opposes limitations on the number and length of depositions.

Godfrey P. Padberg, Esq. of St. Louis favors the use of electronic recording.

David B. Parker of Los Angeles CA opposes all aspects of this revision.

Deana Peck of Phoenix opposes the limits on the number and length of depositions; she notes that the need for depositions is never balanced equally between the parties. She also protests that limitations should be by parties rather than sides.

O. Grady Query, Esq., of Charleston SC opposes any revision of this rule.

Clifford A. Rieders, Esq., of Williamsport PA finds the limits on the number and length of depositions to be arbitrary.

William A. Rossbach, Esq., of Missoula MT finds the discovery limits to be unfair to plaintiffs, who generally have so little information that all can be discovered within those limits.

Susan Vogel Saladoff of Rockville MD opposes limitations on depositions.

Sol Schreiber, Esq. of New York, suggests that parties should be required to provide deponents with advance copies of documents they are expected to comment on at deposition, so no time is lost while deponent is reading. He also observes that 186 of 200 depositions taken in Agent Orange were taken in less than one day.

Victor E. Schwartz, Esq. and Fred S. Souk, Esq. of Washington DC oppose limitation on the number and length of depositions.

Karl E. Seib, Esq., of New York City opposes limits on the number and length of depositions.

Samuel M. Shapiro, Esq of Rockville MD opposes limits on the number and length of depositions.

Thomas G. Shapiro Esq. of Boston opposes any revision of this rule.

Jack N. Sibley Esq. of Atlanta opposes limits on the number and length of depositions.

Christopher C. Skambis, Esq., of Orlando suggests that the rule should limit "defending" depositions to (1) objections to form of question; (2) instructions not to answer based on privilege; or (3) termination of deposition that is abusive, and that mandatory sanctions should be imposed on lawyers delaying depositions by other activities. Mr. Skambis also notes that less time should be needed to transcribe a 6-hour deposition, and that the read-and-sign requirement is often used to delay or prevent use of deposition transcripts at hearings.

Dennis R. Smeal, Esq., of Pasadena, opposes limitations on the number and length of depositions.

Alan H. Stanfill, Esq, of Pasadena CA opposes limitations on the number and length of depositions.

Hon. Correale F. Stevens of Wilkes-Barre opposes the amendment of Rule 30(b); he holds that a stenographic record of depositions is indispensable and should be made by an independent professional reporter.

Laura D. Stith of Kansas City asserts that the limitations on deposition practice are unprecedented and she urges that they be the subject of experiment.

Lawrence A. Strid, Esq. of Irvine CA opposes the revision of Rule 30(b), urging that ER will not provide satisfactory transcripts.

Governor Mike Sullivan of Wyoming supports the provision for electronic recording of depositions.

Thomas F. Tobin, Esq. of Chicago opposes the limitations on the number and length of depositions.

Harry P. Trueheart III, Esq., of Rochester, on behalf of Bausch & Lomb, Inc., Corning Inc., and Eastman Kodak, Inc. opposes the limits on number and length of depositions because one size will not fit all.

Bowen H. Tucker, Esq. of Chicago opposes (a)(1).

Scott J. Tucker Esq of Boston opposes limits on deposition practice.

Windle Turley Esq. of Dallas opposes limits on the number of depositions as unjust to plaintiffs.

Tybo A. Wilhelms, Esq., of Toledo, opposes the limitations on the length of depositions.

James D. Wing, Esq., of Miami, opposes the limitation on the number of depositions.

Ms. Holly Winger of Hartford CT, finds the limits on number and length of depositions not suitable to large toxic tort cases.

The following individuals wrote only to oppose electronic recording of depositions:

Richard J. Abrams, Esq, North Hollywood CA
Michael L. Alderson Esq, Richmond CA
Samuel H. Altman Esq, Charleston SC
Ms. Evelyn Anderson. Charleston WV
Ms. Laura Anderson, Fond du Lac WI
David W. Andreas, Esq., Winfield KS
Laurence L. Angelo Esq. Sacramento
Mr. Robert D. Arconti, Los Angeles
Ms. Terri L. Arp, Dallas
Ms. Alison Ash-Heyman, Felton CA
Ms. Diane M. Baker, Honolulu
G. Lant Barney Esq, Auburn CA
Ms. Donna K. Barr, Dallas
Donald E. Barrows Esq, Stockton CA
Joseph A. Bartholomew, Esq., Belleville IL
Ms. Jeri Beasley, Dallas
Ms. Tamara Blakely, Dallas
Tom Blakeley Esq, Dallas
Sonja E. Blomquist, Esq, San Francisco
Ms. Tamala L. Bohannon, Dallas
Hon. William B. Boone, Santa Rosa CA
Ms. Lonna K. Bougher, Yakima WA
Mr. Andrew T. Bradshaw, Fort Worth
Rickey J. Brantley, Esq., Fort Worth
Michael J. Brickman Esq, Charleston SC

Ms. Jan Brockley, San Diego
Kim R. Brogan, Esq., San Diego
Peggy S. Brooks, Esq, Stockton CA
Paul L. Brown, Esq., Dallas
Hon. Volney V. Brown, Jr., Los Angeles
Jeanne M. Browne, Esq., Santa Rosa CA
Mr. Michael J. Bryant, Fresno
Giacomo Bucci, Esq., Vista CA
Pamela Bunch, Santa Ana CA
Ms. Deobrah M. Buntyn, San Antonio TX
Harland L. Burge, Esq, Irvine CA
Ms. Tierney Burgett, Dallas
Ms. Tina Terrell Burney, Dallas TX
Ms. Jane W. Byrd, Dallas
Hon. A. Dennis Caeton, Fresno
Ms. Michele D. Callian-Boyle, Honolulu
Ms. Veronica E. Cherry, Dallas
Ms. Marian Christensen, Pasadena CA
Ms. Jane H. Clark, Dallas
Robert G. Clawson Esq, Charleston SC
Hon. Thomas L. Clinton, Lubbock TX
Hon. Gordon Cologne, Rancho Sante Fe CA
Paul R. J. Connolly, Esq., Salem OR
Mr. Robert Cook, Cache OK
Hon. Dyson W. Cox, Upland CA
Georgia Bates Creel, Esq., San Francisco
Hon. Sam R. Cummings, N. D. Tex., Lubbock
Charles W. Dahlquist, Esq., Salt Lake City
Richard G. Danner, Esq, Dallas
Mr. Leon R. Dardas, Sarasota FL
Joan Davenport Esq, Boston
Stephen F. De Antonio, Esq. Charleston SC
Allen D. Decker Esq, N. Charleston SC
Dr. Robert Denes, Los Angeles CA
Mr. R. Michael Devitt, San Luis Obispo
Richard C. Detwiler Esq, Columbia SC
Ms. Ann J. Dickey, Dallas
Ms. Kim J. Dickman, Cedar Hill TX
Mr. G. O. Dohn, Yakima WA
Dale A. Drozd, Esq., Sacramento CA
Mr. James M. Duenow, San Luis Obispo
Ms. Pam J. Durrant, Dallas
Mr. Marc Eppler, Cleveland OH
Don A. Ernst Esq, San Luis Obispo
Ms. Dallas Ann Erwood, Palm Desert CA
Ms. Amanda M. Essner, Eugene OR
Barry H. Fanning Esq, Dallas
Brien J. Farrell, Esq., Santa Rosa CA
Mr. Robert H. Faust, Commissioner, Monrovia CA
Hon. John Fitch, Fresno
Mr. Patrick Fitch, Hamet CA
Steven F. Fitzer, Esq. Tacoma WA
Ms. Rita D. Fitzpatrick, Vista CA
Hon. Thomas B. Fletcher, Bass Lake CA

Ms. Carol J. Franklin, San Diego
Mr. Thomas J. Frasik, San Diego CA
Ms. Marie Fuller, Dallas
Mr. Terry Gardner, Fort Worth
Ms. Missy Giamfortone, Dallas
Mr. Robert Gilbreath, Dallas TX
Hon. Stephen G. Gildner, Bakersfield
Kathi Gilmour-Benner, Esq., Sacramento
Ms. Elizabeth F. Goodenough, Dallas
George W. Granger Esq, Bakersfield CA
P. Barron Grier III, Esq., Columbia SC
Claud A. Grinch, Esq., Spokane
Mr. Robert H. Grove, Fresno
Ms. Jacqueline Guido, West Covina CA
John R. Haluck, Esq., Sacramento
Hon. James E. Hammerstone, Stockton CA
Ms. Deborah K. Hamon, Seagoville TX
Vernon W. Harkins Esq, Tacoma WA
Ms. Susan J. Harriman, San Francisco
Ms. Debbie Harris, San Angelo TX
Mr. C. Vernon Hartline, Dallas
Mr. Gary C. Harvey, Fresno
Hon. Charles W. Haydon, San Jose CA
Ms. Cornelia L. Heather, Pacific Palisades
Mr. Daniel E. Henderson Jr, Santa Barbara
Mr. Daniel E. Henderson III, Santa Barbara
Michael J. Henry Esq, Fort Worth
Ms. Donna Heuman, Menlo Park CA
Ms. Rosanna Heywood, Vista CA
Lloyd Hinkelman Esq, Sacramento
Mr. Lynard C. Hinojosa, Los Angeles
Robin L. Hitchcock, Esq., Charleston SC
Ms. Judy Hobart, Bedford TX
Mr. William K. Hokr, San Diego
Ms. Sally A. Hornung, Chino Hills CA
Robert D. Huber, Esq. San Francisco CA
Edward W. Hunt, Esq., Fresno
Ms. Christine Jackson, Flintridge CA
Mr. Bruce B. Johnson, Jr., Fresno
David B. Johnson Esq, Sacramento
John S. Jose, Esq., Fort Worth
Hon. Bernard J. Kamins, Los Angeles
W. Douglas Kari Esq, Los Angeles
Ms. Charlene Keinhofer, Dallas
Ms. Cheryl M. Kingrey, Dallas
Ms. Christine Kleifgen, Madison WI
Ms. Janice M. Knetzger, Middletown CA
Peter J. Koenig Esq, San Francisco
Ms. Claudia L. Kreigenhofer, Chatsworth CA
Ms. Rene T. LaCoursiere, Yakima WA
Ms. Dona M. LaFrance, Indio CA
Ernest Lane, Esq., Greenville MS
Ms. Cathy S. Langford, Dallas
Mr. Patrick A. Lanius, Rancho Cordova CA

Hon. Jerald M. Lasarow , South Lake Tahoe CA
Dennis D. Law, Esq., San Luis Obispo
Ms. Susanne Lazovic, San Diego
Ms. Nancy Lee, San Diego
Carl B. Leverenz, Esq., Chico CA
Stuart L. Levison, Esq., Rochester
Thomas D. Lininger, Esq., Sacramento
Mr. Paul K. Litt, Los Angeles
Mr. Charles T. Locke, New York City
Ms. Judy Lorenz, Madison WI
Hon. Anthony P. Lucaccini, Stockton CA
Ms. Kathleen Lyons, San Diego
Ms. Roberta L. McBride, Kapaa, HI
David P. McCann Esq., Charleston SC
Mr. Francis T. McCann, Charleston SC
Mr. Denver G. McCarty, Carrollton TX
Ann McHugh Esq., Princeton NJ
Ms. Aubrey McIlveene, Dallas
Mr. John McIlveene, Dallas
Hon. Rolleen Kent McIlwrath, Stockton CA
Ms. Kathleen Ann McKee, San Diego
J. William McLafferty Esq, Santa Barbara CA
Ms. Marilyn S. McMartin, Yakima WA
Mr. Richard E. McQueary, San Luis Obispo
Hon. Runston Maino, Vista CA
Hon. Richard M. Mallett, Stockton
Ms. Angela Mancuso, Dallas
Hon. Mark A. Mangerson, Rhinelander WI
Ms. Deborah Marshall, Dallas
Ms. Lisa B. Martin, Dallas
Hon. Edward F. Masters, Joliet IL
Mr. Roger D. May, Los Angeles CA
Ms. Julie A. Meeks, Dallas
Joseph M. Melchers Esq, Columbia SC
Joseph S. Mendelsohn Esq, Charleston SC
Christine R. Miller Esq., Santa Rosa CA
Mr. Jeffrey L. Miller, Encino CA
Ms. Kris Miller, Janesville WI
Ms. Joyce S, Mizutani, Solana Beach CA
Wendy Mohammed-Derzaph, Esq., Pasadena CA
Richard H. Monge, Esq, Fresno
John S. Moore, Esq., Yakima
Hon. S. Clark Moore, Monrovia CA
Mike K. Nakagawa, Esq., Sacramento
Joshua C. Needle Esq, Santa Monica CA
Ms. Paula J. Nelson, Victorville CA
Phillip R. Newell Esq, San Luis Obispo
Ms. Frances L. Newman, San Francisco
Ms Rita Norcross, Federal Way WA
Hon. Ralph Nunez, Fresno
James V. O'Brien, Esq., Clayton MO
Ms. Mary E. Olden, Sacramento
Mr. Daniel J. O'Neill, San Luis Obispo
Hon. Lawrence J. O'Neill, Fresno

Mr. David Orr, Alpharetta GA
Mr. Michael D. Ott, Fresno
Allan J. Owen Esq, Sacramento
Hon. Jerry Pacht, Los Angeles CA
Samuel C. Palmer Esq, Fresno
Ms. Reesa Parker, Dallas
Ms. Leanne C. Pastene, Vista CA
Ms. Ruth Persky, Los Angeles
Jonathan C. Peters, Esq., of Atlanta
G. Mark Phillips, Esq., Charleston SC
Ms. Kimberly K. Pope, Fort Worth
Ashley D. Posner Esq, Los Angeles
Ms. Jennifer Prazak, Ridgeway WI
Ms. April C. Presley, Dallas
Mr. William J. Quilty, Cayucos CA
Ms. Marguerite A. Quinn, Middlebury VT
Ms. Marcy Railsback, Beverly Hills CA
Ms. Vickie Rainwater, Fort Worth
Ms. Tammy L. Rampone, San Diego
Hon Roger D. Randall, Bakersfield
Calvin L. Raup, Esq, Phoenix
Mr. John M. Reece, Stockton CA
Ms. Rose Rhodes, Jacksboro TX
Hon. Roosevelt Robinson Jr., Inglewood CA
Hon. Arnold D. Rosenfield, Santa Rosa CA
Ms. Kelly Rowe, Alpharetta GA
Ms. Laura L. Runyon, El Cajon CA
William R. Sampson Esq, Overland Park KS
Thomas C. Sanford Esq, North Hollywood CA
Sheryl Saylor, Alta Loma CA
Mr. Ronald D. Secrest, Houston TX
Ms. Elizabeth Joy Sell, Madison WI
Roger S. Shafer Esq, Huntington Park CA
Hon Betty Jo Sheldon, San Marino CA
Brian R. Shumake, Esq., South Pasadena CA
Alan D. Sibarium Esq., Dallas
Mr. Wayne E. Silberman, Fort Worth TX
Hon. Shari Kreisler Silver, Los Angeles
Ms. Laurie Small, Downey CA
Ms. Laura L. Smith, Sacramento
Robert Smith, Esq., Los Angeles
Betsy Smyzer Esq., Yreka CA
Mr. Leonard Sparks III, Houston
Ms. Bridget Stallcup, DeSoto TX
Mr. Albert M. Stark, Princeton NJ
Jeffrey S. Stern, Esq., Boston
Ms. Janice L. Stoner, Chicago
Hon. Chris Stromsness, Dunsmuir CA
Mr. Philip J. Sugar, Los Angeles
Hon. Taketsugu Takei, San Jose
Martin J. Tangeman Esq, San Luis Obispo
Lauren E. Tate Esq, Santa Rosa CA
Ms. Michelle A. Taylor, Dallas
Ms. Debra Theine, Oconomowoc WI

Ms. Cindy Thomas, Fort Worth TX
Ms. Elisabeth Thomas, Dallas
George N. Tompkins Jr, Esq., New York City
James S. Thomson Esq, Sacramento CA
Ms. Truenea Teasley, Norcross GA
Ms. Laura D. Tubbs, Dallas
Mr. Harry Ungersohn, New York City
Ms. Julie I. Upton, Dallas
Ms. Tanya Verhoven, Madison WI
Nancy Vitale Esq, Sacramento
Ms. Kelly J. Vujnovich, Beaver Dam WI
Hon Lloyd von Der Mehden, Santa Rosa CA
Ms. Ann Walding, Dallas
Ms. Christy L. Walley, Dallas
Ms. Debra Walter, San Francisco
Ms. Gloria Ware, South Lake Tahoe CA
Mr. Harold E. Warren, Poughkeepsie NY
Ms. Jane E. Wassel, San Diego
Mr. Michael T. Watson, Fort Worth
Ms. Joan M. Weatherell, Pleasanton CA
D. J. Weis, Esq., Rhinelander WI
Ms. Carol Whitney, Federal Way WA
Robert D. Wilkinson Esq, Fresno
Ms. Ruth Ann Williams, Santa Rosa CA
Mr. Clay Williamson, Arlington TX
Ms. Joan Wilson, Manor TX
Ms. Caryl R. Wolff, Los Angeles
Mr. Robert C. Wood, San Diego
Ms. Marilyn J. Woodard, Dallas
Ms. Kate F. Worth, Fond du Lac WI
Ms. Brenda J. Wright, Austin TX
William B. Wyllie, Esq., Salem OR
Ms. Sharon E. Yackey, Granada Hills CA
Ms. Verna L. Young, Del Mar CA
Mr. Donald A. Ziskin, Santa Rosa CA

The foregoing list is less than complete. All but a few of those persons on this list signed one of a half dozen form letters distributed by the professional association. As the volume of mail increased, the Administrative Office ceased to distribute all the copies of every form letter, so that several dozen other individuals did sign such letters but are not listed. In addition, the Committee received 268 post cards indicating that the signers supported the position of the professional association.

The following individuals wrote only to support electronic recording of depositions as permitted by this revision:

Mr. Kent Andrews, Oakland CA
Ms. Dorothy N. Baer, Newport Beach CA
Ms. Judy Barrett, Laguna Niguel CA
Ms. Mindy Belcher, Sterling VA
Mr. Rex M. Blair, Council Bluffs
Hon. Rudi M. Brewster, S.D.Cal.
Mr. Horace W. Briggs, Los Angeles
Mr. Seth D. Bykofsky, Mineola NY

David N. Chandler, Esq., Santa Rosa CA
Ms. Donna K. Chertkow, Anchorage
Mr. R. Douglas Collins, West Hills CA
Ms. Karin Dains, Lathrup Village MI (a court reporter)
Ms. Carol Davis, Monrovia CA
Mr. Dennis Davis, Los Angeles
Ms. Margaret Devers, Vacaville CA
Ms. Wendy Dippold, Orangevale CA
Mr. Warren Doget, Rancho Cucamonga CA
Ms. Marijke Elder, San Rafael CA
Ms. Nancy Farley, Sacramento
Ms. Dolly F. Feigel, Tempe AZ
Ms. Carol C. Fitzgerald, Clerk of Court, D.Nev.
Thomas J. Fleming Esq, New York NY
Mr. L. L. Francisco, San Diego
Ms. Judith M. Garcia, Rockport TX
Ms. Lois Garrett, DeWitt MI
Mr. Robert C. Glustron, Decatur GA
Elwyn S. Goldweber, Esq, New York City
Hon. Charles A. Gonzalez, San Antonio TX
Ms. Myrtle M. Hamilton, South Floral Park NY
Ms. Joyce A. Hasselbalch, Lincoln NE
Mr. Charles J. Hecht, New York City
Mr. Jeffrey W. Herrmann, New York NY
Ms. Linda Kay Isom, Las Vegas NV
Hon. Alan Jaroslovsky, NDCal, Santa Rosa CA
David A. Joffe, Esq., Phoenix
Mr. Jeff Joseph, Milwaukee WI
Mr. Deno Kannes, San Francisco
Hon. John M. Klobucher, E. D. Wash.
Ms. Judy A. Lam Fong, San Bruno CA
Ms. Marie Lancaster, Dallas
Michael P. Lane, Esq. Phoenix
Josephine Lauriello, Esq., New York City
Mr. Randall L. Leshin, Fort Lauderdale
Mr. M. Byron Lewis, Esq., Phoenix
Mr. Franklin A. Luna, San Mateo
Ms. Mary Ann Lutz, Monrovia CA
Mr. Jeffrey T. McDonagh, San Francisco
Ms. Amy L. Mallory, Peoria AZ
David L. Mandell Esq, Madison WI
Mei Ying Manseau, NDCal, Oakland
Ms. Joyce Mitchell, Overland Park KS
Ms. Pam Nelson, Dallas
Bryan A. Nix, Las Vegas NV
David L. O'Daniel Esq, Phoenix
Ray H. Olmstead Esq, Santa Rosa CA
Ms. Carol M. Quintanar, Las Vegas NV
Mr. Sunny L. Pear, Austin TX
Mr. Dominic S. Polimeni, Court Admin, Alhambra CA
Kenneth R. Ross, Chicago
Paul W. Rothschild Esq, Oceanside CA
Hon. Michael B. Rutberg, West Covina CA
Mr. Joe Schafer, San Antonio TX

Ms. Denise Schuster, Spokane
Ms. Edna Segal, Washington DC
Ms. Beverly Sigurnik, Nampa ID
Ms. Cynthia Soltes, Chicago
Mr. V. Terry Sousek, Mineola NY
Ms. Barbara Stacy, San Anselmo CA
Ms. Terry Sublette, Spokane
Ms. Edythe L. Tanner, Citrus Heights CA (50 years as a stenographer)
Hon. Donald J. Tobin, San Diego
Mr. Michael Tortorelli, New York City
Mr. Steve Townsend, Phoenix AZ
Mr. William E. Wagner, Seattle
Elaine W. Wallace, Esq, Oakland CA
Ms. Kelly Ann Weiner, Columbia SC
Roberta Westdal, Deputy Clerk of Court for S.D.Cal.
William D. White Esq, Dallas
Robert M. Wilson Esq., Sacramento
Ms. Myrna Yabs, DeWitt MI

For what it is worth, none of the persons on this list appear to have signed a form letter. Inasmuch as there is no professional organization of transcribers from electronic recordings, it is perhaps unsurprising that their communications appear to be more spontaneous.

RULE 31

ATLA opposes this revision for the same reason that it opposes the revision of Rule 30, that it supposes defendants will comply with Rule 26.

The Chicago Bar Assn favors this revision.

The Federal Bar Association approves this revision.

The Los Angeles County Bar approves this revision.

The Philadelphia Bar opposes this revision.

Randall W. Wilson, Esq., of Houston opposes this change; he asserts that there is no problem of abuse of depositions on written questions.

RULE 32

Theodore Tetzlaff, Chair, opposes trial use of expert depositions because this would turn the expert deposition into a trial examination. He also fears that contentions will occur over edited versions of tapes and suggests that videotapes used at trial should be previewed with opposing parties.

The American Civil Liberties Union opposes the use of expert depositions at trial, urging that two depositions are needed - the first to prepare the cross-examination.

The Chicago Bar Assn favors this revision.

The Department of Justice favors this revision, but would add that when the deposition has been scheduled on insufficient notice that a party need not attend.

Fisher & Phillips of Atlanta argue that the increased role of experts assured by the proposed revision of Rule 702 makes it needful that experts appear in person at trial. They approve the proposal regarding nonappearance at a deposition but urge that it should go further.

Lawyers for Civil Justice oppose the more liberal use of expert depositions, which they fear will undermine live testimony.

A committee of the bar of C.D.Cal. opposes this change, arguing that it will result in videotaping of all expert depositions.

A Committee of the DC Bar favors this revision if the party using the deposition of an expert gives advance notice of that intent, and there should be an opportunity for a discovery deposition before the one to be used at trial.

The Los Angeles County Bar approves this revision.

The Montana Chapter of ABOTA objects to a requirement that the determination of availability of a deponent at trial be made at the time of the deposition.

The New Jersey Bar opposes authorizing use of a deposition by a party of its witness taken by an adversary.

The New York State Bar Committee approves this proposal.

Ogletree Deakins Nash Smoak & Stewart of Greenville SC oppose this revision, arguing that there is no reason to elevate expert witnesses over others.

The Philadelphia Bar favors (a)(3) except for the notice requirement, but it recommends against adoption of the revision.

Shell Oil opposes the use of expert depositions at trial as an increase in the number of depositions.

The South Carolina Defense Trial Attorneys' Assn opposes the admission of expert depositions at trial.

S. Paul Battaglia, of Syracuse, opposes any requirement that would result in a duty to cross-examine experts on deposition.

Gregory J. Digel Esq of Atlanta opposes the use of expert depositions at trial.

Carroll E. Dubac Esq of Los Angeles opposes the use of expert depositions at trial.

Charles F. Freiberger, Esq., of Columbus OH opposes the revision of Rule 32 that would allow experts to be presented in absentia.

Keith Gerrard, Esq., of Seattle expresses concern over the right of cross-examination, which may not be fully exercised in expert depositions.

Lee Hagen, Esq. of Fargo opposes the use of depositions unless the opposing party had a previous opportunity to cross-examine.

Raymond L. Hogge of Norfolk VA opposes the use of expert depositions.

Laurence R. Jensen of San Jose CA will result in the additional expense of videotaping every expert deposition.

Gregory P. Joseph of New York urges that depositions of experts should be usable at trial only if the opposing party has notice and opportunity to prepare a cross-examination after hearing the direct testimony.

M. J. Keefe Esq. of Albuquerque opposes this revision as placing an excessive burden to prepare prior to expert depositions.

Jack L. Nettles, Esq. of Florence SC opposes the use of doctor's depositions in the absence of a prior discovery deposition.

Victor E. Schwartz, Esq. and Fred S. Souk, Esq. of Washington DC oppose the use of expert depositions at trial.

Christopher Skambis, Esq., of Orlando suggests that the sanction of nonuse of a deposition taken on inadequate notice may be an inadequate deterrent. He questions whether a deposition that cannot be used at trial counts as one of the ten, and whether a deponent may in such circumstances be redeposed.

RULE 33

Alliance for Justice regards 15 as too small a number of interrogatories for many cases.

Theodore Tetzlaff, Chair, opposes limits on the number of interrogatories and in any case regards 15 as too low a number.

ATLA opposes limitations on the number of interrogatories.

The Beverly Hills Bar Association urges that 15 is too few; they favor 35.

The California Bar favors a limit of 35 depositions.

A committee of the bar of C.D.Cal. favors this revision.

The Chicago Council of Lawyers regards 15 as too small a limit on the number of depositions.

The Colorado Bar Association urges that 15 is too low a number.

The Connecticut Bar Committee finds 15 entirely too low a number.

A Committee of the DC Bar favors a limit on interrogatories, but proposes 40 as the right number.

The Department of Justice supports this revision.

Hunton & Williams of Richmond argues that the number of interrogatories should be raised to 30.

The Iowa Defense Counsel Association oppose limits on the number of interrogatories.

The Lawyers for Civil Justice oppose a limit on the number of interrogatories. They are especially concerned about the low number of interrogatories and note that the proposed limit is lower than any imposed by the local rules that the Notes cite. They urged SDNY Rule 46 as a workable alternative. That rule allows early interrogatories limited to the subjects identified in 26(a)(1), forbids the use of interrogatories during the discovery stage, and then allows contention interrogatories at the close.

The Los Angeles County Bar finds the provision "including all subparts" to be in need of clarification.

The Los Angeles Chapter of the Federal Bar Association favors a national limit on the number of interrogatories, but urges 30-35 as the right number.

The Montana Bar opposes limits on the number of interrogatories.

Ogletree Deakins Nash Smoak & Stewart of Greenville SC oppose this revision as dilatory.

The Philadelphia Bar favors (b)(1) and (b)(4), but opposes t he changes in (a) and (b)(3).

The Public Citizen Litigation Group endorses the revisions bearing on objections but disapproves of 15 as a limit on the number of interrogatories.

The South Carolina Defense Trial Attorneys' Assn opposes limitations on the number of interrogatories.

Trial Lawyers for Public Justice oppose limits on the number of interrogatories.

Williams & Ranney of Missoula MT opposes limits on the number of interrogatories.

Robert J. Albair, Esq. of Clayton MO opposes the limitations on interrogatories, leading as it will to motion practice in almost every case.

William L. Dorr Esq of Rochester NY opposes this revision.

T. Mack Brabham and fourteen other lawyers in McComb MS favor limitations on interrogatories, but on a case-specific basis.

David F. Fitzgerald, Esq. of Minneapolis urges that 15 is too low a number of interrogatories.

Keith Gerrard,Esq. of Seattle favors limits on the number of interrogatories and requests for production, but thinks the proposed limit too low.

Hugh Q. Gottschalk, Esq., of Denver favors this revision.

Joseph E. Grinnan, Esq., of Southfield MI finds the limit on interrogatories too low.

Lee Hagen, Esq. of Fargo opposes limits on the number of interrogatories.

Jon L. Heberling of Kalispell MT argues that more interrogatories are needed, especially in light of the limitations on depositions.

Raymond L. Hogge of Norfolk VA opposes limits on interrogatories.

Philip A. Lacovara, Esq, of New York favors the limits on interrogatories.

J. D. Ledbetter of Southfield MI opposes limits on the number of interrogatories.

John O. Miller, Esq. of Corpus Christi urges that 30 is the proper limit on the number of interrogatories, and that 120 days are needed for answer.

Marc Nerenstone, Esq., of Washington, argues that there should be no limits on interrogatories, that these should be the discovery method of choice, and one should be encouraged to follow up on evasive responses.

Godfrey P. Padberg, Esq. of St. Louis urges that even 20 interrogatories is often insufficient.

Deana Peck of Phoenix urges that the limit on the number of interrogatories is too low.

Clifford A. Rieders, Esq., of Williamsport PA regards 15 as too low a limit.

Robert S. Rosemurgy, Esq., of Escanaba MI regards the limit of 15 as unreasonably low.

Stephen J. Rothman, Esq., of West Palm Beach finds the limit of 15 interrogatories too low.

Susan Vogel Saladoff of Rockville MD opposes this revision.

Thomas F. Tobin, Esq., urges that 15 is too low a limit on interrogatories.

Windle Turley Esq of Dallas opposes limits on interrogatories as unjust to plaintiffs.

RULE 34

The Chicago Bar Assn favors this revision.

The Connecticut Bar committee finds this provision to be in conflict with the proposed revision of Rule 26; "since the disclosures will not be filed, the court will be at a loss to determine culpability."

The Los Angeles County Bar approves this revision, subject to its comments on Rule 26.

The Philadelphia Bar favors the proposed second paragraph of (b).

Philip A. Lacovara of New York suggests a presumptive limit on the number of documents that a party may be required to produce. The limit he proposes is 500 documents or 5000 pages. He argues that document discovery was never intended to be as broad as questioning on depositions and should be narrowed.

RULE 36

The Chicago Bar Assn favors this revision.

Lawyers for Civil Justice urge elimination of the requirement that requests not be served until after mandatory disclosure.

The Los Angeles County Bar approves this revision, subject to its comments on Rule 26.

The Philadelphia Bar opposes this revision.

RULE 37

Theodore Tetzlaff, Chair, opposes the sanctions imposed on non-disclosures, at least until experimentation has been conducted in some districts.

The American Civil Liberties Union urges that sanctions under this rule should be permissive.

The Chicago Bar Assn favors this revision except that there should be no sanction for failing voluntarily to disclose documents harmful to a party's contention.

The Chicago Council of Lawyers is concerned that the requirement of good faith effort has no time limit. It observes that some litigants of obstructive bent will not commit themselves to either impasse or resolution.

The Connecticut Bar committee fears that this revision will place counsel on the witness stand to justify failures to disclose.

The Department of Justice supports this revision. It also recommends an English rule on fees with respect to discovery motions.

Except insofar as it reflects 26(a), the Federal Bar Association supports the revision of this rule.

Kincaid Gianunzio Caudle & Hubert of Oakland CA oppose the meet and confer requirement as an increasing cost. They assert that the revisions would result in substantial litigation on sanctions.

The Los Angeles County Bar approves this revision, subject to its comments on Rule 26.

The Los Angeles Chapter of the Federal Bar Association favors this revision except that they question the meaning of "after affording an opportunity to be heard" in (a)(4) and the provisions of (c)(1) as they relate to 26(a)(1).

The Montana Bar opposes the sanction of revelation to the jury of non-disclosure; it finds this sanction excessive.

The Montana Chapter of ABOTA questions whether evidence not yet required to be disclosed (e.g. expert opinions) can be offered at the summary judgment stage. They also suggest that the modifier "substantive" is not needed to describe evidence that may be excluded under this rule, and that its use causes uncertainty.

The Philadelphia Bar favors the revisions in (a)(1), (a)(2), (a)(4)(A), (a)(4)(B), (a)(4)(C), and (d), but opposes this in (a)(3), (c) and (g).

T. Mack Brabham and fourteen other lawyers in McComb MS favor the evidence-excluding sanction, but fear that it is insufficient.

Roy B. Dalton of Orlando, urges that it is a toothless sanction to preclude a nondisclosing party from offering undisclosed evidence because the evidence will always be harmful to the non-discloser.

Keith Gerrard, Esq. of Seattle thinks the sanctions proposed for non-disclosure too severe.

The Local Rules Committee of D.Md. questions the routine disclosure to the jury of the contentions involved in discovery disputes as provided in Rule 37(c). They urge that disclosure of the withholding should be in the discretion of the court.

The Public Citizen Litigation Group favors the revision of (a)(4) and the requirement of an effort to confer, but in the latter connection that sometimes the dispute is so clear that conferring is useless and good faith has no meaning.

Mssrs. Turner, Klaber, Sommer & Donovan of Pittsburgh find the sanctions in (c) excessive for the vague provisions of (a)(1).

RULE 43

Not a comment on this proposal, the ABA at its 1991 meeting called on the Committee to take action to correct "megatrials" in criminal cases.

Theodore Tetzlaff, Chair, opposes this revision; he notes that some busy judges will not read the written statement prior to the cross-examination.

The American Board of Trial Advocates opposes this revision as an impediment to cross-examination.

The American Civil Liberties Union opposes this revision.

American Insurance Association urges that this revision be brought more in line with the committee's notes.

The American Intellectual Property Assn urges that this revision be qualified or forsaken.

The Chicago Bar Assn favors this change, so long as no issue of credibility is at stake.

The Federal Bar Association endorses this revision.

The Federal Courts Committee of the American College of Trial Lawyers opposes the amendment to Rule 43. They hold that an affidavit is not a substitute for oral testimony, and questions whether the adopted written report must be under oath. They are concerned about the right of counsel to expose the credibility of a witness to the perception of the judge, and also fear that the affidavit evidence will be more accessible to the judge than oral testimony in those cases taken under advice for substantial periods.

ABCNY opposes this proposal as extremely unwise and most unlikely to lead to any discernible benefit.

The Connecticut Bar committee opposes this revision.

Fisher & Phillips of Atlanta finds this revision acceptable.

Laurence R. Jensen of San Jose CA opposes this revision.

Lawyers for Civil Justice oppose the use of written evidence where live testimony is available.

The Los Angeles County Bar disapproves this revision. It would approve if "in appropriate circumstances" were added.

The Montana Chapter of ABOTA contends that the rule should permit the court to authorize the presentation of routine testimony in the manner provided by the revision, but should not permit the court to require it.

The Philadelphia Bar opposes this revision

The Public Citizen Litigation Group endorses this revision, but suggest that the Note encourage the court to secure consent for this practice.

The South Carolina Defense Trial Attorneys' Assn opposes this revision.

Trial Lawyers for Public Justice oppose this revision.

The Washington State Bar opposes this revision.

The Wichita Bar Association opposes this revision.

Frank, Napolitano & Resnik generally oppose a move away from orality. They also oppose increased use of deposition testimony at trial, urging that this will require two depositions.

Roy B. Dalton, Esq., of Orlando, opposes this revision, urging that the demeanor evidence is important.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Lee Hagen, Esq. of Fargo opposes this revision.

Godfrey P. Padberg, Esq. of St. Louis does not think that this revision will result in much time saved.

Susan Vogel Saladoff of Rockville MD opposes this revision.

Victor E. Schwartz, Esq. and Fred S. Souk, Esq. of Washington DC oppose this revision.

Samuel M. Shapiro, Esq of Rockville MD opposes this revision.

Thomas F. Tobin, Esq., of Chicago opposes this revision.

RULE 50

Professor Michael J. Waggoner of the University of Colorado calls the attention of the Committee to a possible unintended inference from the 1991 revision of this rule.

RULE 54

Alliance for Justice does not oppose fee schedules or references to masters: fee litigation is so distasteful and often so protracted that any chance of prompt resolution seems agreeable. They urge that there should be that there should be a possibility of out-of-town rates where local lawyers in the fiel strenuously object to the 14-day period for filing as not allowing sufficient time for documentation.

Theodore Tetzlaff, Chair, perceives that this revision would overrule *Budinich v. Becton Dickinson* with respect to the timing of an appeal on the merits when a fees issue remains unresolved. He finds a clear bright line in Budinich that it is unhelpful to blur. He also opposes local fee schedules and references to masters.

The American Civil Liberties Union favors most of this revision. It questions the requirement of a filing in 14 days and suggests a second deadline of 30 or 45 days for completing the application for fees. The ACLU supports the idea of local rate schedules, but urges an exception where it is necessary to bring in special counsel from outside the area. It suggests that there should be a local advisory committee in each district to consider the schedule. It also urges that the Rule address interim fees, post-judgment fees, and common fund fees. It also questions the use of special masters.

The Federal Courts Committee of the American College of Trial Lawyers supports the revisions of Rules 54.

ABCNY urges that these reforms do not go far enough. They urge that a motion for fees should render an otherwise final judgment non-appealable unless the district court enters a separate judgment under 54(b) or certifies under 1292(b) or mandamus lies. This would effect economy and eliminate issue of when to file notice of appeal. They suggest a 21-day time limit for filing fees motions; if the 14-day limit is maintained, then billing data should be permitted for another week or two. ABCNY endorses the concept of a local fee schedule based on a wide spectrum of information. It is uneasy about the use of special masters, and would like to see a provision on interim awards.

The Beverly Hills Bar Assn disfavors the local fee schedule as unfair to transient lawyers. It favors the 14-day rule.

The California Bar favors this revision except for the local fee schedule.

A committee of the bar of C.D.Cal. opposes the establishment of local fee schedules.

The Chicago Bar Assn favors this revision, but cautions that a local fee schedule could be too rigid, and a special master too costly.

The Chicago Council of Lawyers is concerned that rate schedules tend to lag behind the market and that the court is not suited to determine proper rates. They recommend that fees should be fixed on a basis that takes more account of the sanction's impact on the violator. They are especially concerned about the use of such a standard in §1988 cases.

A committee of the Colorado Bar supports this proposal.

Fisher & Phillips of Atlanta favor this revision.

The advisory committee to the Fourth Circuit favors this revision but argues that the 14-day period is too short.

The Los Angeles County Bar opposes local standards applied to work performed elsewhere. It otherwise approves.

The Los Angeles Chapter of the Federal Bar Association urges that this rule should also apply to situations in which fees are recovered as part of damages. They also suggest that "related nontaxable expenses" is unclear, that the fees claimed should be specified and not estimated, that the last sentence of (d)(2)(B) is unnecessary; that (d)(2)(C) would be clearer if "in accordance" were replaced by "subject to;" and that (d)(2)(D) is not well-advised.

Frank, Napolitano & Resnik argue that these revisions should await a more comprehensive review of the judgments rule, including a provision for the method of entering a consent decree. They are concerned about the use of special masters or magistrates and suggest a possible conflicts with 28 USC §636 since these are not pretrial matters. They suggest language for using Judicial Reform Act committees to establish fee schedules. They renew the suggestion that the rule should provide for interim awards. They would prefer that the provision on finality of fee awards be located in Rule 54 rather 58. They recommend that a request for fees render the case unappealable unless certified by the district court; this would have the effect of making it clear that the time for filing a notice of appeal is after the fee award has been made. They suggest that the words "before a notice of appeal has been filed and become effective" at line 13 of Rule 58 be dropped.

Gregory P. Joseph Esq. of New York suggests that the rule should also apply to fees imposed as an exercise of inherent power.

Paul A. Manion, Esq., of Pittsburgh favors this revision.

National Assn of Securities and Commercial Law Attorneys urge that it be made clear that rule does not apply to common fund cases.

A committee of the New York County Bar favors this revision.

The Philadelphia Bar is uncertain which claims for fees would be subject to this procedure; it is troubled that (d)(2)(A) is non-exclusive.

The Public Citizen Litigation Group opposes this revision and prefers the local rule in DDC. They suggest that 14 days is not long enough to negotiate fees. They believe that local fee schedules are not needed and they disfavor delegation to a magistrate or master.

The Southern District of Iowa supports this revision, but urges that 14 days be extended to 30.

Trial Lawyers for Public Justice oppose this revision as an impediment to the recovery of fees.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Harold E. Kohn, Esq. of Philadelphia argues that (d)(2) is unnecessary and that (b)(2)(C) requires clarification. He questions the need for this rule.

RULE 56

Alliance for Justice favors summary adjudication of defenses but fears that the revision of (f) may encourage premature summary adjudication. They also oppose (g)(3).

The Admiralty and Maritime Litigation Committee of the ABA opposes the provision guaranteeing an opportunity for discovery on grounds that it will result in costly delays. They compliment the provision authorizing partial dispositions.

The ABA Section on Antitrust opposes making summary judgment discretionary. It favors the requirement that summary judgments be explicated and favors the provisions bearing on partial summary judgment. It would require the district court to explain denials of summary judgments.

Theodore Tetzlaff, Chair, finds this revision unnecessary, especially the assurance of an opportunity for discovery. He also opposes the specificity requirements imposed on moving and responding papers, and urges that the grant of summary judgment should not be permissive.

ABCNY regards this proposal as long and unnecessarily burdensome. It approves the change to 30 days as a response period, but finds the proposal unduly favoring those parties wishing to prolong wasteful discovery. By incorporating some of the case law in the rule, ABCNY fears that courts may infer that other court-made law has been altered, e.g., Anderson v. Liberty Lobby and Matsushita. They are also concerned about the deletion of 56(g) in light of changes made in Rule 11.

The American Civil Liberties Union opposes this revision as unnecessary. It supports the extension of the time for the motion and the repeal of (g).

American Insurance Association favors this revision, but urges that the rule should be strengthened, as by requiring findings and conclusions when a motion is denied. It urges that the burden on the moving party be more narrowly defined and disapproves the expanded definition of admissions set forth in (b). It also opposes offers of proof as a means of opposing summary judgment, and the enlargement in (c) of the time before which a party can move for summary adjudication.

ATLA finds this revision to be unnecessary and likely to create occasions for litigation. They do approve the language of (c), but are especially concerned by (g)(4) as an invitation to misuse.

The Arkansas Bar Association favors this revision.

The Beverly Hills Bar Association supports this revision, but urges that evidence should not be required to be admissible. They suggest a rewording of (f) to correct what it sees an unfair advantage to the party opposing Rule 56 motions.

The California Bar generally supports this revision with qualifications. It opposes an admissibility requirement for evidence consider on the motion and it opposes the revision of (f); it urges the following language:

> Should it appear from the affidavits of a party opposing a motion for summary judgment that the party cannot for good cause shown present materials needed to support that opposition, the court may deny the motion or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

The California Trials Lawyers Association opposes this revision.

A committee of the bar of C.D.Cal. favors this revision as proposed.

The Chicago Bar Association generally supports this revision. It suggests that the comment to (a) should be explicit that what is intended is no change from the present (a) and (b). It suggests that (e) should be clear that "admissions" includes concessions made in pleadings, motions or briefs.

The Chicago Council of Lawyers supports this revision, except insofar as it codifies *Anderson v. Liberty Lobby*, which it believes to have been wrongly decided.

A committee of the Colorado Bar supports this proposal.

The Connecticut Bar committee opposes this revision as an effort to take summary judgment away from the parties to give to the court. It deplores the apparent removal of argument. It opposes the partial summary disposition of issues as excessively vague.

The Department of Justice does not believe that the rewriting of Rule 56 is necessary, but it supports some changes. It is concerned that the rule does not require the court to render summary judgment when appropriate. It argues that the proposed draft is not clear that only disputes on material issues can forestall judgment. It opposes the revision of the timing requirements, particularly to assure opportunity for discovery

A Committee of the DC Bar favors this revision as generally reassuring to present practice. They question whether the factual recitation should be required as part of the motion rather than in a separate instrument. They are also concerned that (g) is not adequately distinguished from a Rule 42 proceeding to determine credibility.

The Federal Bar Association endorses this revision, but suggest that the moving party should have a right of reply.

Fisher & Phillips of Atlanta favor this revision, but question the term "without argument." They also urge that (f) be rewritten.

Kincaid Gianunzio Caudle & Hubert of Oakland CA suggest that Rule 56 should speak to the use of disclosures in Rule 56 proceedings.

The Los Angeles County Bar approves this revision.

The Los Angeles Chapter of the Federal Bar Association generally favors this revision. They express anxiety that (e) may imply that the moving party must have supporting material; they fear that this might be thought to overrule *Catrett*; they express regret that a paragraph in the 1990 Notes affirming this aspect of *Catrett* was deleted. They also urge that the admissibility requirement is not necessary are helpful. They also question the provision in (f) for offers of proof.

The Mississippi Defense Lawyers Assn opposes the revision insofar as it guarantees an opportunity for discovery.

The National Assn of Independent Insurers favors this revision, but fears that it will not induce judges to use summary judgment more often, as they assert the judges should.

National Assn of Securities and Commercial Law Attorneys opposes this revision.

The New Jersey Bar opposes any effort to restate the trilogy. It also holds that the "reasonable opportunity to discover" is vague and may give rise to delay. It does not believe that the rule needs to be amended.

A committee of the New York County Bar favors this revision, but opposes the provision authorizing the court to preclude motions.

The Orange County Bar Committee singles this revision out as the one having the most desirable effects.

The Philadelphia Bar favors this revision.

The Public Citizen Litigation Group generally approves this revision. They express concern that the Committee Notes may overly qualify the assurance given in the text of an opportunity to use discovery. They suggest that the movant be required to certify that the opposing party has been afforded a reasonable opportunity to discover relevant evidence pertinent to the motion. One purpose would to forestall premature motions which, they suggest, may be fostered by the revision. They suggest a need for more explicit provisions on cross-motions. They also suggest that all the required information should not be in the moving party's motion, which they would keep short. They also suggest that the Notes should be clear that an admission does not go to relevance or materiality. And they suggest that the limitation imposed in (c)(3) may in some cases be improvident. With respect to (c)(2), they suggest retention of the existing requirement that a motion can be defeated by identifying need for further discovery and also suggest that the party resisting the motion be required to identify the triable issues. Perhaps, (c)(4) could be amplified thus: if the party is opposing summary adjudication, it shall identify those issues that need to be tried and explain their relevance to the ultimate determination of the case. Finally, they express concern that the court may become entangled making rulings on admissibility in order to determine a Rule 56 motion, an activity they think premature.

Trial Lawyers for Public Justice oppose this revision as unjust to plaintiffs and unnecessary. They perceive the revision to effect material change in the standard for the grant of summary judgment and to threaten the right to trial by jury.

Washington Trial Lawyers Assn opposes this revision.

Hon. Albert V. Bryan, EDVa, sees no benefit in the change of nomenclature of a partial summary judgment to summary adjudication.

Roy B. Dalton, Esq., of Orlando, regards this revision as unnecessary.

S. Paul Battaglia, Esq. of Syracuse, supports this revision.

Frank, Napolitano & Resnik oppose this revision as too long, and unnecessary.

Keith Gerrard, Esq., Seattle, supports this proposal.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Lee Hagen, Esq. of Fargo opposes this revision as increasing the power and discretion of the court.

Laurence R. Jensen of San Jose approves of this revision.

Ernest Lane Esq of Greenville MS opposes this revision as unnecessary.

Hugh Q. Gottschalk, Esq., of Denver favors this revision.

Paul A. Manion, Esq., of Pittsburgh favors this revision.

Robert W. Powell of Detroit, for the firm of Dickinson, Wright et al favors this revision as a material improvement.

Robert S. Rosemurgy, Esq., of Escanaba MI expresses support for this revision.

Professor Maurice Rosenberg finds this revision not necessary and not likely to be significant. He would leave this rule alone.

Christopher C. Skambis, Esq., of Orlando commends this revision.

Paul L. Stritmatter, Esq. of Hoquiam WA opposes this revision as broadly expanding the power of the court to grant summary judgment.

Mssrs. Turner, Klaber, Sommer & Donovan of Pittsburgh find the provisions for partial summary judgment "a very positive change." They are troubled, however, by the provision assuring a reasonable opportunity for discovery. They assert that there are cases in which summary judgment should be considered before the initial disclosures are made.

RULE 58

Alliance for Justice urges that there is no reason to litigate fees while a judgment for the defendant is being appealed. They also question whether the tolling provision can work except by agreement of the parties.

Theodore Tetzlaff, Chair, opposes this revision. He suggests additional revisions of the Appellate Rules.

The American Civil Liberties Union favors the purpose of this revision, but suggests that the time for appeal should normally be stayed, subject to exceptions by certificate under 54(b) or Section 1292(b). Where the fees decision is postponed pending the appeal, they urge the need for an initial fee award, citing 9th circuit decisions.

The Federal Courts Committee of the American College of Trial Lawyers supports the revisions of Rule 58.

The Beverly Hills Bar Association supports this revision.

The California Bar supports this revision.

The Los Angeles County Bar approves this revision.

The Philadelphia Bar opposes this revision.

The Public Citizen Litigation Group fears that this revision will encourage piecemeal fees litigation.

RULE 83

The Admiralty and Maritime Litigation Committee of the ABA expresses concern that (d) may be compromised by the 1991 revision of Rule 5 which they fear may authorize the court to refuse to accept for filing papers that are defective only in form.

Theodore Tetzlaff, Chair, opposes this revision as an invitation to further localization of the rules.

American Board of Trial Advocates suggests that disclosure rules should be tried in demonstration districts.

The American Civil Liberties Union strongly supports (d), but opposes authorization for experimental rules.

American Insurance Association supports this revision.

ABCNY would prefer to postpone discovery reform until the Civil Justice Reform Act has been implemented, which will entail some experimentation. It is puzzled that the Civil Rules Committee should go forward with a national experiment with disclosure and at the same time authorize local experimentation. ABCNY endorses subdivision (d).

The Beverly Hills Bar Association supports this revision.

The California Bar supports this revision.

The Chicago Bar Assn favors this revision.

The Connecticut Bar committee favors experimental rules so that its district can experiment with its present rules for five years, there being no reason to change.

The Federal Bar Association approves this revision.

Fisher & Phillips of Atlanta express concern that (d) will defeat the efficacy of local rules.

Hunton & Williams of Richmond urges that experimental rules should be subject to the notice and comment requirements of (a).

Kincaid Gianunzio Caudle & Hubert of Oakland CA oppose the provision for experimental rules; they believe the rules should be uniform.

The Judicial Conference of the United States favors uniform numbering of local rules. Judge Keeton informs the Civil Rules Committee that the Standing Committee has offered to assist courts in achieving uniformity in numbering.

The Los Angeles County Bar approves this revision.

The Los Angeles Chapter of the Federal Bar Association favors this revision.

The Philadelphia Bar opposes this revision as unnecessary.

The Public Citizen Litigation Group is skeptical of new authority to make local rules.

Professor Kim Dayton of the University of Kansas is horrified that the Committee would favor experimental rules. This he finds inconsistent with the CJRA of 1990.

Professor Leo Levin, University of Pennsylvania, strongly approves of the content of Rule 83, but urges that it should be enacted by Congress in order to avoid any possible supersession of 28 USC §2071(a). His views are published at 139 U PA L REV 1567.

Frank, Napolitano & Resnik oppose localism in the rules. They argue that too much local discretion is authorized in proposed rules 26 and 54. They would delete 83(b), and also the words "of form imposed" in 83(d).

RULE 84

The Los Angeles County Bar approves this revision.

The Philadelphia Bar favors this revision.

EVIDENCE RULE 702

Alliance for Justice opposes this revision.

The Alliance of American Insurers urges that the presentation of expert opinion should be a matter of right to the parties and not for the discretion of the court.

The ABA Section on Antitrust favors this revision.

Theodore Tetzlaff, Chair, believes that further study of this revision is desirable.

The American Board of Trial Advocates opposes this change as an affront to the Seventh Amendment. They resolved on February 18, 1992 that this revision was of such consequence that further hearings should be conducted.

The American Civil Liberties Union urges that the committee notes should make it clear that an expert opinion need not be "generally accepted" in order to be reliable. It opposes a requirement that such testimony be substantially helpful; such decisions should be left to counsel. If expert reports are to be required, it favors the requirement that the experts stick to those reports.

The American College of Trial Lawyers favors this revision.

The Arkansas Bar Association opposes this revision.

ACCA expresses the opinion that this revision does not go far enough to prevent the use of opinion testimony not rooted in good science.

American Insurance Association supports this revision.

ATLA opposes this revision for the reasons stated by Judge Weinstein.

ABCNY supports this revision.

The Beverly Hills Bar Association supports this revision.

The California Bar supports this revision.

The California Trials Lawyers Association opposes this revision.

A committee of the bar of C.D.Cal. opposes this revision as expert testimony is often needed in new and emerging areas and may be impeded by the court.

The Department of Justice supports this revision, but fears that it is insufficiently stringent in excluding "junk science."

A Committee of the DC Bar favors this revision.

The Federal Bar Association supports this revision.

The Federal Judicial Center, per Joe S. Cecil and Molly Treadway Johnson, surveyed federal judges regarding this revision. 141 favor the proposed revision of the first sentence of the rule; 33 favor the revision if limited to civil cases; 113 oppose the change. 194 of those responding favored the requirement that expert opinion be "reasonably reliable," with an additional 17 favoring that change if limited to civil cases.

Fisher & Phillips of Atlanta favor this revision but urge that committee notes should caution the court against disallowing expression of scientific opinions that are minority views.

Hunton & Williams of Richmond supports this revision.

Lawyers for Civil Justice support this revision.

The Los Angeles Chapter of the Federal Bar Association reports that it is deeply divided on the wisdom of this revision.

The Montana Bar opposes this revision.

Murphy Oil Co., El Dorado AK, favors this revision.

The NAACP Legal Defense Fund opposes this revision, which, it suggests would have excluded the expert testimony in *Brown v. Board of Education*.

The New York State Bar Committee opposes the revision of the first sentence of this rule, but favors the addition of the second sentence. They argue that the proposed change in the first sentence will not accomplish much because the issues of reliability and substantiality are appropriately issues to be decided by the trier of fact.

Ogletree Deakins Nash Smoak & Stewart of Greenville SC favor this revision.

The Public Citizen Litigation Group approves the provision freezing the expert's testimony but disapproves the enlarged duty of the court to exclude opinion evidence. They assert that the Note's language requiring "significant support or acceptance within the scientific community" is subject to the same problems that plague *Frye*. They also question the meaning of "substantially assist."

The Southern District of Iowa supports this revision.

Trial Lawyers for Public Justice oppose this revision.

The Washington State Bar opposes this revision.

Washington TLA opposes this revision.

Robert J. Albair, Esq., of Clayton MO, opposes the revision of Rule 702 as giving too much power to the district judge.

Hank Anderson, Esq., of Wichita Falls TX opposes the revision of Rule 702 as imposing an impossible burden on judges to foretell what will be substantially helpful and reliable.

S. Paul Battaglia, Esq., of Syracuse, supports this revision.

Raymond I. Booth, Esq. of Jacksonville FL opposes this revision.

T. Mack Brabham and fourteen other lawyers in McComb MS oppose this revision as conferring too much power on the judge.

Mary Coffey of Saint Louis urges that juries are capable of evaluating experts and that no change is needed.

Thomas J. Conlin, Esq., of Minneapolis, opposes the revision of the first sentence as offensive to jurors and to effectiveness of cross-examination.

John B. Donohue, Esq., of Richmond VA favors this revision.

Winslow Drummond Esq of Little Rock opposes this revision.

Carroll E. Dubac of Los Angeles favors this revision.

David H. Dunaway, Esq. of LaFollette TN opposes this revision.

Richard Duncan, Esq. of Knoxville opposes the amendment of Rule 702 as an unwarranted intrusion on the jury, leading federal courts to define scientific orthodoxy.

Hon. J. Owen Forrester (ND Ga) urges that the Committee go further in its revision of Rule 702. He proposes language designed to separate the expert opinion from background information. He argues that it is the former that is a problem, while background data is often a substantial help. He also urges that "reasonably reliable" is not strong enough with respect to opinions - such should be "reasonably certain" to help.

Charles F. Freiberger, Esq., of Columbus OH, finds the change in Rule 702 to be either inappropriate or ineffective.

Gail N. Friend, Esq, of Houston, urges that the authority of someone other than the trier of fact to determine whether expert opinion shall be admitted is "a glaring impingement of due process."

Eugene O. Gehl, Esq., Madison WI, urges that the revision does not go far enough to assure that opinions be based on science or technical knowledge.

Keith Gerrard, Esq., Seattle, regards this proposal as long overdue.

Professor Paul C. Giannelli of Case Western Reserve questions why this revision is not equally applicable to criminal cases. He also notes that *Frye* is still good in most circuits. He asks whether the committee means to require "wide acceptance," the term employed in a recent Executive Order. He also questions the meaning of "substantial" in this context.

Hugh Q. Gottschalk, Esq., of Denver favors this revision.

Professor Michael Graham of the University of Miami regards this amendment as being on the right track, but questions the phrase "reasonably reliable." He suggests that it fails to deal with several enumerated problems, and favors the use of "substantial acceptance" in the relevant expert community as the proper test. That phrase is drawn from the case law. Specifically, his proposal is:

> Testimony providing scientific, medical, technical, or other specialized information in the form of an opinion, inference, or otherwise, may be permitted only if (1) the information is based upon adequate underlying facts, data or opinions, (2) the information conforms to an explanative theory that has received substantial acceptance by the relevant expert community, (3) the witness is qualified as an expert by knowledge, skill, experience, training or education to provide such information and (4) the information will substantially assist the trier of fact to understand the evidence or to determine a fact or issue.

Richard W. Groner, Esq. of Venice Florida opposes the change in Rule 702. In construction litigation, he has found testimony of workmen on industry custom to be very valuable and fears that it will be excluded pursuant to the revised rule.

Fredd J. Haas, Esq. of Des Moines opposes this revision.

Lee Hagen, Esq. of Fargo opposes this revision.

Jon L. Heberling, Esq. of Kalispell MT finds this proposal not well thought out. He asks: how does the court appraise evidence that it has not heard?

John C. Holme, Esq. of Chester VT opposes this revision.

Laurence R. Jensen of San Jose CA opposes that part of this revision that would require advance disclosure of expert testimony.

Leonard S. Katkowsky, Esq. of Southfield MI opposes the requirement of "reasonable reliability" as unnecessary.

M. J. Keefe, Esq of Albuquerque finds this proposal alarming because it may result in experts being more valuable to well-financed litigants.

Ann Kelly Esq of Santa Monica opposes this revision.

Prof. Kenneth R. Kreiling of Vermont Law School favors raising the threshold for expert testimony but questions the use of the term "reliable," which he finds problematic.

J. D. Ledbetter, Esq. of Southfield MI opposes this revision.

Thomas M. Loeb, Esq. of Southfield MI opposes this revision.

Keith A. McIntyre, Esq. of Statesboro GA opposes the revision of Rule 702, asserting that the overwhelming majority of expert opinion is reliable and useful.

Henry Oechler, Esq., New York, expresses concern that the Committee Notes to Rule 702 may discourage use of new science.

James F. O'Neill, Esq. of Burlington VT opposes this revision as conferring too much discretion on judges,

Godfrey P. Padberg, Esq. of St. Louis suggests that this revision will prevent Columbus from testifying that the earth is round.

Mitchell I. Pearl, Esq. of Middlebury VT opposes this revision.

Anthony Z. Roisman, Esq. of Washington DC opposes this revision.

Susan Vogel Saladoff of Rockville MD opposes this revision.

Professor Michael J. Saks of the University of Iowa supports the revision and argues especially for its application in criminal cases, where, he observes, the worst abuses of opinion testimony are those of prosecutors. Very few criminal defendants, he notes, can afford expert testimony of any kind.

Samuel M. Shapiro, Esq of Rockville MD opposes this revision.

Professor Daniel Shuman of Southern Methodist, writes to call attention to an empirical study in which he participated: Champagne, Shuman & Whitaker, An Empirical Examination of the Use of Expert Witnesses in American Courts, JURIMETRICS, Summer 1991 at 375. The study shows that experts testify in about half of civil cases, often for only one side. They report a shared perception of those participating in the study regarding the ways in which lawyers recruit and coach experts.

David A. Stjern of Springfield IL opposes this revision as giving too much power to the court.

Laura D. Stith of Kansas City favors this revision.

William R. Wilson, Esq. of Little Rock (a member of the Standing Committee) fears that the amendment will operate to the disadvantage of less resourceful lawyers and clients who cannot afford the best-qualified experts.

Martha K. Wivell, Esq. of Minneapolis opposes this revision.

Hon. H. David Young, E.D. Ark., fears that this revision will disfavor the infrequent independent expert and favor the hired guns who will be able to comply with the requirements imposed.

EVIDENCE RULE 705

Theodore Tetzlaff, Chair, believes that further study of this revision is desirable.

The Department of Justice favors this revision.

The New York State Bar Committee favors this proposal.

The Philadelphia Bar opposes this revision.

UNIVERSAL COMMENTS

The Arkansas Bar requests further time for study. Professor Robert R. Wright, University of Arkansas, requests further time specifically to study the revisions of Rules 16, 26 and 702.

The Maryland Trial Lawyers Association opposes the entire package of amendments "for reasons stated by TLPJ."

The Philadelphia Bar recommends that no changes be made to the Rules at this time. It sees Rule 26(a) as the centerpiece of these revisions and sees that rule as better subject to experimentation through the Civil Justice Reform Act of 1990. It has however commented on the rules individually, and its comments are recorded here subject to this general qualification.

The Washington State Bar Association requests an extension until July 1 for comment on these proposals.

Lance J. Stevens, Esq. of Jackson MS opposes all changes in the Rules, because the present rules provide the proper balance.

PAUL D. CARRINGTON

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