To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **May 17, 2004**

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

Introduction

The Civil Rules Advisory Committee met at a conference on electronic discovery at Fordham Law School on February 20-21, 2004, and met again at the Administrative Office of the United States Courts on April 15-16, 2004. Style Subcommittees A and B met at Fordham Law School, one on February 19 and the other on February 21. The Discovery Subcommittee met on March 20 at the Administrative Office of the United States Courts. The several Subcommittees also met by conference calls during the time since the January meeting of the Standing Committee. Draft Minutes of the April Advisory Committee meeting are attached.

Part I of this report presents action items. Part I A recommends transmission for approval of amendments to Civil Rules 6(e), 27, and 45, as well as Supplemental Rules B and C. These proposals were published for comment in August 2003. A new Rule 5.1 and conforming amendments to Rule 24(c) also were published last August, but the Advisory Committee has tabled discussion of these proposals for further work.

Part I B recommends several proposals for publication for comment in August 2004. One proposal is to amend Rule 50. A package of proposals aimed at discovery of electronically stored information includes amendments to Rules 16, 26, 33, 34, 37, and 45, along with a related amendment of Form 35. Another package includes a new Supplemental Rule G for civil asset forfeiture actions, along with conforming amendments of Supplemental Rules A, C, and E.

Part I C recommends approval for publication early in 2005 of Style Rules 38 through 63, minus Style Rule 45 which was approved for later publication at the January 2004 Standing Committee

meeting. This part also seeks approval to publish a small number of amendments for comment in parallel with the Style Package. These amendments were considered in the Style Project, but seemed arguably substantive. At the same time, they seem to be both noncontroversial and clear improvements. For ease of internal reference, they have been referred to as the "Style-Substance Track."

Part II of this report presents information items. Ongoing deliberations on the proposal to adopt a new Rule 5.1 are briefly noted. The Federal Judicial Center Report on filed and sealed settlement agreements is described, with a note on the Center's survey of class actions. Initial work on a rule to implement the E-Government Act is reported.

I Action Items

A. Rules for Adoption: 6(e), 27, 45; Supplemental Rules B, C

Rule 6(e)

The Advisory Committee recommends approval for adoption of amended Rule 6(e) as follows on the next page:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 6. Time

* * * * *

(e) Additional Time After Certain Kinds of Service ~~Under Rule 5(b)(2)(B), (C), or (D).~~ Whenever a party ~~has the right or is required to do some act or take some proceedings~~ must or may act within a prescribed period after ~~the service of a notice or other paper upon the party and the notice or paper is served upon the party~~ service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ are added ~~to~~ after the prescribed period would otherwise expire under [subdivision] (a).

Committee Note

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.

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

The effect of invoking the day when the prescribed period would otherwise expire under Rule 6(a) can be illustrated by assuming that

> the thirtieth day of a thirty-day period is a Saturday. Under Rule 6(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 6(a) the period expires on Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the third and final day to act. If the period prescribed expires on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.
>
> Application of Rule 6(e) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 6(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 6(e) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

Rule 6(e) as Published

This recommendation modifies the version of Rule 6(e) that was published for comment as follows:

(e) Additional Time After <u>Certain Kinds of</u> Service ~~Under Rule 5(b)(2)(B), (C), or (D).~~ Whenever a party ~~has the right or is required to do some act or take some proceedings~~ <u>must or may act</u> within a prescribed period after ~~the service of a notice or other paper upon the party and the notice or paper is served upon the party~~ <u>service and service is made</u> under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ <u>are</u> added ~~to~~ <u>after</u> the ~~prescribed~~ period.

The changes from the published version eliminate ambiguities that were detected in the published version. Since the primary purpose of the amendment is to eliminate ambiguities, recognizing that the actual number of days allowed is a secondary concern, the changes do not require republication.

Discussion

Publication of any day-counting amendment inevitably attracts suggestions that all the time periods in the rules should be reconsidered. Improvements are urged both in expression and in function. The most satisfactory approach to this large task is likely to involve all the sets of

procedural rules, establishing uniform methods that can be relied upon in all federal-court settings. The Standing Committee has recognized these pleas; the long-range agenda includes a joint project to reconsider the time rules. Until that project matures, room remains for smaller-scale improvements in individual sets of rules. The Appellate Rules Committee is considering changes to Appellate Rule 26(c) to parallel the proposed Rule 6(e) changes — indeed, it was the Appellate Rules Committee that referred these questions to the Civil Rules Committee for consideration. The proposal made here reflects helpful advice and comments made by the Appellate Rules Committee and its Reporter, Professor Schiltz. Both Professor Schiltz and the Reporter to the Bankruptcy Rules Committee, Professor Morris, are in agreement with the approach the Civil Rules Committee is taking.

Cases and commentary have recognized four possible means of calculating the three days added by present Rule 6(e). Practicing attorneys report that much time is devoted to nervous counting and recounting the days. Achieving a clear answer is the first concern. In the abstract, there is much to be said for counting the three added days before the prescribed period is counted — the underlying theory is that a paper served by mail or the other means incorporated in Rule 6(e) may take up to three days to arrive. But an informal survey of practicing attorneys revealed that almost all add the three days at the end. Transition to a clear new rule will work best if the new rule conforms closely to what most attorneys have been doing anyway.

The premise that three days should be added at the end of the prescribed period could be implemented in different ways. The shortest extension would be provided by adding three days after counting the days in the original period without regard to any Saturday, Sunday, or legal holiday. If the last prescribed day is a Saturday, for example, day 1 would be Sunday, day 2 would be Monday even if Monday is a legal holiday, and day 3 would be Tuesday. The act would be due on Tuesday; in this illustration, the 3 added days would not extend the time to act. An intermediate extension could be provided by looking to the last day to act under Rule 6(a) before counting the three added days. In the example just given the original period would expire on Tuesday, the first day that is not a Saturday, Sunday, or legal holiday. Wednesday, Thursday, and Friday would be the three added days.

In determining how to express in the rule the method of calculating the addition of three days, the Civil Rules Committee has attempted to be clear, resolving the ambiguities that the public comment had pointed out; consistent with proposed Appellate Rule 26(c) and with the corresponding Bankruptcy Rules; and to provide the maximum time to act that meets these goals. The method of calculation that achieves all these objectives is to count to the end of the prescribed period under Rule 6(a), using all the time-counting rules except the three-day extension, and then add three days. The rule language set out above is clear and consistent with the Appellate Rules. After the end of the prescribed period is identified, three days are added. The Notes provide explicit direction on how to treat intermediate Saturdays, Sundays, and legal holidays. The last day to act is the third day,

unless the third day is a Saturday, Sunday, or legal holiday. The last day to act in that case is the next day that is not a Saturday, Sunday, or legal holiday.[1]

This formulation is consistent with the Appellate Rule calculation and as generous as that consistency allows. Application is illustrated in the Committee Note. One way to explain the result is that no Saturday, Sunday, or legal holiday is to be counted against more than one exclusion. Adoption of this recommendation reflects the view that such an extension will not often interfere with the real-world pace of litigation.

Rule 6(a) states that the last of the counted days is included in calculating time limits unless, among other things, the required act is filing a paper in court and the day is one on which weather or other conditions have made the clerk's office inaccessible. There is no apparent reason to address this circumstance in Rule 6(e). If the clerk's office is inaccessible on the last day counted under Rule 6(e), the time to act is extended by Rule 6(a). Inaccessibility during the period before the last day counted under Rule 6(e) does not warrant any additional extension.

Changes Made After Publication and Comment

Changes were made to clarify further the method of counting the three days added after service under Rule 5(b)(2)(B), (C), or (D).

Summary of Comments

03-CV-001, Thomas J. Yerbich (Court Rules Attorney, D.Alaska): (1) Suggests that Rule 6(a) should be amended to ensure that the three days added by Rule 6(e) do not convert all 10-day periods to 13-day periods: "**(a)** * * * When the period of time prescribed or allowed is less than 11 days determined without regard to subdivision (e), intermediate Saturdays * * *"

(2) Urges that a further change should be made to ensure that time is not extended too much, and computations are not complicated too much, for situations in which the period ends on a Saturday, Sunday, or legal holiday. If the period ends on a Saturday, for example, the three Rule 6(e) days should begin on Sunday, not Monday or the next day that is not a legal holiday. Possible confusion arises from referring to a "period" to act — the period ends not on Saturday but on Monday,

[1] In April 2004, the Civil Rules Committee agreed on language that would have excluded intermediate Saturdays, Sundays, and legal holidays in the calculation of the three days following the expiration of the prescribed period. The full Committee has agreed unanimously to revise that language. The revision resulted from the recognition that the Committee mistakenly believed its approach was consistent with the approach of proposed Appellate Rule 26. The Appellate Rule approach is simply to count the prescribed period, making use of all of the timecounting rules save the three-day extension. After the end of the prescribed period is identified, three "real" (i.e., calendar) days are added. The effect of the language the Civil Rules Committee first adopted in April 2004 excluded intermediate Saturdays, Sundays, or holidays in calculating the three days, which was inconsistent with the Appellate Rules approach.

implying that the three days are added after Monday. To fix this problem, substitute "number of days" for "period":

> Whenever a party must or may act within a prescribed ~~period~~ number of days after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the ~~period~~ number of days [expires?].

(This comment includes several examples of ways to calculate in "business days" and "calendar days.")

(3) Offers a proposal for the "counting backward" question — what happens if you must act "10 days before" a defined day and the tenth day before is a Saturday, Sunday, or legal holiday. May you file on Monday, or the next day that is not a legal holiday, even though it is less than 10 days before the defined day? The proposal relies on "not later than" to say that you must file before the 10th day:

> **(f)** Whenever a party has the right or is required to do some act or take some proceedings within a period of time before a specified date or event prescribed or allowed by these rules, by the local rules of any district court, or by order of court, or by any applicable statute, the right must be exercised, the required act performed or the proceedings taken, not later than the prescribed time preceding the specified date or event.

03-CV-003, Professor Patrick J. Schiltz: Professor Schiltz describes a draft Committee Note for the parallel amendment of Appellate Rule 26(c), recommending the opposite answer to the question addressed by Comment 03-CV-001:

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. (For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2). After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate further: A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 1, 2005.

(If the Appellate Rules version is adopted, it should be in the form approved by the Appellate Rules Committee.)

03-CV-007, S. Christopher Slatten, Esq.: Amended Rule 6(e) remains ambiguous. Do we add 3 "calendar days" or 3 "business days"? It would be good to emulate appellate Rule 26(c) by providing that "3 calendar days are added after the period." If the period ends on Friday, for example, Saturday, Sunday, and Monday are the 3 days.

03-CV-008, State Bar of California Committee on Federal Courts: Supports the clarification.

03-CV-009, State Bar of Michigan Committee on United States Courts: (1) Federal time-counting rules are too complicated. A uniform set of rules, based on calendar weeks, should be substituted for Civil, Criminal, and Appellate Rules. (2) The Committee Note rejects the argument that the 3 added days are an independent period of less than 11 days, so that Saturdays, Sundays, and legal holidays are excluded. But the Rule remains ambiguous. It should say: "3 consecutive calendar days are added after the period." (3) The rule remains ambiguous as to the time when the "prescribed period" ends. If the last day is a Saturday, Sunday, or legal holiday, does it end only on the next day that is none of those? Clarity can be achieved by saying: "The 3 days must be added before determining whether the last day of the period falls on a day that requires extension under Rule 6(a)."

03-CV-011, Peter D. Keisler, Assistant Attorney General, Civil Division, U.S. Department of Justice: Suggests one addition: "3 calendar days are added after the period." "[T]his addition will make absolutely clear the Committee's intention that parties include weekends and holidays when counting the three extra days."

03-CV-012, Alex Manners, CompuLaw: Ambiguities remain. First, the 3 additional days should be described as "calendar days," to ensure that Saturdays, Sundays, and legal holidays are counted. Second, it may be uncertain when a period ends if the last day is a Saturday, Sunday, or legal holiday. Are the 3 days added after the last day to act if there were no extension? This can be made clear by adding this at the end: "If the original period is less than 11 days, the original period is subject to Rule 6(a), whereby holidays and weekends are excluded from the computation, and then three calendar days are added."

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports the proposal. But time calculations under Rule 6 are still "rather complex," and indeed "border on being labyrinthian and require 'finger counting,' a very fallible method." The Standing Committee and Advisory Committee should "revisit Rule 6 in its entirety with an eye toward promulgating a rule based in 'running time' tied to a calendar week or multiples thereof."

Rule 27(a)(2)

The Advisory Committee recommends approval for adoption of amended Rule 27(a)(2) as follows:

Rule 27. Deposition Before Action or Pending Appeal

(a) Before Action.

* * * * *

~~**(2) Notice and Service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of the hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.~~

(2) Notice and Service. At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided by Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

* * * * *

Committee Note

The outdated cross-reference to former Rule 4(d) is corrected to incorporate all Rule 4 methods of service. Former Rule 4(d) has been allocated to many different subdivisions of Rule 4. Former Rule 4(d) did not cover all categories of defendants or modes of service, and present Rule 4 reaches further than all of former Rule 4. But there is no reason to distinguish between the different categories of defendants and modes of service encompassed by Rule 4. Rule 4 service provides effective notice. Notice by such means should be provided to any expected adverse party that comes within Rule 4.

Other changes are made to conform Rule 27(a)(2) to current style conventions. (new)

Rule 27(a)(2) as Published

Only style changes are made to the version of Rule 27(a)(2) that was published for comment in August 2003. The changes are indicated on the published version by overstriking words deleted and double-underlining words added:

Rule 27. Deposition Before Action or Pending Appeal

(a) Before Action.

* * * * *

~~**(2) Notice and Service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of the hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.~~

(2) Notice and Service. At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing ~~on the petition~~. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent ~~on behalf of persons not served and~~ if an unserved person is not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

Discussion

Only style changes are recommended in the published draft. The few public comments all support the proposal as published.

Changes Made After Publication and Comment

Only style changes are recommended in the published draft.

Summary of Comments

03-CV-002 Jack E. Horsley, Esq.: The Rule 27 amendment is prudent.

03-CV-008, State Bar of California Committee on Federal Courts: Supports the published amendment.

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports the changes. The style changes bring "much greater clarity."

Rule 45(a)(2)

The Advisory Committee recommends approval for adoption of amended Rule 45(a)(2) as follows:

Rule 45. Subpoena

(a) Form; Issuance.

* * * * *

~~**(2)** A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.~~

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production and inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

* * * * *

Committee Note

This amendment closes a small gap in regard to notifying witnesses of the manner for recording a deposition. A deposition subpoena must state the method for recording the testimony.

Rule 30(b)(2) directs that the party noticing a deposition state in the notice the manner for recording the testimony, but the notice need not be served on the deponent. The deponent learns of the recording method only if the deponent is a party or is informed by a party. Rule 30(b)(3) permits another party to designate an additional method of recording with prior notice to the deponent and the other parties. The deponent thus has notice of the recording method when an additional method is designated. This amendment completes the notice provisions to ensure that a nonparty deponent has notice of the recording method when the recording method is described only in the deposition notice.

A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain

manner. Should such a witness not learn of the manner of recording until the deposition begins, undesirable delay or complication might result. Advance notice of the recording method affords an opportunity to raise such protective issues.

Other changes are made to conform Rule 45(a)(2) to current style conventions.

Rule 45(a)(2) as Published

A single style change has been made in each of subparagraphs (A), (B), and (C) to reflect Style Subcommittee decisions made after publication in August 2003. The change is shown in the proposal as published by overstriking words deleted and double-underlining words added:

Rule 45. Subpoena

(a) Form; Issuance.

* * * * *

~~(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.~~

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, ~~in the name of~~ from the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, ~~in the name of~~ from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production and inspection, if separate from a subpoena commanding a person's attendance, ~~in the name of~~ from the court for the district where the production or inspection is to be made.

Discussion

There were few comments on this proposal. A recommendation for adoption seems warranted for the reasons described in the Committee Note.

Changes Made After Publication and Comment

Only a small style change has been made in the proposal as published.

Summary of Comments: Rule 45

03-CV-006, Eugene F. Hestres, Esq.: The notice of taking the deposition states the method of recording and normally is served on a nonparty deponent. "Requiring that the Notice of the deposition be also served upon the non-party deponent would eliminate the need to amend Rule 45." Requiring that the subpoena state the method may create problems when a last-minute change is made in the method of recording. The deponent can always object.

03-CV-008, State Bar of California Committee on Federal Courts: Supports the published proposal.

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports the proposal.

Supplemental Rule B

The Advisory Committee recommends approval for adoption of amended Supplemental Rule B(1)(a) as follows:

Rule B. In Personam Actions: Attachment and Garnishment

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

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up

to the amount sued for — in the hands of garnishees named in the process.

* * * * *

Committee Note

Rule B(1) is amended to incorporate the decisions in *Heidmar, Inc. v. Anomina Revennate de Armamento Sp.A. of Ravenna*, 132 F.3d 264, 267-268 (5th Cir.1998), and *Navieros InterAmericanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 314-315 (1st Cir. 1997). The time for determining whether a defendant is "found" in the district is set at the time of filing the verified complaint that prays for attachment and the affidavit required by Rule B(1)(b). As provided by Rule B(1)(b), the affidavit must be filed with the complaint. A defendant cannot defeat the security purpose of attachment by appointing an agent for service of process after the complaint and affidavit are filed. The complaint praying for attachment need not be the initial complaint. So long as the defendant is not found in the district, the prayer for attachment may be made in an amended complaint; the affidavit that the defendant cannot be found must be filed with the amended complaint.

Rule B(1)(a) as Published

No change has been made in Rule B(1)(a) as published:

Discussion

The only comment supported adoption of the proposed amendment.

Changes Made After Publication and Comment

No changes have been made since publication.

Summary of Comments: Supplemental Rule B(1)(a)

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports both the Rule B and Rule C proposals.

Supplemental Rule C

The Advisory Committee recommends approval for adoption of amended Supplemental Rule C(6)(b) as follows:

C. In Rem Actions: Special Provisions

* * * * *

(6) Responsive Pleading; Interrogatories.

* * * * *

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

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

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

(B) within the time that the court allows;

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

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

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within 20 days after filing the statement of interest or right.

*** * * * ***

Committee Note

Rule C(6)(b)(i)(A) is amended to delete the reference to a time 10 days after completed publication under Rule C(4). This change corrects an oversight in the amendments made in 2000. Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10 days after execution of process. Execution of process will always be earlier than publication.

Rule C(6)(b) as Published

No change has been made in Rule C(6)(b) as published.

Discussion

The only comment supported adoption of the proposed amendment.

Changes Made After Publication and Comment

No changes have been made since publication.

Summary of Comments: Supplemental Rule C(6)(b)

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports both the Rule B and Rule C proposals.

B. Rules for Publication (1): 16, 26, 33, 34, 37, 45, & Form 35

The Civil Rules Committee recommends that the Standing Committee publish for comment a package of proposed rule amendments relating to the discovery of electronically stored information. The Committee has long heard concerns that the discovery rules are inadequate to accommodate the unique features of information generated by, stored in, retrieved from, and exchanged through, computers. These concerns first emerged in 1997, during the study of discovery that led to the adoption of the 2000 discovery rule amendments. In the next several years, as electronic discovery moved from an unusual activity reserved to large cases to a frequently-seen activity, used in an increasing proportion of the litigation filed in the federal courts, the Committee continued to hear concerns over the fit between the discovery rules and the dramatic changes in practice resulting from the growing importance of this form of discovery.

In 2000, the Committee began to examine this topic in detail. To gather information from diverse segments of the bar, and to hear from judges, the Committee held two mini-conferences — one in San Francisco and the other in Brooklyn — and a major conference in February 2004 at the Fordham Law School. The Committee has also, through its discovery subcommittee, solicited and received helpful comment from a number of lawyers, judges, and bar organizations, as well as considerable and ongoing assistance from the Federal Judicial Center. The Committee has also drawn on the accumulation of experience in this area, reflected in case law, the expanded treatment in the Manual for Complex Litigation, and in "best practices" protocols drafted by the ABA Litigation Section and others.

Through this work, the Committee has concluded that it is time to present proposed rule changes for public comment. Electronic discovery is now a routine part of civil litigation. Electronic discovery has unique features, distinct from conventional discovery into, and by, paper, which rules changes can helpfully address. There is a growing demand for rules in this area, which is still new for many judges and lawyers. At least four United States district courts — E. & W. Dist. Ark, D.N.J., and D. Wyo. — have adopted local rules in this area, and many more are under consideration. At least two states — Texas and Mississippi — have adopted court rules specifically addressing these issues. More are in the pipeline. There is much to be said for experimentation at the local level and we have learned much from these efforts. But if the national rules committees delay, the timetable of the rulemaking process will inevitably result in a proliferation of local rules. Adoption of differing local rules by many courts may freeze disuniform practices in place and frustrate the ability to achieve national consistency in an area that should be covered by the uniformity the Civil Rules were meant to achieve.

The publication process is more critical in this area than for many other proposed rule amendments. Litigants and lawyers live with the problems raised by electronic discovery in ways that judges do not. The comments from litigants and lawyers on specific proposals for rules that attempt to accommodate electronic discovery, as it is practiced today and as it will develop in the future, are essential.

The information and insights we have already received from the bar have greatly increased our appreciation of the problems electronic discovery presents. The sheer volume of electronically stored information and the dynamic nature of such information are different from information kept on, and discovered through, paper. The distinctive features of electronic discovery threaten to increase the expense and burden of discovery, and uncertainty as to the applicable standards exacerbates these problems. The challenge is to ensure that the rules provide effective support and guidance for managing discovery practice as it changes with technology.

The rules proposals are as follows: amending Rules 26(f) and 16(b) and Form 35 to prompt early discussion of issues relating to electronically stored information and of handling privilege issues, and to call for the results of such discussions to be reported to the judge; amending Rule 34(a) to clarify and modernize the definition of discoverable material; amending Rule 34(b) to provide for the form of producing electronically stored information; amending Rule 33(d) to provide for electronically stored information a parallel option to produce business records to answer interrogatories; amending Rule 26(b)(2) to provide that electronically stored information that is not reasonably accessible need not be produced unless a court so orders on a showing of good cause; amending Rule 26(b)(5) to provide a procedure that applies when a party asserts an inadvertent production of information privileged or protected from discovery, carefully avoiding any determination on the outcome of the privilege assertion; and amending Rule 45 to incorporate these changes. The Advisory Committee was nearly unanimous in recommending that these proposals be published for comment.

The Advisory Committee debated at length what may be the most controversial of the proposals, the creation of a limited safe harbor in Rule 37 that would apply only to information destroyed or lost as a result of the routine operation of computer systems, such as the loss or destruction of information as a result of recycling back-up tapes or the automatic overwriting of "deleted" information. Much of the discussion heard at the Fordham Conferences and other meetings supporting a limited safe harbor emphasized the need for balancing the need for litigants to obtain information and the need of every organized entity, public and private, to continue the routine operations of computer systems. Such a limited and narrow safe harbor would recognize the unique features of electronically stored information necessary to business and government operations. These features include the routine automatic destruction or recycling necessary to business operations and the dynamic nature of the data that makes it change automatically, without the operator's involvement or even awareness. Reducing this to rule language is challenging. The Committee agreed that the proposed rule should be limited to loss of electronically stored information that results from routine operation of a party's computer system. But the Committee divided over two primary features of the proposed rule: whether it should offer some protection when a party's reasonable efforts to preserve fail to prevent a loss of electronically stored information that violates a court preservation order in the action.

This report sets out the proposals for rule amendments that the Committee recommends the Standing Committee publish for comment. As noted, the Committee was virtually unanimous as to all the proposals except the safe harbor provision. As to this provision, a clear majority of the

Committee expressed a preference for what is presented here as Alternative 1. All members of the Committee voted in favor of publishing Alternative 1 for comment. The only significant Committee disagreement on the recommendation to the Standing Committee was over whether to recommend that only Alternative 1 be published for comment, or that both Alternative 1 and what is presented here as Alternative 2, for which there was also support, be published for comment, stating the Committee's preference for Alternative 1. As to that question, the Committee divided evenly.

It should be emphasized that a majority of the Committee prefers Alternative 1 to Alternative 2. As discussed more fully below, those in favor of publishing only Alternative 1 for comment believe that Alternative 2 should not be formally published for comment, given the Committee's preference for Alternative 1 and absence of a majority favoring the publication of Alternative 2. Those in favor of publishing Alternative 2 are also concerned that Alternative 2 goes too far and that publishing Alternative 2 may have a polarizing effect. Those in favor of publishing both Alternatives 1 and 2 for comment recognize that the safe harbor is both important and difficult and believe that public comment will be better focused if both formulations are presented.

This final question is perhaps more one of form than substance, pertaining only to one aspect of one of the electronic discovery proposals. As to this one aspect, whether we publish only Alternative 1 or both, we will need to ask for public comment addressing the issues framed by Alternative 2. Public comment is likely to be robust and informative, whether Alternative 1 is the only proposed formulation formally published or not. But because the Committee was evenly divided on whether to recommend the publication for comment of only Alternative 1, or the publication for comment of both Alternative 1 and 2 accompanied by a statement that a majority of the Committee preferred Alternative 1, both proposals for a Rule 37(f) safe harbor are discussed in this report.

I. Early Discussion of Electronic Discovery Issues — Rules 26(f), Form 35, and Rule 16(b)*

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in categories of proceedings exempted from initial disclosure under Rule

* Proposed revisions based on rules as amended by the Style Project.

26(a)(1)(B) or when otherwise ordered, the parties must hold a conference as soon as practicable — and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues relating to preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule

26(a)(1), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced;

(D) whether, upon agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information; and

(E~~C~~) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

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

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the conference to occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed fewer than 14 days after the conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

*** * * * ***

Committee Note

The Committee has repeatedly been told that problems associated with discovery of various types of information generated by or stored on computers need attention in the rules. Among other things, electronically stored information is distinctive in its volume. *See Manual for Complex Litigation (4th)* § 11.446 (describing the "sheer volume" of such information). Electronic information may exist in dynamic databases that do not correspond readily to hard-copy documents traditionally subject to discovery. The ordinary operation of computers — including the simple act of turning a computer on — can alter or destroy electronically stored information; computer systems often automatically discard or overwrite data as a part of their routine operation. Computers often automatically create information without the operator's direction or awareness, a feature with no direct counterpart in hard-copy documents. Electronically stored information may be "deleted," yet continue to exist, but in forms difficult to locate, retrieve, or search. Together, these and other distinctive features of electronically stored information justify specific attention in the rules.

Rule 34(a) is amended to make clear that electronically stored information is subject to discovery. The broad definition of "electronically stored information" should be applied at other points in the rules where the expression is used, such as in Rule

26(f)(3)((C). Rule 33(d) is similarly amended to make clear that the option to produce business records includes electronically stored information. Rule 45 is amended to make clear that electronically stored information may also be obtained by subpoena. Although courts have generally not had difficulty concluding that electronically stored information is properly a subject of discovery, these changes make the rule language consistent with practice.

Other amendments address specific aspects of discovery of electronically stored information. Rule 34(b) is amended to authorize a party to specify the form in which electronically stored information should be produced and to authorize the responding party to object to that request. Rule 26(b)(2)(C) is added to provide that a party need not provide discovery of electronically stored information that is not reasonably accessible unless the court orders discovery for good cause. Rule 37(f) is added to address a party's inability to provide discovery of electronically stored information lost as a result of the routine operation of the party's electronic information system. Rule 26(b)(5) is amended by the addition of Rule 26(b)(5)(B), which provides a procedure for assertion of privilege after production of privileged information. In addition, Rule 45 is amended to include provisions parallel to those added to the party discovery rules.

Subdivision (f). Early attention to managing discovery of electronically stored information can be important. Rule 26(f)(3) is amended to direct the parties to discuss these subjects during their discovery-planning conference. *See Manual for Complex Litigation (4th)* § 11.446 ("The judge should encourage the parties to discuss the scope of proposed computer-based discovery early in the case"). The rule focuses on "issues related to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, addressing the issues at the outset should often avoid problems that might otherwise arise later in the litigation, when they are more difficult to resolve.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly

important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation (4th)* § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period regarding which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(C). The form or format in which a party keeps such information also may be considered, as well as the forms in which it might be produced for review by other parties. "Early agreement between the parties regarding the forms of production will help eliminate waste and duplication." *Manual for Complex Litigation (4th)* § 11.446. Even if there is no agreement, discussion of this topic may prove useful. Rule 34(b)(1)(B) is amended to permit a party to specify the form in which it wants electronically stored information produced. An informed request is more likely to avoid difficulties than one made without adequate information.

Form 35 is also amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court, thus enabling the court to address the topic in its Rule 16(b) order. Provision for any aspects of disclosing or discovering electronically stored information that are suitable for discussion under Rule 26(f) may be included in the report to the court. Any that call for court action, such as the extent of the search for information, directions on evidence preservation, or cost allocation, should be included.

Rule 26(f)(2) is amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. The volume and

dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Complete cessation of that activity could paralyze a party's operations. *Cf. Manual for Complex Litigation (4th)* § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") Rule 37(f) addresses these issues by limiting sanctions for loss of electronically stored information due to the routine operation of a party's electronic information system. The parties' discussion should aim toward specific provisions, balancing the need to preserve relevant evidence with the need to continue routine activities critical to ongoing business. Wholesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, may rarely be warranted. Failure to attend to these issues early in the litigation increases uncertainty and raises a risk of later unproductive controversy. Although these issues have great importance with regard to electronically stored information, they are also important with hard copy and real evidence. Accordingly, the rule change should prompt discussion about preservation of all evidence, not just electronically stored information.

Rule 26(f)(3) is also amended by adding to the discovery plan any agreement that the court enter a case-management order facilitating discovery by protecting against privilege waiver. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege are often difficult to identify, and failure to withhold even one such item may result in waiver of privilege as to all other privileged materials on that subject matter. Not only may this effort impose substantial costs on the party producing the material, but the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems can become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive

and time consuming. Some information associated with operation of computers poses particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic document files but not apparent to the creator of the document or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic document file but not make them apparent to the reader. Other data describe the history, tracking, or management of an electronic document (sometimes called "metadata"), and are usually not apparent to the reader viewing a printout or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

The *Manual for Complex Litigation* notes these difficulties:

> A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.

Manual for Complex Litigation (4th) § 11.446.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide requested materials for initial examination without waiving any privilege — sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal

production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements — sometimes called "clawback agreements" — that production without intent to waive privilege should not be a waiver so long as the producing party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation.

As noted in the *Manual for Complex Litigation*, these agreements can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and reducing the cost and burden of review by the producing party. As the Manual also notes, a case-management order implementing such agreements can further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent privilege forfeiture or waiver that the parties have reached, and Rule 16(b) is amended to emphasize the court's entry of an order recognizing and implementing such an agreement as a case-management order. Rule 26(f)(3)(D) is modest; the entry of such a case-management order merely implements parties' agreement. But if the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to provide an additional protection against inadvertent privilege waiver by establishing a procedure for assertion of privilege after such production, leaving the question of waiver to later determination by the court if production is still sought.

Form 35. Report of Parties' Planning Meeting

*** * * * ***

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)_____

Disclosure or discovery of electronically stored information should be handled as follows: _____(brief description of parties' proposals) _____

The parties have agreed to a privilege protection order, as follows: (brief description of provisions of proposed order)

All discovery commenced in time to be competed by _____(date)_____. [Discovery on _____(issue for early discovery)_____to be completed by _____(date)_____.]

* * * * *

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Planning.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule as inappropriate, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail , or other suitable means.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within 120 days after any defendant has been served with the

complaint and within 90 days after any defendant has appeared.

(3) ***Contents of the Order.***

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) adopt the parties' agreement for protection against waiving privilege;

(v~~iii~~) set dates for other conferences and for trial; and

(vi~~iv~~) include other appropriate matters.

(4) ***Modifying Schedule.*** A schedule may be modified only for good cause and by leave of the district judge or, when authorized by local rule, of a magistrate judge.

*** * * * ***

Committee Note

Rule 26(f)(3) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is amended to call for a report to the court about the results of this discussion. The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise later.

Rule 26(f)(3) has also been amended by adding to the discovery plan any proposal that the court include in the case-management order the parties' agreement to facilitate discovery by minimizing the risk of waiver of privilege. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege to enable the party seeking production to designate the materials desired for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged information is inadvertently produced the producing party may by timely notice assert the privilege and obtain return of the materials without waiving the privilege. Other arrangements are possible. A case-management order to effectuate the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. *See Manual for Complex Litigation (4th)* § 11.446. Rule 16(b)(3)(B)(iv) recognizes the propriety of including such directives in the court's case management order. Court adoption of the chosen procedure by order advances enforcement of the agreement between the parties and adds protection against nonparty assertions that privilege has been waived. The rule does not provide the court with authority to enter such a case-management order without party agreement, or limit the court's authority to act on motion.

II. Option to Produce Electronically Stored Information in Response to Interrogatories — Rule 33(d)

Rule 33. Interrogatories to Parties

* * * * *

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, inspecting, compiling, abstracting, or summarizing a party's business records, <u>including electronically stored information</u>, and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to permit the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine, audit, and inspect the records and to make copies, compilations, abstracts, or summaries.

Committee Note

Rule 33(d) is amended to parallel Rule 34(a) by recognizing the importance of electronically stored information. The term "electronically stored information" has the same broad meaning in Rule 33(d) as in Rule 34(a). Much business information is stored only in electronic form; the Rule 33(d) option should be available with respect to such records as well.

> Special difficulties may arise in using electronically stored information, either due to its format or because it is dependent on a particular computer system. Rule 33(d)(1) says that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it "as readily as the responding party," and Rule 33(d)(2) provides that the responding party must give the interrogating party a reasonable opportunity to examine the information. Depending on the circumstances of the case, satisfying these provisions may require the responding party to provide some combination of technological support, information on application software, access to the pertinent computer system, or other assistance. The key question is whether such support enables the interrogating party to use the electronically stored information as readily as the responding party.

III. Definition of Electronically Stored Information — Rule 34(a)

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. Any party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, ~~and~~ copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated electronically stored information or any designated documents — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium — from which information can be obtained either directly or after the responding party translates it into a reasonably usable form, or

(B) any designated tangible things ~~— and to test or sample these things~~; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

*** * * * ***

Committee Note

Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to authorize discovery of data compilations in anticipation that the use of computerized information would grow in importance. Since that time, the growth in electronically stored information and in the variety of systems for creating and storing such information have been dramatic. It is difficult to say that all forms of electronically stored information fit within the traditional concept of a "document." Accordingly, Rule 34(a) is amended to acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery. The title of Rule 34 is modified to acknowledge that discovery of electronically stored information stands on equal footing with discovery of documents. Although discovery of electronically stored information has been handled under the term "document," this change avoids the need to stretch that word to encompass such discovery. At the same time, a Rule 34 request for production of "documents" should be understood to include electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against attempting a limiting or precise definition of electronically stored information.

The definition in Rule 34(a)(1)(A) is expansive, including any type of information that can be stored electronically. A common example that is sought through discovery is electronic communications, such as e-mail. A reference to "images" is added to clarify their inclusion in the listing already provided. The reference to "data or data compilations" includes any databases currently in use or developed in the future. The rule covers information stored "in any medium," to encompass future developments in computer technology. Rule 34(a)(1)(A) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive definition. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the definition in Rule 34(a)(1)(A) is invoked in a number of other amendments, such as those to Rules 26(b)(2)(C), 26(b)(5)(B), 26(f)(3), 34(b) and 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1)((A).

The definition of electronically stored information is broad, but whether material within this definition should be produced, and in what form, are separate questions that must be addressed under Rule 26(b)(2)(C), Rule 26(c), and Rule 34(b).

Rule 34(a) is amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly provides that such discovery is permitted. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2)(B) and 26(c).

Rule 34(a)(1)(B) is amended to make clear that tangible things must — like documents and entry onto land sought through discovery — be designated in the request.

IV. Form of production — Rule 34(b)

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * * * *

(b) Procedure.

(1) ***Form of the Request.*** The request ~~must~~:

(A) must describe with reasonable particularity each item or category of items to be inspected; ~~and~~

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts~~.~~; and

(C) may specify the form in which electronically stored information is to be produced.

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be directed by the court or stipulated by the parties under Rule 29.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including an objection to the requested form for producing electronically stored information, stating the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection and related activities with respect to the rest.

(D) *Producing the documents or electronically stored information.* Unless the parties otherwise agree, or the court otherwise orders,

(i) a party producing documents for inspection must produce them as they are kept in the usual course of business or must organize them and label them to correspond to the categories in the request.

(ii) if a request for electronically stored information does not specify the form of production, a party must produce it in a form in which the producing party ordinarily maintains it, or in an electronically searchable form. The party need only produce such information in one form.

* * * * *

Committee Note

Subdivision (b). Rule 34(b)(1)(B) permits the requesting party to designate the form in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although one format a requesting party could designate would be hard copy. Specification of the desired form may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The parties should exchange information about the form of production well before production actually occurs, such as during the early opportunity provided by the Rule 26(f) conference. Rule 26(f)(3)(C) now calls for discussion of form of production during that conference.

The rule does not require the requesting party to choose a form of production; this party may not have a preference, or may not know what form the producing party uses to maintain its electronically stored information. If the request does not specify a form of production for electronically stored information, Rule 34(b)(2)(D)(ii) provides the responding party with options analogous to those provided in Rule 34(b)(2)(D)(i) with regard to hard-copy materials. The responding party may produce the information in a form in which it ordinarily maintains the information. If it ordinarily

maintains the information in more than one form, it may select any such form. But the responding party is not required to produce the information in a form in which it is maintained. Instead, the responding party may produce the information in a form it selects for the purpose of production, providing the form is electronically searchable. Although this option is not precisely the same as the option under Rule 34(b)(2)(D)(i) to produce hard copy materials organized and labelled to correspond to the requests, it should be functionally analogous because it will enable the party seeking production to locate pertinent information.

If the requesting party does specify a form of production, Rule 34(b)(2)(B) permits the responding party to object. The grounds for objection depend on the circumstances of the case. When such an objection is made, Rule 37(a)(2)(B)[1] requires the parties to confer about the subject in an effort to resolve the matter in a mutually satisfactory manner before a motion to compel is filed. If they cannot agree, the court will have to resolve the issue. The court is not limited to the form initially chosen by the requesting party, or to the alternatives in Rule 34(b)(2)(D)(ii), in ordering an appropriate form or forms for production. The court may consider whether a form is electronically searchable in resolving objections to the form of production.

Rule 34(b)(D)(ii) provides that electronically stored information ordinarily need be produced in only one form, but production in an additional form may be ordered for good cause. One such ground might be that the information cannot be used by the party seeking production in the form in which it was produced. Advance communication about the form that will be used for production might avoid that difficulty.

As a part of the general restyling of the Civil Rules, the redundant reminder of Rule 37(a) procedure in the final sentence of former Rule 34(b) is omitted as no longer useful.

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[1] In the ongoing Style Project, the designation of Rule 37(a)(2)(B) has been changed to 37(a)(3)(B).

V. Reasonably Accessible Information — Rule 26(b)(2)(C)

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(b) Discovery Scope and Limits

* * * * *

(2) ***Limitations on Frequency and Extent***

(A) ***When Permitted.*** By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) ***When Required.*** The court must limit the frequency or extent of discovery otherwise permitted by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery in resolving the issues.

(C) ***Electronically Stored Information.*** A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information sought is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause.

(D~~C~~) ***On Motion or the Court's Own Initiative.*** The court may act on motion or on its own after reasonable notice.

*** * * * ***

Committee Note

Rule 26(b)(2)(C) is designed to address some of the distinctive features of electronically stored information — the volume of that information and the variety of locations in which it might be found. In many instances, the volume of potentially responsive information that is reasonably accessible will be very large, and the effort and extra expense needed to obtain additional information may be substantial. The rule addresses this concern by providing that a responding party need not provide electronically stored information that it identifies as not reasonably accessible. If the requesting party moves to compel additional discovery under Rule 37(a), the responding party must show that the information is not reasonably accessible. Even if the information is not reasonably accessible, the court may nevertheless order discovery for good cause, subject to the provisions of Rule 26(b)(4)(B).

The *Manual for Complex Litigation (4th)* § 11.446 illustrates that problems of volume that can arise with electronically stored information:

> The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

With volumes of these dimensions, it is sensible to limit initial discovery to that which is reasonably accessible.

Whether given information is "reasonably accessible" may depend on a variety of circumstances. One referent would be whether the party itself routinely accesses or uses the information. If the party does routinely use the information — sometimes called "active data" — it would ordinarily seem that the information should be considered reasonably accessible. The fact that the party does not routinely access the information does not necessarily mean that it cannot do so without substantial effort or cost.

Other information is not reasonably accessible. Many parties have significant quantities of electronically stored information that can be located, retrieved, or reviewed only with very substantial effort or expense. For example, some information may be stored solely for disaster-recovery purposes and be expensive and difficult to use for other purposes. Time-consuming and costly restoration of the data may be required and it may not be organized in a way that permits searching for information relevant to the action.

Technological developments may change what is "reasonably accessible" by removing obstacles to using some electronically stored information. But technological change can also impede access. Some information may be "legacy" data that remains from obsolete systems; such data is no longer used and may be costly and burdensome to restore and retrieve. Other information may have been deleted in a way that makes it inaccessible using normal means, even though technology provides the capability to retrieve and produce it through extraordinary efforts. Ordinarily such information would not be considered reasonably accessible under current technology.

Rule 26(b)(2)(C) excuses a party responding to a discovery request from providing electronically stored information on the ground that it is not reasonably accessible if the responding party identifies such information. The specificity the responding party must use in identifying such electronically stored information will

vary with the circumstances of the case. For example, a category of information, such as information stored solely for disaster recovery purposes, can be specified. In other cases, the difficulty of accessing the information — as with "legacy" data stored on obsolete systems — can be provided. The goal is that the requesting party be sufficiently apprised of the circumstances to know that some requested information has not been reviewed or provided on this ground, the nature of this information, and the grounds for the responding party's contention that the information is not reasonably accessible.

If the requesting party moves to compel discovery, the responding party must show that the information sought is not reasonably accessible to invoke this rule. Such a motion would provide the occasion for the court to determine whether the information is reasonably accessible; if it is, this rule does not limit discovery, although other limitations — such as those in Rule 26(b)(4)(B) — may apply. Similarly, if the responding party sought to be relieved from providing such information, as on a motion under Rule 26(c), it would have to demonstrate that the information is not reasonably accessible to invoke the protections of this rule.

When the responding party demonstrates that the information is not reasonably accessible, the court may nevertheless order discovery if the requesting party shows good cause. The good-cause analysis would balance the requesting party's need for the information and the burden on the responding party. Courts addressing such concerns have properly referred to the limitations in Rule 26(b)(2)(B) for guidance in deciding when and whether the effort involved in obtaining such information is warranted. Thus *Manual for Complex Litigation (4th)* § 11.446 invokes Rule 26(b)(2), stating that "the rule should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems." It adds: "More expensive forms of production, such as production of word-processing files with all associated metadata or production of data in specified nonstandard format, should be conditioned upon a showing of need or sharing expenses."

The proper application of those principles can be developed through judicial decisions in specific situations. Caselaw has already begun to develop principles for making such determinations. *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002); *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2000). Courts will be able to adapt the principles of Rule 26(b)(2) to the specific circumstances of each case in light of evolving technology.

VI. Belated Assertion of Privilege — Rule 26(b)(5)(B)

Rule 26. Duty to Disclose; General Provisions Regarding Discovery

* * * * *

(b) Discovery Scope and Limits.

* * * * *

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Privileged information withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i)~~(A)~~ expressly make the claim; and

(ii)~~(B)~~ describe the nature of the documents, communications, or things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) *Privileged information produced.* When a party produces information without intending to waive a

claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

* * * * *

Committee Note

The Committee has repeatedly been advised that privilege waiver, and the review required to avoid it, add to the costs and delay of discovery. Rule 26(f)(3) is amended to direct the parties to discuss privilege issues in their discovery plan, and Rule 16(b) is amended to alert the court to consider a case-management order to provide for protection against waiver of privilege.

Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on grounds of privilege to make a privilege claim so that the requesting party can contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party that has inadvertently produced privileged information to assert the privilege claim and permit the matter to be presented to the court for its determination.

Rule 26(b)(5)(B) does not address the question whether there has been a privilege waiver. Orders entered under Rule 16(b)(3)(B)(iv) may have provisions bearing on whether a waiver has occurred. In addition, the courts have developed principles for determining whether waiver results from inadvertent production of privileged information. *See* 8 *Fed. Prac. & Pro.* § 2016.2 at 239-46. Rule 26(b)(5)(B) provides a procedure for addressing these issues.

Under Rule 26(b)(5)(B), a party that has produced privileged information must notify the parties who received the information of

its claim of privilege within a "reasonable time." Many factors bear on whether the party gave notice within a reasonable time in a given case, including the date when the producing party learned of the production, the extent to which other parties had made use of the information in connection with the litigation, the difficulty of discerning that the material was privileged, and the magnitude of production.

The rule does not prescribe a particular method of notice. As with the question whether notice has been given in a reasonable time, the manner of notice should depend on the circumstances of the case. It may be that in many cases informal but very rapid and effective means of asserting a privilege claim as to produced information would be a reasonable means of initial notice, followed by more formal notice. Whatever the method, the notice should be as specific as possible about the information claimed to be privileged, and about the producing party's desire that the information be promptly returned or destroyed.

Each party that received the information must promptly return or destroy it on being notified. The option of destroying the information is included because the receiving party may have incorporated some of the information in protected trial-preparation materials. A party that has disclosed or provided the information to a nonparty should attempt to obtain the return of the information or arrange for it to be destroyed.

Whether the information is returned or not, the producing party must assert its privilege in compliance with Rule 26(b)(5)(A) and preserve the information pending the court's ruling on whether the privilege is properly asserted and whether it was waived. As with claims of privilege made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

If the party that received the information contends that it is not privileged, or that the privilege has been waived, it may present the issue to the court by moving to compel production of the information.

VII. "Safe Harbor" on Sanctions — Rule 37(f)

As explained in the introduction, two alternative versions of this rule are presented because the Advisory Committee divided on which to prefer. Both versions are included so that the Standing Committee can consider both in deciding whether to publish both. All members of the Advisory Committee favor publishing Alternative 1, but that committee was closely divided on whether to publish Alternative 2 also.

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

* * * * *

Alternative 1

(f) Electronically stored information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions on the party for failing to provide such information if:

(1) the party took reasonable steps to preserve the information after it knew or should have known the information to be discoverable in the action; and

(2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

* * * * *

Committee Note

Subdivision (f) is new. It addresses a distinctive feature of computer operations, the routine deletion of information that attends ordinary use. Rule 26(f)(2) is amended to direct the parties to address issues of preserving discoverable information in cases in which they are likely to arise. In many instances, their discussion may result in an agreed protocol for preserving electronically stored information and management of the routine operation of a party's information system to avoid loss of such information. Rule 37(f) provides that, unless a court order requiring preservation of electronically stored information is violated, the court may not impose sanctions on a party when such information is lost because of the routine operation of its electronic information system if the party took reasonable steps to preserve discoverable information.

The prerequisite in Rule 37(f)(1) that the party take reasonable steps to preserve discoverable information — sometimes called a "litigation hold" — provides an important assurance that needed information will be available for discovery. Subdivision (f)(1) says that the party must take those steps when it "knew or should have known the information to be discoverable in the action." Under some circumstances, a party will have such knowledge before the action is actually commenced. It is widely recognized that preservation obligations arise in some instances before the filing of a suit. *See, e.g., American Bar Association, Civil Discovery Standards*, Standard 10 (1999) (lawyer should inform client of duty to preserve on learning "that litigation is probable"). Each case must be decided on its own circumstances; the question is whether a party reasonably anticipated litigation based on the circumstances that gave rise to the action. Cf. Rule 26(b)(3) (offering protection against discovery for matters prepared "in anticipation of litigation").

Rule 37(f) provides that, once litigation is sufficiently foreseeable, the party is insulated against sanctions in the action for failure to preserve only if it takes "reasonable steps" to preserve information. Like the foreseeability of litigation, the reasonableness of the steps taken is determined by the circumstances presented. The party is to preserve information "it knew or should have known to be discoverable." Application of this standard depends on what the party knew about the nature of the litigation. That knowledge should inform its judgment about what subjects are pertinent to the action, and which people are likely to have relevant information. In some

instances, it may be necessary for a party to preserve electronically stored information that it would not usually access if it is relevant and is not otherwise available. In assessing the steps taken by the party when asked to impose sanctions, the court should bear in mind what the party reasonably knew or should have known when it took steps to preserve information. Often, taking no steps at all would not suffice, but the specific steps to be taken would vary widely depending on the nature of the party's electronic information system and the nature of the litigation.

One consideration that may sometimes be important in evaluating the reasonableness of steps taken is the existence of a statutory or regulatory provision for preserving information, if it required retention of the information sought through discovery. *See, e.g.*, 15 U.S.C. § 78u-4(b)(3)(C); Securities & Exchange Comm'n Rule 17a-4. Although violation of such a provision does not automatically preclude the protections of Rule 37(f), the court may take account of the statutory or regulatory violation in determining whether the party took reasonable steps to preserve the information in light of the prospect of litigation. Whether or not Rule 37(f) is satisfied, violation of such a statutory or regulatory requirement for preservation may subject the violator to sanctions in another proceeding — either administrative or judicial — but the court may not impose sanctions in the action if it concludes that the party's steps satisfy Rule 37(f)(1).

Rule 37(f) does not apply if the party's failure to provide information resulted from its violation of an order in the action requiring preservation of the information. An order that directs preservation of information on identified topics ordinarily should be understood to include electronically stored information. Should such information be lost even though a party took "reasonable steps" to comply with the order, the court may impose sanctions. If such an order was violated in ways that are unrelated to the party's current inability to provide the electronically stored information at issue, the violation does not deprive the party of the protections of Rule 37(f). The determination whether to impose a sanction, and the choice of sanction, will be affected by the party's reasonable attempts to comply.

If Rule 37(f) does not apply, the question whether sanctions should actually be imposed on a party, and the nature of any sanction to be imposed, is for the court. The court has broad discretion to

determine whether sanctions are appropriate and to select a proper sanction. *See, e.g.*, Rule 37(b). The fact that information is lost in circumstances that do not satisfy Rule 37(f) does not imply that a court should impose sanctions.

Failure to preserve electronically stored information may not totally destroy the information, but may make it difficult to retrieve or restore. Even determining whether the information can be made available may require great effort and expense. Rule 26(b)(2)(C) governs determinations whether electronically stored information that is not reasonably accessible should be provided in discovery. If the information is not reasonably accessible because a party has failed to take reasonable steps to preserve the information, it may be appropriate to direct the party to take steps to restore or retrieve information that the would might otherwise not direct.

Alternative 2

(f) Electronically Stored Information. A court may not impose sanctions on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the deletion or loss was intentional or reckless.

Committee Note

Subdivision (f) is new. It addresses a distinctive feature of computer operations, the routine deletion and alteration of information that attends ordinary use. If the filing or prospect of litigation meant that this routine operation of electronic information systems could not continue, many governmental and business entities could not function. Rule 37(f) is intended to provide a limited "safe harbor" for the continuing routine operation of such systems without the threat of sanctions in the action.

Rule 26(f)(2) is amended to direct the parties to address issues of preserving discoverable information in cases in which such issues are likely to arise. In many instances, their discussion may result in an

agreed protocol for preserving electronically stored information that addresses the effects of the routine operation of electronic information systems. Rule 37(f) provides that the court may not sanction a party for failure to preserve electronically stored information that results from such routine operation unless the party's failure was intentional or reckless.

The protection provided by Rule 37(f) is limited to a party's inability to provide electronically stored information that is caused by the routine operation of the party's electronic information system. The party invoking the subdivision must show that such operation caused the loss of the information in question. If that is proven, the party seeking sanctions must show that the failure to preserve the information resulted from the fault of the party sought to be sanctioned.

The determination whether the party's failure to preserve was intentional or reckless may take account of all relevant circumstances. One might be the party's awareness of the manner in which its electronic information system retains or discards information. Although a party's failure to become familiar with such operations might be reckless, there may be instances in which the party's knowledge of its system does not support that conclusion. The party's sophistication in general, and with respect to electronic information systems in particular, may be relevant to this consideration. That sophistication may also be relevant to whether the loss of the information would be intentional, for a finding that it was intentional would often depend on the party's awareness of the way in which its electronic information system operates.

Another circumstance is the party's knowledge of the litigation and the scope of likely discoverable information. One important factor is whether the litigation has been filed and served. A party may have sufficient information before those events to make its failure to prevent the loss of electronically stored information as a result of the routine operation of its electronic information system intentional or reckless. Before filing suit a plaintiff, for example, is likely to be aware of the allegations that will be made. Similarly, a prospective defendant may anticipate litigation before it is formally commenced and know the identity of the people with pertinent knowledge, and the areas of information likely to be significant to the action. Coupled with familiarity with the manner of operation of its electronic information system, this awareness may support the

conclusion that the party acted recklessly or intentionally in failing to preserve information that would be discarded by its electronic information system. In some circumstances, a party's failure to arrange for preservation of certain electronically stored information relevant to a contemplated or pending action — sometimes called a "litigation hold" — may be intentional or reckless. A party that knows its electronic information system automatically removes discoverable information may also be found to have acted intentionally in failing to prevent that deletion.

Another consideration would be the nature and extent of any preservation obligations. The existence of any statutes or regulations requiring retention of the information sought may bear on whether the failure to preserve such information was intentional or reckless. *See, e.g.*, 15 U.S.C. § 78u-4(b)(3)(C); Securities & Exchange Comm'n Rule 17a-4. Failure to honor such requirements may be viewed as reckless or intentional conduct under Rule 37(f), and therefore to deprive the party of the protections of Rule 37(f). The violation of such a provision may subject the violator to sanctions in another proceeding — either administrative or judicial — even if Rule 37(f) protects against sanctions in the action.

Failure to comply with an order in the action that the information in question be retained would often be even more pertinent to Rule 37(f)'s culpability standard. An order to preserve information often provides greater direction and focus than a statue or regulation. Particularly if the order refers explicitly to electronically stored information, it would emphasize the need for the party to become sufficiently familiar with the operation of its electronic information system to determine what intervention would be needed to comply with the order. Failure to preserve information that would not be intentional or reckless in the absence of such an order may be reckless or intentional after an order is entered. Preservation of all information instantly — even when a court so orders — may be impossible. But unless the party took reasonable steps to comply with the court's preservation order, the failure to comply may support a finding that the party acted recklessly or intentionally in failing to prevent the loss of the information through the routine operation of its electronic information system. If such an order was violated in ways that are unrelated to the party's current inability to provide the electronically stored information at issue, the violation does not deprive the party of the protections of Rule 37(f). The rule deals with

sanctions for failure to provide the information that the order directed be preserved but was not.

If Rule 37(f) does not apply, the question whether sanctions should actually be imposed on a party, and the nature of any sanction to be imposed, is for the court. The court has broad discretion in determining whether sanctions are appropriate and in selecting a proper sanction. *See, e.g.*, Rule 37(b). The purpose of subdivision (f) is to ensure that parties who satisfy its requirements are not sanctioned because discoverable information was lost due to the routine operation of their computer systems. The fact that information is lost in circumstances that do not satisfy Rule 37(f) does not require that a court impose sanctions.

Failure to preserve electronically stored information may not totally destroy the information, but may make it difficult to retrieve or restore. Even determining whether the information can be made available may require great effort and expense. Rule 26(b)(2)(C) governs determinations whether electronically stored information that is not reasonably accessible should be provided in discovery. If the information is not reasonably accessible because a party has failed to take reasonable steps to preserve the information, it may be appropriate to direct the party to take steps to restore or retrieve information that the would might otherwise not direct.

VIII. Subpoena for Electronically Stored Information — Rule 45

Rule 45. Subpoena

(a) In General.

(1) ***Form and Contents.***

(A) *Requirements*. Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; or produce and permit the inspection, ~~and~~ copying, testing, or sampling of designated documents, electronically stored information, or tangible things in that person's possession, custody, or control, or permit the inspection of premises; and

(iv) set forth the text of Rule 45(c) and (d).

(B) *Command to Produce Evidence or Permit Inspection.* A command to produce evidence or to permit inspection, testing, or sampling may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set forth in

a separate subpoena. A subpoena may specify the form in which electronically stored information is to be produced.

(2) ***Issued from Which Court.*** A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production, ~~and~~ inspection, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production, ~~or~~ inspection, testing, or sampling is to be made.

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney, as an officer of the court, may also issue and sign a subpoena from:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court in which the action is pending.

(b) Service.

(1) ***By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena on a named person requires delivering a copy to that person and, if the subpoena commands that person's attendance, tendering to that person the fees for one day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then before it is served on the named person, a notice must be served on each party as provided in Rule 5(b).

(2) ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the court from which it issued;

(B) outside that district but within 100 miles of the place of the deposition, hearing, trial, production, ~~or~~ inspection, testing, or sampling specified in the subpoena;

(C) within the state of the court from which it issued if a state statute or court rule permits serving a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, ~~or~~ inspection, testing, or sampling specified in the subpoena; or

(D) that the court authorizes, if a United States statute so provides, upon proper application and for good cause.

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs the issuance and service of a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the court from which the subpoena issued a statement showing the date and manner

of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and must impose on a party or attorney who fails to comply with the duty an appropriate sanction, which may include lost earnings and reasonable attorney's fees.

(2) ***Command to Produce Materials, or to Permit Inspection, Testing, or Sampling.***

(A) *Appearance Not Required.* A person commanded to produce and permit the inspection, ~~and~~ copying, testing, or sampling of designated electronically stored information, documents, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* Subject to Rule 45(d)(2), a person commanded to produce and permit inspection ~~and~~ copying, testing, or sampling may serve on the party or attorney designated in the subpoena a written objection to providing ~~inspecting or copying~~ any or all of the designated materials — or to providing information in the form requested — or to inspecting the premises. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court from which the subpoena issued for an order compelling production, inspection, ~~or~~ copying, testing, or sampling.

(ii) Inspection, ~~and~~ copying, testing, or sampling may be done only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court from which a subpoena issued must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from the place where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), such a person may be commanded to attend a trial by traveling from any place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court from which it issued may, on timely motion, quash or modify the subpoena if it requires:

(i) disclosure of a trade secret or other confidential research, development, or commercial information;

(ii) disclosure of an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) travel of more than 100 miles to attend trial by a person who is neither a party nor a party's officer, as a result of which the person will incur substantial expense.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the party on whose behalf the subpoena was issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena

(1) **(A)** *Producing Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business, or organize and label them according to the categories of the demand.

(B) *Form for Producing Electronically Stored Information.* If the subpoena does not specify the form for producing electronically stored information, a person responding to a subpoena must produce it in a form in which the person ordinarily maintains it or in an electronically searchable form. The person producing electronically stored information need only produce it in one form.

(C) *Reasonably Accessible Electronically Stored Information.* A person responding to a subpoena need not provide discovery of electronically stored information that the person identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information sought is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause.

(2) ***Claiming Privilege or Protection***

(A) *Privileged materials withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i)~~**(A)**~~ expressly assert the claim; and

(ii)~~**(B)**~~ describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the applicability of the privilege or protection.

(B) *Privileged materials produced.* When a person produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, any party must promptly return or destroy the specified information and any copies. The person who produced the information must comply with Rule 45(d)(2)(A) with regard to the information and preserve it pending a ruling by the court.

(e) Contempt. The court from which a subpoena issued may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place not within the limits of Rule 45(c)(3)(A)(ii).

Committee Note

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(A)(iii) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. As under Rule 34(b), Rule 45(a)(1)(B) is amended to provide that the subpoena can designate a form for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b)(2)(B), to authorize the party served with a subpoena to object to the requested form. In addition, as under Rule 34(b)(2)(D)(ii), Rule 45(d)(1)(B) is amended to provide that the party served with the subpoena must produce electronically stored information either in a form in which it is usually maintained or in an electronically searchable form, and that the party producing electronically stored information should not have to produce it in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding party. The Rule 45(c) protections should guard against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Rule 45(d)(1)(C) is added to provide that the responding party need

only provide reasonably accessible electronically stored information, unless the court orders additional discovery for good cause. In many cases, advance discussion about the extent, manner, and form of producing electronically stored information should alleviate such concerns.

Rule 45(a)(1)(B) is also amended, as is Rule 34(a)(1), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena, however, the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege after inadvertent production of privileged information.

Throughout Rule 45, further amendments have been made to conform the rule to the changes described above.

Rules for Publication (2): Supplemental Rule G, with A, C, and E

Introduction

Civil forfeiture proceedings are governed by the Supplemental Rules for Certain Admiralty and Maritime Claims. Reliance on the Supplemental Rules reflects tradition, the in rem character of forfeiture, and many forfeiture statutes that expressly invoke the Supplemental Rules. But the relationship has come under some strain. Procedures developed over the centuries to respond to the peculiar needs of admiralty practice do not always respond well to the needs of civil forfeiture proceedings. The tensions have increased as the number of civil forfeiture proceedings continues to grow. The Supplemental Rules were amended in 2000 to adopt some distinctions between admiralty and forfeiture practice. The Supreme Court transmitted these changes to Congress at the same time as Congress adopted the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). An immediate consequence was that some details of the amendments had to be revised to avoid superseding statutory provisions that could not have been foreseen when the amendments were working their way through the Enabling Act process. Beyond those particular details, CAFRA made many other changes that suggested the need for further work on civil forfeiture procedures.

Soon after CAFRA was enacted, the Department of Justice approached the Civil Rules Committee with the suggestion that the time had come to consolidate civil forfeiture procedure into a single supplemental rule that would be consistent with the statute. An Advisory Committee subcommittee was appointed and met frequently by conference call, with a day-long meeting last December. The Subcommittee was greatly assisted in this specialized area by both the Department of Justice and the National Association of Criminal Defense Lawyers, which made suggestions, reviewed drafts, and provided comments. After two years of examination, drafting, and redrafting, the Committee recommends the publication of proposed new Rule G for comment from bench and bar.

Rule G seeks to accomplish several goals. Separating civil forfeiture procedures from most admiralty procedure reduces the danger — already a source of concern — that the distinctive needs of forfeiture procedure will distort the interpretation of common provisions in ways that interfere with best admiralty practice, or vice versa. New statutory provisions can be reflected — one example is forfeiture of property located in a foreign country. Developing constitutional law doctrines also can be reflected — one example is the first-ever provision for direct notice to known potential claimants. Distinctive procedural needs can be accommodated — one example is present Rule C(6)(c), which provides for serving interrogatories with the complaint in terms broader than civil forfeiture practice requires (see Rule G(6)). Still other changes reflect developments in technology, such as the provision for publishing notice on the internet (G(4)(a)(iv)(c)).

The Subcommittee and full Committee considered in depth whether the Rule should define "standing" to assert a claim after the government initiates a civil forfeiture action, to make clear who can put the government to its burden of proof in a forfeiture case. The Department of Justice proposed that the Rule limit claim standing to a person who would qualify as an "owner" within the

CAFRA definition of the innocent-owner defense. After extensive study and discussion, the Committee decided not to include a definition of claim standing in the Rule itself. The proposed Rule instead includes provisions addressing the procedures for pretrial determination of standing. The Rule includes procedural protections for both claimants, such as direct notice requirements, and for the government, providing for interrogatories addressing claim standing that must be answered before a motion to dismiss can be granted.

The Committee recommends publication for comment of the following Rule G and Committee Note:

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule G. Forfeiture Actions In Rem

(1) Application. This rule governs a forfeiture action in rem arising from a federal statute. To the extent that this rule does not address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply.

(2) Complaint. The complaint must:

(a) be verified;

(b) state the grounds for subject-matter jurisdiction, in rem jurisdiction over the defendant property, and venue;

(c) describe the property with reasonable particularity;

(d) if the property is tangible, state its location when any seizure occurred and — if different — its location when the action is filed;

(e) identify the statute under which the forfeiture action is brought; and

(f) state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.

(3) Judicial Authorization and Process.

(a) Real Property. If the defendant is real property, the government must proceed under 18 U.S.C. § 985.

(b) Other Property; Arrest Warrant. If the defendant is not real property:

(i) the clerk must issue a warrant to arrest the property if it is in the government's possession;

(ii) the court – on finding probable cause – must issue a warrant to arrest the property if it is not in the government's possession and is not subject to a judicial restraining order;

(iii) a warrant is not necessary if the property is subject to a judicial restraining order.

(c) Execution of Process.

(i) The warrant and any supplemental process must be delivered to a person or organization authorized to execute it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone

specially appointed by the court for that purpose; or (D) any United States officer or employee.

(ii) The authorized person or organization must execute the warrant and any supplemental process on property in the United States as soon as practicable unless:

(A) the property is in the government's possession; or

(B) the court orders a different time when the complaint is under seal, the action is stayed before the warrant and supplemental process are executed, or the court finds other good cause.

(iii) The warrant and any supplemental process may be executed within the district or, when authorized by statute, outside the district.

(iv) If executing a warrant on property outside the United States is required, the warrant may be transmitted to an appropriate authority for serving process where the property is located.

(4) Notice.

(a) Notice by Publication.

(i) When Publication is Required. A judgment of forfeiture may be entered only if the government has published notice of the action within a reasonable time after filing the complaint or at a time the court orders. But notice need not be published if:

(A) the defendant property is worth less than $1,000 and direct notice is sent under subdivision (4)(b) to every person the government can reasonably identify as a potential claimant; or

(B) the court finds that the cost of publication exceeds the property's value and that other means of notice would satisfy due process.

(ii) Content of the Notice. Unless the court orders otherwise, the notice must:

(A) describe the property with reasonable particularity;

(B) state the times under subdivision (5) to file a claim and to answer; and

(C) name the government attorney to be served with the claim and answer.

(iii) Frequency of Publication. Published notice must appear

(A) once a week for three consecutive weeks, or

(B) only once if, before the action was filed, notice of nonjudicial forfeiture of the same property was published on an official internet government forfeiture site for at least 30 consecutive days, or in a newspaper of general circulation for three consecutive weeks in a district where publication is authorized under subdivision (4)(a)(iv).

(iv) Means of Publication. The government should select from the following options a means of publication reasonably calculated to notify potential claimants of the action:

(A) if the property is in the United States, publication in a newspaper generally circulated in the district where the action is filed, where the property was seized, or where property that was not seized is located;

(B) if the property is outside the United States, publication in a newspaper generally circulated in a district where the action is filed, in a newspaper generally circulated in the country where the

property is located, or in legal notices published and generally circulated in the country where the property is located; or

(C) instead of (A) and (B), posting a notice on an official internet government forfeiture site for at least 30 consecutive days.

(b) Notice to Known Potential Claimants.

(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of the time for filing a claim under subdivision (5)(a)(ii)(B).

(ii) Content of the Notice. The notice must state:

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer or a motion under Rule 12 must be filed no later than 20 days after filing the claim; and

(D) the name of the government attorney to be served with the claim and answer.

(iii) Sending Notice.

(A) The notice must be sent by means reasonably calculated to reach the potential claimant.

(B) Notice may be sent to the potential claimant or to the attorney representing the potential claimant with respect to the seizure of the property or in a related investigation, administrative forfeiture proceeding, or criminal case.

(C) Notice sent to a potential claimant who is incarcerated must be sent to the place of incarceration.

(D) Notice to a person arrested in connection with an offense giving rise to the forfeiture who is not incarcerated when notice is sent may be sent to the address that person last gave to the agency that arrested or released the person.

(E) Notice to a person from whom the property was seized who is not incarcerated when notice is sent may be sent to the last address that person gave to the agency that seized the property.

(iv) When Notice is Sent. Notice by the following means is sent on the date when it is placed in the mail, delivered to a commercial carrier, or sent by electronic mail.

(v) Actual Notice. A potential claimant who had actual notice of a forfeiture action may not oppose or seek relief from forfeiture because of the government's failure to send the required notice.

(5) Responsive Pleadings.

(a) Filing a Claim.

(i) A person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending. The claim must:

(A) identify the specific property claimed;

(B) identify the claimant and state the claimant's interest in the property;

(C) be signed by the claimant under penalty of perjury; and

(D) be served on the government attorney designated under subdivision (4)(a)(ii)(C) or (b)(ii)(D).

(ii) Unless the court for good cause sets a different time, the claim must be filed:

(A) by the time stated in a direct notice sent under subdivision (4)(b);

(B) if notice was published but direct notice was not sent to the claimant or the claimant's attorney, no later than 30 days after final publication of newspaper notice or legal notice under subdivision (4)(a) or no later than 60 days after the first day of publication on an official internet government forfeiture site; or

(C) if notice was not published and direct notice was not sent to the claimant or the claimant's attorney:

(1) if the property was in government possession when the complaint was filed, no later than 60 days after the filing, not counting any time when the complaint was under seal or when the action was stayed before execution of a warrant issued under subdivision (3)(b); or

(2) if the property was not in government possession when the complaint was filed, no later than 60 days after the government complied with 18 U.S.C. § 985(c) as to real property, or 60 days after process was executed on the property under (3).

(iii) A claim filed by a person asserting an interest as a bailee must identify the bailor.

(b) Answer. A claimant must serve and file an answer to the complaint or a motion under Rule 12 within 20 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue if the objection is not made by motion or stated in the answer.

(6) Special Interrogatories.

(a) Time and Scope. The government may serve special interrogatories under Rule 33 limited to the claimant's identity and relationship to the defendant property without the court's leave at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within 20 days after the motion is served.

(b) Answers or Objections. Answers or objections to these interrogatories must be served within 20 days after the interrogatories are served.

(c) Government's Response Deferred. The government need not respond to a claimant's motion to dismiss the action under subdivision (8)(b) until 20 days after the claimant has answered these interrogatories.

(7) Preserving and Disposing of Property; Sales.

(a) Preserving Property. When the government does not have actual possession of the defendant property the court, on motion or on its own, may enter any order necessary to preserve the property and to prevent its removal or encumbrance.

(b) Interlocutory Sale or Delivery.

(i) Order to Sell. On motion by a party or a person having custody of the property, the court may order all or part of the property sold if:

(A) the property is perishable or at risk of deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or is disproportionate to its fair market value;

(C) the property is subject to a mortgage or to taxes on which the owner is in default; or

(D) the court finds other good cause.

(ii) Who Makes the Sale. A sale must be made by a United States agency that has custody of the property, by the agency's contractor, or by any person the court designates.

(iii) Sale Procedures. The sale is governed by 28 U.S.C. §§ 2001, 2002, and 2004, unless all parties, with the court's approval, agree to the sale, aspects of the sale, or different procedures.

(iv) Sale Proceeds. Sale proceeds are a substitute res subject to forfeiture in place of the property that was sold. The proceeds must be held in an interest-bearing account maintained by the United States pending the conclusion of the forfeiture action.

(v) Delivery on a Claimant's Motion. The court may order that the property be delivered to the claimant pending the conclusion of the action if the claimant

shows circumstances that would permit sale under (i) and gives security under these rules.

(c) Disposing of Forfeited Property. Upon entry of a forfeiture judgment, the property or proceeds from selling the property must be disposed of as provided by law.

(8) Motions.

(a) Motion to Suppress Use of the Property as Evidence. If the defendant property was seized, a party with standing to contest the lawfulness of the seizure may move to suppress use of the property as evidence. Suppression does not affect forfeiture of the property based on independently derived evidence.

(b) Motion to Dismiss the Action.

(i) A claimant who establishes standing to contest forfeiture may move to dismiss the action under Rule 12(b).

(ii) In an action governed by 18 U.S.C. § 983(a)(3)(D) the complaint may not be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property. The sufficiency of the complaint is governed by subdivision (2).

(c) Motion to Strike a Claim or Answer.

(i) At any time before trial, the government may move to strike a claim or answer:

(A) for failing to comply with subdivisions (5) or (6); or

(B) because the claimant lacks standing to contest the forfeiture.

(ii) The government's motion must be decided before any motion by the claimant to dismiss the action.

(iii) If, because material facts are in dispute, a motion under (i)(B) cannot be resolved on the pleadings, the court must conduct a hearing. The claimant has the burden of establishing standing based on a preponderance of the evidence.

(d) Petition to Release Property.

(i) If a United States agency or an agency's contractor holds property for judicial or nonjudicial forfeiture under a statute governed by 18 U.S.C. § 983(f), a person who has filed a claim to the property may petition for its release under § 983(f).

(ii) If a petition for release is filed before a judicial forfeiture action is filed against the property, the

petition may be filed either in the district where the property was seized or in the district where a warrant to seize the property issued. If a judicial forfeiture action against the property is later filed in another district – or if the government shows that the action will be filed in another district – the petition may be transferred to that district under 28 U.S.C. § 1404.

(e) Excessive Fines. A claimant may seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment by motion for summary judgment or by motion made after entry of a forfeiture judgment if:

(i) the claimant has pleaded the defense under Rule 8, and

(ii) the parties have had the opportunity to conduct civil discovery on the defense.

(9) Trial.

Trial is to the court unless any party demands trial by jury under Rule 38.

Committee Note

Rule G is added to bring together the central procedures that govern civil forfeiture actions. Civil forfeiture actions are in rem proceedings, as are many admiralty proceedings. As the number of civil forfeiture actions has increased, however, reasons have appeared to create sharper distinctions within the framework of the

Supplemental Rules. Civil forfeiture practice will benefit from distinctive provisions that express and focus developments in statutory, constitutional, and decisional law. Admiralty practice will be freed from the pressures that arise when the needs of civil forfeiture proceedings counsel interpretations of common rules that may not be suitable for admiralty proceedings.

Rule G generally applies to actions governed by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) and also to actions excluded from it. The rule refers to some specific CAFRA provisions; if these statutes are amended, the rule should be adapted to the new provisions during the period required to amend the rule.

Rule G is not completely self-contained. Subdivision (1) recognizes the need to rely at times on other Supplemental Rules and the place of the Supplemental Rules within the basic framework of the Civil Rules.

Supplemental Rules A, C, and E are amended to reflect the adoption of Rule G.

Subdivision (1)

Rule G is designed to include the distinctive procedures that govern a civil forfeiture action. Some details, however, are better supplied by relying on Rules C and E. Subdivision (1) incorporates those rules for issues not addressed by Rule G. This general incorporation is at times made explicit — subdivision (7)(b)(v), for example, invokes the security provisions of Rule E. But Rules C and E are not to be invoked to create conflicts with Rule G. They are to be used only when Rule G, fairly construed, does not address the issue.

The Civil Rules continue to provide the procedural framework within which Rule G and the other Supplemental Rules operate. Both Rule G(1) and Rule A state this basic proposition. Rule G, for example, does not address pleadings amendments. Civil Rule 15 applies, in light of the circumstances of a forfeiture action.

Subdivision (2)

Rule E(2)(a) requires that the complaint in an admiralty action "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Application of this standard to civil forfeiture actions has evolved to the standard stated in subdivision (2)(f). The complaint must state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial. *See U.S. v. Mondragon*, 313 F.3d 862 (4th Cir.2002). Subdivision (2)(f) carries this forfeiture case law forward without change.

Subdivision (3)

Subdivision (3) governs in rem process in a civil forfeiture action.

Paragraph (a). Paragraph (a) reflects the provisions of 18 U.S.C. § 985.

Paragraph (b). Paragraph (b) addresses arrest warrants when the defendant is not real property. Subparagraph (i) directs the clerk to issue a warrant if the property is in the government's possession. If the property is not in the government's possession and is not subject to a restraining order, subparagraph (ii) provides that a warrant issues only if the court finds probable cause to arrest the property. This provision departs from former Rule C(3)(a)(i), which authorized issuance of summons and warrant by the clerk without a probable-cause finding. The probable-cause finding better protects the interests of persons interested in the property. Subparagraph (iii) recognizes that a warrant is not necessary if the property is subject to a judicial restraining order. The government remains free, however, to seek a warrant if it anticipates that the restraining order may be modified or vacated.

Paragraph (c). Subparagraph (ii) requires that the warrant and any supplemental process be served as soon as practicable unless the property is already in the government's possession. But it authorizes the court to order a different time. The authority to order a different time recognizes that the government may have secured orders sealing the complaint in a civil forfeiture action or have won a stay after filing. The seal or stay may be ordered for reasons, such as protection of an ongoing criminal investigation, that would be defeated by prompt service of the warrant. Subparagraph (ii) does

not reflect any independent ground for ordering a seal or stay, but merely reflects the consequences for execution when sealing or a stay is ordered. A court also may order a different time for service if good cause is shown for reasons unrelated to a seal or stay. Subparagraph (iv) reflects the uncertainty surrounding service of an arrest warrant on property not in the United States. It is not possible to identify in the rule the appropriate authority for serving process in all other countries. Transmission of the warrant to an appropriate authority, moreover, does not ensure that the warrant will be executed. The rule requires only that the warrant be transmitted to an appropriate authority.

Subdivision (4)

Paragraph (a). Paragraph (a) reflects the traditional practice of publishing notice of an in rem action.

Subparagraph (i) recognizes two exceptions to the general publication requirement. Publication is not required if the defendant property is worth less than $1,000 and direct notice is sent to all reasonably identifiable potential claimants as required by subdivision (4)(b). Publication also is not required if the cost would exceed the property's value and the court finds that other means of notice would satisfy due process. Publication on a government-established internet forfeiture site, as contemplated by subparagraph (iv), would be at a low marginal publication cost, which would likely be the cost to compare to the property value.

Subparagraph (iv) states the basic criterion for selecting the means and method of publication. The purpose is to adopt a means reasonably calculated to reach potential claimants. A reasonable choice of the means most likely to reach potential claimants at a cost reasonable in the circumstances suffices.

If the property is in the United States and newspaper notice is chosen, publication may be where the action is filed, where the property was seized, or — if the property was not seized — where the property is located. Choice among these places is influenced by the probable location of potential claimants.

If the property is not in the United States, account must be taken of the sensitivities that surround publication of legal notices in other countries. A foreign country may forbid local publication. If

potential claimants are likely to be in the United States, publication in the district where the action is filed may be the best choice. If potential claimants are likely to be located abroad, the better choice may be publication by means generally circulated in the country where the property is located.

Newspaper publication is not a particularly effective means of notice for most potential claimants. Its traditional use is best defended by want of affordable alternatives. Paragraph (iv)(C) contemplates a government-created internet forfeiture site that would provide a single easily identified means of notice. Such a site could allow much more direct access to notice as to any specific property than publication provides.

Paragraph (b). Paragraph (b) is entirely new. For the first time, Rule G expressly recognizes the due process obligation to send notice to any person who reasonably appears to be a potential claimant.

Subparagraph (i) states the obligation to send notice. Many potential claimants will be known to the government because they have filed claims during the administrative forfeiture stage. Notice must be sent, however, no matter what source of information makes it reasonably appear that a person is a potential claimant. The duty to send notice terminates when the time for filing a claim expires.

Notice of the action does not require formal service of summons in the manner required by Rule 4 to initiate a personal action. The process that begins an in rem forfeiture action is addressed by subdivision (3). This process commonly gives notice to potential claimants. Publication of notice is required in addition to this process. Due process requirements have moved beyond these traditional means of notice, but are satisfied by practical means that are reasonably calculated to accomplish actual notice.

Subparagraph (ii)(B) directs that the notice state a deadline for filing a claim that is at least 35 days after the notice is sent. This provision applies both in actions that fall within 18 U.S.C. § 983(a)(4)(A) and in other actions. Section 983(a)(4)(A) states that a claim should be filed no later than 30 days after service of the complaint. The variation introduced by subparagraph (ii)(B) reflects the procedure of § 983(a)(2)(B) for nonjudicial forfeiture proceedings. The nonjudicial procedure requires that a claim be filed "not later than the deadline set forth in a personal notice letter (which

may be not earlier than 35 days after the date the letter is sent) * * *." This procedure is as suitable in a civil forfeiture action as in a nonjudicial forfeiture proceeding. Thirty-five days after notice is sent ordinarily will extend the claim time by no more than a brief period; a claimant anxious to expedite proceedings can file the claim before the deadline; and the government has flexibility to set a still longer period when circumstances make that desirable.

Subparagraph (iii) begins by stating the basic requirement that notice must be sent by means reasonably calculated to reach the potential claimant. No attempt is made to list the various means that may be reasonable in different circumstances. It may be reasonable, for example, to rely on means that have already been established for communication with a particular potential claimant. The government's interest in choosing a means likely to accomplish actual notice is bolstered by its desire to avoid post-forfeiture challenges based on arguments that a different method would have been more likely to accomplish actual notice. Flexible rule language accommodates the rapid evolution of communications technology.

Notice may be directed to a potential claimant through counsel, but only to counsel already representing the claimant with respect to the seizure of the property, or in a related investigation, administrative forfeiture proceeding, or criminal case. This provision should be used only when notice to counsel reasonably appears to be the most reliable means of notice.

Subparagraph (iii)(C) reflects the basic proposition that notice to a potential claimant who is incarcerated must be sent to the place of incarceration. Notice directed to some other place, such as a pre-incarceration residence, is less likely to reach the potential claimant. This provision does not address due process questions that may arise if a particular prison has deficient procedures for delivering notice to prisoners. *See Dusenbery v. U.S.*, 534 U.S. 161 (2002).

Items (D) and (E) of subparagraph (iii) authorize the government to rely on an address given by a person who is not incarcerated. The address may have been given to the agency that arrested or released the person, or to the agency that seized the property. The government is not obliged to undertake an independent investigation to verify the address.

Subparagraph (iv) identifies the date on which notice is considered to be sent for some common means, without addressing the circumstances for choosing among the identified means or other means. The date of sending should be determined by analogy for means not listed. Facsimile transmission, for example, is sent upon transmission. Notice by personal delivery is sent on delivery.

Subparagraph (v), finally, reflects the purpose to effect actual notice by providing that a potential claimant who had actual notice of a forfeiture proceeding cannot oppose or seek relief from forfeiture because the government failed to comply with subdivision (4)(b).

Subdivision (5)

Paragraph (a). Paragraph (a) establishes that the first step of contesting a civil forfeiture action is to file a claim. A claim is required by 18 U.S.C. § 983(a)(4)(A) for actions covered by § 983. Paragraph (a) applies this procedure as well to actions not covered by § 983. "Claim" is used to describe this first pleading because of the statutory references to claim and claimant. It functions in the same way as the statement of interest prescribed for an admiralty proceeding by Rule C(6), and is not related to the distinctive meaning of "claim" in admiralty practice.

If the claimant states its interest in the property to be as bailee, the bailor should be identified.

The claim must be signed under penalty of perjury by the person making it. An artificial body that can act only through an agent may authorize an agent to sign for it. Excusable inability of counsel to obtain an appropriate signature may be grounds for an extension of time to file the claim.

Paragraph (a)(ii) sets the time for filing a claim. Item (C) applies in the relatively rare circumstance in which notice is not published and the government did not send direct notice to the claimant because it did not know of the claimant or did not have an address for the claimant.

Paragraph (b). Under 18 U.S.C. § 983(a)(4)(B), which governs many forfeiture proceedings, a person who asserts an interest by filing a claim "shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the

claim." Paragraph (b) recognizes that this statute works within the general procedures established by Civil Rule 12. Rule 12(a)(4) suspends the time to answer when a Rule 12 motion is served within the time allowed to answer. Continued application of this rule to proceedings governed by § 983(a)(4)(B) serves all of the purposes advanced by Rule 12(a)(4), *see U.S. v. $8,221,877.16*, 330 F.3d 141 (3d Cir. 2003); permits a uniform procedure for all civil forfeiture actions; and recognizes that a motion under Rule 12 can be made only after a claim is filed that provides background for the motion.

Failure to present an objection to in rem jurisdiction or to venue by timely motion or answer waives the objection. Waiver of such objections is familiar. An answer may be amended to assert an objection initially omitted. But Civil Rule 15 should be applied to an amendment that for the first time raises an objection to in rem jurisdiction by analogy to the personal jurisdiction objection provision in Civil Rule 12(h)(1)(B). The amendment should be permitted only if it is permitted as a matter of course under Rule 15(a).

A claimant's motion to dismiss the action is further governed by subdivisions (6)(c), (8)(b), and (8)(c).

Subdivision (6)

Subdivision (6) illustrates the adaptation of an admiralty procedure to the different needs of civil forfeiture. Rule C(6) permits interrogatories to be served with the complaint in an in rem action without limiting the subjects of inquiry. Civil forfeiture practice does not require such an extensive departure from ordinary civil practice. It remains useful, however, to permit the government to file limited interrogatories at any time after a claim is filed, to gather information that bears on the claimant's standing. Subdivisions (8)(b) and (c) allow a claimant to move to dismiss only if the claimant has standing, and recognize the government's right to move to dismiss a claim for lack of standing. Subdivision (6) interrogatories are integrated with these provisions in that the interrogatories are limited to the claimant's identity and relationship to the defendant property. If the claimant asserts a relationship to the property as bailee, the interrogatories can inquire into the bailor's interest in the property and the bailee's relationship to the bailor. The claimant can accelerate the time to serve subdivision (6) interrogatories by serving a motion to dismiss — the interrogatories must be served within 20

days after the motion is served. Integration is further accomplished by deferring the government's obligation to respond to a motion to dismiss until 20 days after the claimant moving to dismiss has answered the interrogatories.

The statement that subdivision (6) interrogatories are served under Rule 33 recognizes that these interrogatories are included in applying the numerical limit in Rule 33(a).

Subdivision (6) supersedes the discovery "moratorium" of Rule 26(d) and the broader interrogatories permitted for admiralty proceedings by Rule C(6).

Subdivision (7)

Paragraph (a). Subdivision (7) is adapted from Rule E(9)(b). It provides for preservation orders when the government does not have actual possession of the defendant property.

Paragraph (b). Paragraph (b)(i)(C) recognizes the authority, already exercised in some cases, to order sale of property subject to a defaulted mortgage or to defaulted taxes. The authority is narrowly confined to mortgages and tax liens; other lien interests may be addressed, if at all, only through the general good-cause provision. The court must carefully weigh the competing interests in each case. This provision does not address the questions whether a mortgagee or other lien holder can force sale of property held for forfeiture or whether the court can enjoin the sale. Neither does it attempt to account for the interest that a crime victim may have in restoration of forfeited property under 18 U.S.C. § 981(e)(6).

Paragraph (b)(i)(D) establishes authority to order sale for good cause. Good cause may be shown when the property is subject to diminution in value — the classic example is a load of fresh fish. Care should be taken before ordering sale to avoid diminished value. In some cases the government and claimants will agree to sale. But this ground should be invoked with restraint in circumstances that do not involve physical deterioration. An automobile, for example, is likely to lose value continually unless it is a collector's item. Shares of stock are subject to market-value fluctuations. But the government's interest in maximizing the value gained upon forfeiture and in avoiding storage costs must be balanced against the claimant's interests. A claimant may prefer to regain the specific asset, or to

retain a voice in the timing of sale in relation to market fluctuations through the agreed-sale provisions of (b)(iii).

Paragraph (b)(iii) recognizes that if the court approves, the interests of all parties may be served by their agreement to sale, aspects of the sale, or sale procedures that depart from governing statutory procedures.

Paragraph (c) draws from Rule E(9)(a), (b), and (c). Disposition of the proceeds as provided by law may require resolution of disputed issues. A mortgagee's claim to the property or sale proceeds, for example, may be disputed on the ground that the mortgage is not genuine. An undisputed lien claim, on the other hand, may be recognized by payment after an interlocutory sale.

Subdivision (8)

Subdivision (8) addresses a number of issues that are unique to civil forfeiture actions.

Paragraph (a). Standing to suppress use of seized property as evidence is governed by principles distinct from the principles that govern claim standing. A claimant with standing to contest forfeiture may not have standing to seek suppression. Rule G does not of itself create a basis of suppression standing that does not otherwise exist.

Paragraph (b). Paragraph (b)(i) is one element of the system that integrates the procedures for determining a claimant's standing to claim and for deciding a claimant's motion to dismiss the action. Under paragraph (c)(ii), a motion to dismiss the action cannot be addressed until the court has decided any government motion to strike the claim or answer. This procedure is reflected in the (b)(i) reminder that a motion to dismiss the forfeiture action may be made only by a claimant who establishes claim standing. The government, moreover, need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered any subdivision (6) interrogatories.

Paragraph (b)(ii) mirrors 18 U.S.C. § 983(a)(3)(D). It applies only to an action independently governed by § 983(a)(3)(D), implying nothing as to actions outside § 983(a)(3)(D). The adequacy of the complaint is measured against the pleading requirements of subdivision (2), not against the quality of the evidence available to the government when the complaint was filed.

Paragraph (c). As noted with paragraph (b), paragraph (c) governs the procedure for determining whether a claimant has standing.

Paragraph (c)(i)(A) provides that the government may move to strike a claim or answer for failure to comply with the pleading requirements of subdivision (5) or to answer subdivision (6) interrogatories. As with other pleadings, the court should strike a claim or answer only if satisfied that an opportunity should not be afforded to cure the defects under Rule 15. So too, not every failure to respond to subdivision (6) interrogatories warrants an order striking the claim. But the special role that subdivision (6) plays in the scheme for determining claim standing may justify a somewhat more demanding approach than the general approach to discovery sanctions under Rule 37.

Paragraph (d). The hardship release provisions of 18 U.S.C. § 983(f) do not apply to a civil forfeiture action exempted from § 983 by § 983(i).

Paragraph (d)(ii) reflects the venue provisions of 18 U.S.C. § 983(f)(3)(A) as a guide to practitioners. In addition, it makes clear the status of a civil forfeiture action as a "civil action" eligible for transfer under 28 U.S.C. § 1404. A transfer decision must be made on the circumstances of the particular proceeding. The district where the forfeiture action is filed has the advantage of bringing all related proceedings together, avoiding the waste that flows from consideration of the different parts of the same forfeiture proceeding in the court where the warrant issued or the court where the property was seized. Transfer to that court would serve consolidation, the purpose that underlies nationwide enforcement of a seizure warrant. But there may be offsetting advantages in retaining the petition where it was filed. The claimant may not be able to litigate, effectively or at all, in a distant court. Issues relevant to the petition may be better litigated where the property was seized or where the warrant issued. One element, for example, is whether the claimant has sufficient ties to the community to provide assurance that the property will be

available at the time of trial. Another is whether continued government possession would prevent the claimant from working — whether seizure of the claimant's automobile prevents work may turn on assessing the realities of local public transit facilities.

Paragraph (e). The Excessive Fines Clause of the Eighth Amendment forbids an excessive forfeiture. *U.S. v. Bajakajian*, 524 U.S. 321 (1998). 18 U.S.C. § 983(g) provides a "petition" "to determine whether the forfeiture was constitutionally excessive" based on finding "that the forfeiture is grossly disproportional to the offense." Paragraph (e) describes the procedure for § 983(g) mitigation petitions, and adopts the same procedure for forfeiture actions that fall outside § 983(g). The procedure is by motion, either for summary judgment or for mitigation after a forfeiture judgment is entered. The claimant must give notice of this defense by pleading, but failure to raise the defense in the initial answer may be cured by amendment under Rule 15. The issues that bear on mitigation often are separate from the issues that determine forfeiture. For that reason it may be convenient to resolve the issue by summary judgment before trial on the forfeiture issues. Often, however, it will be more convenient to determine first whether the property is to be forfeited. Whichever time is chosen to address mitigation, the parties must have had the opportunity to conduct civil discovery on the defense. The extent and timing of discovery are governed by the ordinary rules.

Subdivision (9)

Subdivision (9) serves as a reminder of the need to demand jury trial under Rule 38.

Supplemental Rules A, C, E Amended To Conform to G

Rule A. Scope of Rules

(1) These Supplemental Rules apply to:

(A) the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

(i~~1~~) maritime attachment and garnishment,~~;~~

(ii~~2~~) actions in rem,~~;~~

(iii~~3~~) possessory, petitory, and partition actions,and~~;~~

(iv~~4~~) actions for exoneration from or limitation of liability;~~.~~

(B) forfeiture actions in rem arising from a federal statute; and

(C) ~~These rules also apply to~~ the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

(2) The ~~general~~ Federal Rules of Civil Procedure ~~for the United States District Courts are~~ also ~~applicable~~ apply to the

foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

Committee Note

Rule A is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions. Rule G(1) contemplates application of other Supplemental Rules to the extent that Rule G does not address an issue. One example is the Rule E(4)(c) provision for arresting intangible property.

Rule C. In Rem Actions: Special Provisions

(1) An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

*** * * * ***

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

(a) be verified;

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

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

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

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

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

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

(3) Judicial Authorization and Process.

(a) ***Arrest Warrant.***

~~**(i)** When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures.~~

(i~~i~~)~~(A)~~ ~~In other actions, t~~The court must review the complaint and any supporting papers.

*** * * * ***

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

(b) *Service.*

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

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

* * * * *

(6) Responsive Pleading; Interrogatories.

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

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

~~**(A)** within 30 days after the earlier of (1) the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or~~

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

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

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

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

* * * * *

(b~~c~~c) *Interrogatories.*

* * * * *

Committee Note

Rule C is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions.

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

* * * * *

(3) Process.

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

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

(b~~c~~) *Issuance and Delivery*.

* * * * *

(5) Release of Property.

(a) *Special Bond*. ~~Except in cases of seizures for forfeiture under any law of the United States, w~~Whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security,

to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

*** * * * ***

(9) Disposition of Property; Sales.

~~**(a)** *Actions for Forfeitures.* In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.~~

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

*** * * * ***

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

(bc) *Sales, Proceeds.*

*** * * * ***

Committee Note

Rule E is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions.

FEDERAL RULES OF CIVIL PROCEDURE

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

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

(1) Initial Disclosures.

*** * * * ***

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

*** * * * ***

(ii) a forfeiture action in rem arising from a federal statute;

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

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

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

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

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

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

(~~viii~~ix) an action to enforce an arbitration award.

*** * * * ***

Committee Note

Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Rules for Publication (3): 50(b)Rule 50(b): Trial Motion Prerequisite; Hung Jury

The Advisory Committee recommends publication for comment of the following amended Rule 50(b). The Style form of present Rule 50(a) is included to illustrate the context of the Rule 50(b) proposal without recommending that Style Rule 50(a) be published now.[*]

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

(a) Judgment as a Matter of Law.

(1) ***In General.*** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) determine the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) ***Motion.*** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

[*] Proposed amendments to Rule 50(b) based on existing language of the rule.

(b) Renewing the Motion ~~for Judgment~~ After Trial; Alternative Motion for a New Trial. If~~, for any reason,~~ the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under [subdivsion] (a), the court is ~~considered~~ deemed to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment, or — if the motion addresses a jury issue not decided by a verdict — by filing a motion no later than 10 days after the jury was discharged. ~~—~~ and The movant may alternatively request a new trial or join a motion for a new trial under Rule 59.

In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

*** * * * ***

Committee Note

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. As amended, the rule permits renewal of any Rule 50(a) motion for judgment as a matter of law. Because the Rule 50(b) motion is only a renewal of the earlier motion, it can be supported only by arguments made in support of the earlier motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment. Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 U.S. 654 (1935).

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.

Finally, an explicit time limit is added for making a post-trial motion when the trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict. The motion must be made no later than 10 days after the jury was discharged.

Discussion

Many reported appellate decisions continue to wrestle with the problems that arise when a party has moved for judgment as a matter of law before the close of all the evidence but has failed to renew the motion at the close of all the evidence. No doubt the problems occur more frequently than appears in reported appellate decisions. The appellate decisions have begun to permit slight relaxations of the requirement that a post-verdict motion be supported by — be a renewal of — a motion made at the close of all the evidence. These departures seem desirable, but come at the price of increasingly uncertain doctrine that in turn may invite still more frequent appeals. The proposed amendment reflects the belief that a motion made during trial serves all of the functional needs served by a motion at the close of all the evidence. As now, the post-trial motion renews the trial motion and can be supported only by arguments made to support the trial motion. The opposing party has had clear notice of the asserted deficiencies in the case and a final opportunity to correct them. Satisfying these functional purposes equally satisfies Seventh Amendment concerns.

Separately, the proposal provides a sensible time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict on an issue addressed by the motion.

The attached memorandum discusses in detail the long history of the close-of-the-evidence motion requirement and describes the cases that in some rather limited circumstances have departed from the requirement.

The Advisory Committee agenda has carried for some years the question whether to revise Rule 50(b) to establish a clear time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict. The question was raised by Judge Stotler while she chaired the Standing Committee. The problem appears on the face of the rule, which seems to allow a motion at the close of the evidence at the first trial to be renewed at any time up to ten days after judgment is entered following a second (or still later) trial. It would be folly to disregard the sufficiency of the evidence at a second trial in favor of deciding a motion based on the evidence at the first trial, and unwise to allow the question to remain open indefinitely during the period leading up to the second trial. There is authority saying that the motion must be renewed ten days after the jury is discharged. See C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d*, § 2357, p. 353. This authority traces to the 1938 version of Rule 50(b), which set the time for a judgment n.o.v. motion at ten days after the jury was discharged if a verdict was not returned. This provision was deleted in 1991, but the Committee Note says only that amended Rule 50(b) "retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment." Research into the Advisory Committee deliberations that led to the 1991 amendment has failed to show any additional explanation. It now seems better to restore the 1991 deletion.

Rule 50(b) Background Memorandum

The Advisory Committee considered this memorandum in deliberating its Rule 50(b) recommendations. It is included to provide a detailed description of the Seventh Amendment developments that first established the legitimacy of judgments notwithstanding the verdict. It also describes a cross-section of the appellate decisions that have begun to erode, if only at the edges, the requirement that there be a motion at the close of all evidence. The concluding sections discuss a few additional topics that do not bear on the present recommendations; they are included only to fill out the picture.

Rule 50(b): Trial Motion Prerequisite for Post-Trial Motion

The Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association has recommended an amendment of Civil Rule 50(b). 03-CV-A. The amendment would soften the rule that a motion for judgment as a matter of law made after trial can advance only grounds that were raised by a motion made at the close of all the evidence. The Committee's specific proposal would add a few words to Rule 50(b):

> If, for any reason, the court does not grant a motion for judgment as a matter of law made after the non-moving party has been heard on an issue or rested, or at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.

The alternative proposed below is based on the current Style version of Rule 50(b):

(b) Renewing the Motion After Trial; Alternative Motion for New Trial. If the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under (a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment * * *.

The effect of this amendment would be to carry forward the requirement that there be a pre-verdict motion for judgment as a matter of law at trial, but to eliminate the requirement that an earlier motion be renewed by a duplicating motion at the close of all the evidence.

This proposal renews a question that was considered by the Advisory Committee when it developed the 1991 Rule 50 amendments. Failure to move in this direction appears to have been affected by lingering Seventh Amendment concerns. The concerns may have been affected by considering a proposal that would eliminate any requirement for a pre-verdict motion. There was little doubt then that a more functional approach would provide real benefits. It is difficult to believe that lingering Seventh Amendment concerns dictate the precise point at which a pre-verdict motion must be made during trial. There is at least good reason to believe that the Seventh Amendment permits a more aggressive approach that would ask only whether the issue raised by a post-verdict

motion was clearly disclosed to the opposing party before the close of all the evidence. This proposal does not go that far, for the reasons suggested in Part IV.

One further question might be considered. An old question was renewed during the Style project. Rule 50(b) does not clearly provide a time to renew a trial for judgment as a matter of law after the jury fails to agree on a verdict. Read literally, the rule would permit a motion made during the first trial to be renewed at any time up to entry of judgment following a second (or still later) trial. That is not a good idea. There is authority for the proposition that the motion must be renewed within 10 days after the jury is discharged. 9A *Federal Practice & Procedure*: § 2537, p. 353. That result could be built into the rule:

> * * * The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment, or if a complete verdict was not returned by filing a motion no later than 10 days after the jury was discharged. ~~— and~~ The movant may alternatively request a new trial or join a motion for a new trial under Rule 59. * * *

These notes begin with a brief sketch of the Seventh Amendment history. The reasons for considering Rule 50(b) amendments are then illustrated by adding a random selection of cases to those described by the Committee on Federal Procedure. These cases are but a few among many that convincingly demonstrate that failures to heed the clear requirements of Rule 50(b) are all too common. The cases also provide strong support for the proposition that some change is desirable. The final sections explore alternative approaches to amending Rule 50(b). The first recommendation is set out above — it would require only that a post-verdict motion be supported by a motion for judgment as a matter of law made during trial. The advantages of some formalism justify the costs that will follow when a lawyer fails to honor even this easily-remembered stricture.

I. Seventh Amendment History

The Seventh Amendment history can be recalled in brief terms. The beginning is *Slocum v. New York Life Ins. Co.*, 1913, 228 U.S. 364, 33 S.Ct. 523. The defendant's motion for a directed verdict at the close of all the evidence was denied. Judgment was entered on the verdict for the plaintiff, denying the defendant's post-verdict motion for judgment notwithstanding the verdict. The court of appeals ordered judgment notwithstanding the verdict, drawing on Pennsylvania judgment n.o.v. practice. The Supreme Court reversed, ruling that the Seventh Amendment prohibits judgment notwithstanding the verdict. It agreed that the trial court should have directed a verdict for the defendant. But the Court ruled that conformity to state practice could not thwart the Seventh Amendment in federal court. A jury must resolve the facts; even if the court directs a verdict, the jury must return a verdict according to the direction The most direct statement was:

> When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before.

> * * * [T]his procedure was regarded as of real value, because, in addition to fully recognizing [the right of trial by jury], it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity, and for anything that appears in the record it may enable her to supply omissions in her own evidence, or to show inaccuracies in that of the defendant * * *. 228 U.S. at 380-381.

The Court also observed that it is the province of the jury to settle the issues of fact, and that

> while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment; and this * * * consists of the court and jury, unless there be a waiver of the latter. 228 U.S. 387-388.

(Justice Hughes was joined in dissent by Justices Holmes, Lurton, and Pitney. He concluded that the result achieved by a judgment n.o.v. could "have been done at common law, albeit by a more cumbrous method." There is no invasion of the jury's province when there is no basis for a finding by a jury. "We have here a simplification of procedure adopted in the public interest to the end that unnecessary litigation may be avoided. The party obtains the judgment which in law he should have according to the record. * * * [T]his court is departing from, instead of applying, the principles of the common law * * *." 228 U.S. at 428.

It took some time, but Justice Van Devanter, author of the Court's opinion in the Slocum case, came to write the opinion for a unanimous Court that gently reversed the Slocum decision by resorting to fiction. *Baltimore & Carolina Line v. Redman*, 1935, 297 U.S. 654, 55 S.Ct. 890, was similar to the Slocum case in almost every detail except that it came out of a federal court in New York, not Pennsylvania. The defendant moved for a directed verdict "[a]t the conclusion of the evidence." The court of appeals concluded that judgment on the verdict for the plaintiff must be reversed for insufficiency of evidence, but that the Slocum case required it to direct a new trial rather than entry of judgment for the defendant. The Supreme Court reversed. It noted that the trial court "reserved its decision" on the directed verdict motion, and "submitted the case to the jury subject to its opinion on the questions reserved * * *. No objection was made to the reservation[] or to this mode of proceeding." Then it explained that the "aim" of the Seventh Amendment

> is to preserve the substance of the common-law right of trial by jury [that existed under the English common law], as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury * * *. 295 U.S. at 657

In the Slocum case, the "request for a directed verdict was denied without any reservation of the question of the sufficiency of the evidence * * *; and the verdict for the plaintiff was taken unconditionally, and not subject to the court's opinion on the sufficiency of the evidence."

In the Redman case, on the other hand, the trial court expressly reserved its ruling. And

> [w]hether the evidence was sufficient or otherwise was a question of law to be resolved by the court. The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings. No objection was made to the reservation or this mode of proceeding, and they must be regarded as having the tacit consent of the parties. 295 U.S. at 659

Common-law practice included "a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved * * *." This practice was well established when the Seventh Amendment was adopted. Some states, including New York, have statutes that "embody[] the chief features of the common-law practice" and apply it to questions of the sufficiency of the evidence. Following this practice, entry of judgment notwithstanding the verdict "will be the equivalent of a judgment for the defendant on a verdict directed in its favor."

As to the Slocum decision,

> it is true that some parts of the opinion * * * give color to the interpretation put on it by the Court of Appeals. In this they go beyond the case then under consideration and are not controlling. Not only so, but they must be regarded as qualified by what is said in this opinion. 295 U.S. at 661.

In 1935 it would not have been easy to guess whether anything turned on the several possible limits. The trial court expressly reserved its ruling on the sufficiency of the evidence. No party objected. The Court actually asserted that the "tacit consent of the parties" must be found. It would be strange to allow this practice under the Seventh Amendment only if the parties actually consent, and only if the trial judge remembers to make an express reservation. But arguments could be found for that result.

These possible uncertainties were promptly addressed by the original adoption of Rule 50(b) in 1938:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict * * *. (308 U.S. 645, 725-726.)

Rule 50(b) does not require the opposing party's consent, and does not require an express reservation by the court. To the contrary, the court is "deemed" to have reserved the question even if the court expressly denies the motion. The fiction created by "deemed" carries the Seventh Amendment burden.

II. Functional Values

Sixty-five years of fiction is enough. The question today is not whether the Seventh Amendment commands that a post-verdict motion for judgment be supported by a motion at the close of all the evidence in order to rely on the ancient practice of reserving a ruling.[2] The question is whether there are functional advantages in a close-of-the evidence motion that might be read into the Seventh Amendment and that in any event justify carrying forward the requirement as a matter of good procedure.

The central functional purpose in requiring a close-of-the-evidence motion is to afford the opposing party one final notice of the evidentiary insufficiency. Courts repeatedly state this purpose. The benefits flow to the court and the moving party as well as to the opposing party. The opposing party, given this final notice, may in fact supply sufficient evidence that otherwise would not be provided. But if the opposing party does not fill in the gap, the final clear notice makes it

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[2] This flat assertion seems safe in all reason. But the weight of Seventh Amendment tradition cannot be shrugged off without some effort. An illustration is provided by *Duro-Last, Inc. v. Custom Seal, Inc.*, Fed.Cir.2003, 321 F.3d 1098, 1105-1108. The plaintiff moved for judgment as a matter of law at the close of the evidence. The verdict found the plaintiff's patent invalid for obviousness. The plaintiff renewed its motion and won judgment as a matter of law holding the patent not invalid. The Federal Circuit reversed because it concluded that the motion made at the close of all the evidence did not sufficiently specify the obviousness issue as a ground. "The requirement for specificity is not simply the rule-drafter's choice of phrasing. In view of a litigant's Seventh Amendment rights, it would be constitutionally impermissible for the district court to re-examine the jury's verdict and to enter JMOL on grounds not raised in the pre-verdict JMOL."

The Federal Circuit cited Morante v. American Gen. Fin. Center, 5th Cir.1998, 157 F.3d 1006, 1010. The court reversed judgment as a matter of law on an agency question, citing several decisions for the rule that a post-verdict motion cannot assert a ground that was not included in a motion made at the close of the evidence. This paragraph concludes by citing *Sulmeyer v. Coca Cola Co.*, 5th Cir.1975, 515 F.2d 835, 846 n. 17. The body of the Sulmeyer opinion ruled that the plaintiff's post-verdict motion for judgment n.o.v. could not be supported by arguing a claim that had not been presented in any way at trial. The footnote observed: "It would be a constitutionally impermissible re-examination of the jury's verdict for the district court to enter judgment n.o.v. on a ground not raised in the motion for directed verdict. *Compare Baltimore & Carolina Line, Inc. v. Redman* * * * with *Slocum v. New York Life Ins. Co.* * * *."

As interesting as this tenacious bit of history is, it does not justify the conclusion that the Seventh Amendment demands that a post-verdict motion can be supported only on grounds stated in a motion made at the close of all the evidence. At most, the Seventh Amendment might be said to require that the ground have been raised during trial. The proposal suggested below retains that requirement.

easier for the court after verdict to deny any second opportunity by way of a new trial or dismissal without prejudice. Another advantage may be reflected in statements that the close-of-the-evidence motion enables the trial court to reexamine the sufficiency of the evidence (*e.g.*, *Polanco v. City of Austin*, 5th Cir.1996, 78 F.3d 968, 973-975). Although courts commonly prefer to take a verdict in order to avoid the retrial that would be required by reversal of a pre-verdict judgment, there are advantages in directing a verdict. These advantages are more likely to be realized if a ruling is prompted by a close-of-the-evidence motion.

The need to point out a perceived deficiency in the evidence is real. But this need ordinarily is satisfied repeatedly as the case progresses toward the close of all evidence. The deficiencies are likely to be pointed out in pretrial conference, by motion for summary judgment, in arguments, and in jury instruction requests. And a motion for judgment as a matter of law at the close of the plaintiff's case frequently points out deficiencies that are not cured by the examination and cross-examination of the defendant's witnesses. The need to alert the adversary to the claimed deficiencies can be served by many means.

The question, then, is how far to approach a rule that permits a post-verdict motion to rest on any argument clearly made on the record before the action was submitted to the jury. In the end, the cautious answer may be to require a Rule 50(a) motion for judgment as a matter of law, but to accept a Rule 50(a) motion made at any time during trial. Lower courts are gingerly working part way toward this solution, but cannot get there without the assistance of a Rule 50(b) amendment.

III. Relaxations of Rule 50(b)

Rule 50(b) does not say directly that a post-trial motion for judgment as a matter of law must be supported by a motion made at the close of all the evidence. In its present form, it is captioned: "Renewing Motion for Judgment After Trial * * *." It begins much as it began in 1938: "If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law * * *." The 1991 Committee Note makes express the apparent implication that only a motion made at the close of all the evidence may be renewed. Subdivision (b) "retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. One purpose of this concept was to avoid any question arising under the Seventh Amendment. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940). It remains useful as a means of defining the appropriate issue posed by the post-verdict motion."

Since the 1991 amendments, courts have continued to recognize the close-of-the-evidence motion requirement. The most straight-forward cases are those in which the issue raised by post-verdict motion or by the court was not raised by any pre-verdict motion. *See American & Foreign Ins. Co. v. Bolt*, 6th Cir.1997, 106 F.3d 155, 159-160. In others, a motion made at the close of the plaintiff's case but not renewed at the close of the evidence is held not sufficient to support a post-verdict motion. *E.g.*, *Mathieu v. Gopher News Co.*, 8th Cir.2001, 273 F.3d 769, 774-778, stating

that Rule 50(b) cannot be ignored simply because its purposes have been fulfilled; *Frederick v. District of Columbia*, D.C.Cir.2001, 254 F.3d 156, ruling that a motion at the close of the plaintiff's case cannot stand duty as a close-of-the-evidence motion merely because the district court took the motion under advisement.

The close-of-the-evidence motion requirement retained by Rule 50(b) has been relaxed in a number of ways. Some of the decisions rely on general procedural theories and others look directly to Rule 50(b).

Forfeiture and plain error principles have been applied to the close-of-the evidence motion requirement. Issues not raised in a close-of-the-evidence motion have been considered on a post-verdict motion when the opposing party did not object to the post-verdict motion on the ground that the issues had not been raised by a close-of-the-evidence motion. *See Thomas v. Texas Dept. of Criminal Justice*, C.A.5th, 2002, 297 F.3d 361, 367; *Williams v. Runyon*, C.A.3d, 1997, 130 F.3d 568, 571-572 (listing decisions from the 5th, D.C., 2d, 7th, and 6th Circuits). And some courts say that "plain error" principles permit review to determine whether there is "any" evidence to support a verdict, despite the failure to make a close-of-the-evidence motion. *See Dilley v. SuperValu, Inc.*, 10th Cir.2002, 296 F.3d 958, 962-963 ("'plain error constituting a miscarriage of justice'"; the usually stringent standard for judgment as a matter of law "is further heightened"); *McKenzie v. Lee*, 5th Cir.2001, 246 F.3d 494 (reverses judgment on jury verdict; assuming that the defendant's vague acts did not satisfy the close-of-the-evidence-motion requirement, plain error appears because there was no evidence to support the verdict); *Kelly v. City of Oakland*, 9th Cir.1999, 198 F.3d 779, 784, 785 (the court's statement that one defendant "is without liability in this case" may indicate a direction that judgment be entered without a new trial); *Campbell v., Keystone Aerial Surveys, Inc.*, 5th Cir.1998, 138 F.3d 996, 1006; *O'Connor v. Huard*, 1st Cir.1997, 117 F.3d 12, 17; *Patel v. Penman*, 9th Cir.1996, 103 F.3d 868, 878-879 (finding no evidence and remanding for further proceedings — apparently a new trial). (These cases generally do not say whether the remedy for clear error could be entry of judgment notwithstanding the verdict or can only be a new trial. A new trial would not be inconsistent with the Slocum decision.)

Other cases directly relax the close-of-the-evidence motion requirement. Many of them are summarized in the Committee on Federal Procedure submission. In some ways the least adventuresome are those that emphasize action by the trial court that seemed to induce reliance by expressly reserving for later decision a motion for judgment as a matter of law made at the close of the plaintiff's case. *Tamez v. City of San Marcos*, C.A.5th, 1997, 118 F.3d 1085, 1089-1091, presented a variation. The court denied the motion at the close of the plaintiff's case but "agree[d] to revisit the issue after the jury verdict." At the close of the evidence, the defendant requested that the court consider judgment as a matter of law after the verdict and the court agreed. The extensive discussion with the court at that point was tantamount to a renewed motion.

A somewhat similar principle is involved in cases that treat a Rule 51 request for jury instructions as satisfying the functions of a close-of-the-evidence motion. *See Bartley v. Euclid, Inc.*, 5th Cir.1998, 158 F.3d 261, 275 (objection to any instruction on an issue not supported by

evidence); *Bay Colony, Ltd. v. Trendmaker, Inc.*, 5th Cir.1997, 121 F.3d 998 (objection to instruction on same grounds as advanced in motion for judgment at close of the plaintiff's case); *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 5th Cir.1996, 81 F.3d 606, 610-611 & n. 14. When the instruction request explicitly presents a "no sufficient evidence" argument, it seems easy enough to treat it as equivalent to a motion for judgment as a matter of law on that issue.

An example of a somewhat more expansive principle is provided by Judge Posner's opinion in *Szmaj v. American Tel. & Tel. Co.*, 7th Cir.2002, 291 F.3d 955, 957-958. The court took under advisement a motion made at the close of the plaintiff's case. The defendant did not renew the motion at the close of the evidence. The court affirmed judgment as a matter of law for the defendant. It observed that if the motion at the close of the plaintiff's case is denied, the plaintiff may assume that the denial "is the end of the matter." But if the motion is taken under advisement, the plaintiff knows that the defendant's demand for judgment as a matter of law remains alive. "There is no mousetrapping of the plaintiff in such a case." Neither Rule 50(b) nor the Committee Note state that renewal of the motion is required, and it would be wasteful to require renewal.

This approach blends into a still more open approach that excuses de minimis departures. Justice White, writing for the Eighth Circuit, articulated the elements of this approach, assuming but not deciding that it would be adopted by the Circuit. *Pulla v. Amoco Oil Co.*, 8th Cir.1995, 72 F.3d 648, 654-657. This approach excuses failure to make a close-of-the-evidence motion:

> where (1) the party files a Rule 50 motion at the close of the plaintiff's case; (2) the district court defers ruling on the motion; (3) no evidence related to the claim is presented after the motion; and (4) very little time passes between the original assertion and the close of the defendant's case.

The Fifth Circuit has taken an openly flexible approach in a number of opinions that may represent the furthest general reach of the pragmatic view. In *Polanco v. City of Austin*, 5th Cir.1996, 78 F.3d 968, 973-975, the court confessed that it has strayed from the strict requirement of Rule 50(b) only where "the departure from the rule was 'de minimis,' and the purposes of the rule were deemed accomplished." The purpose is to enable the trial court to reexamine the sufficiency of the evidence and to alert the opposing party to the insufficiency of the evidence. "This generally requires (1) that the defendant made a motion for judgment as a matter of law at the close of the plaintiff's case and that the district court either refused to rule or took the motion under advisement, and (2) an evaluation of whether the motion sufficiently alerted the court and the opposing party to the sufficiency issue." In *Serna v. City of San Antonio*, 5th Cir.2001, 244 F.3d 479, 481-482, the court took this approach to the point of ordering judgment as a matter of law on the basis of a motion made after the jury had retired and begun deliberating. It noted that the district court chose to rule on the merits of the motion — if the district court had rejected the motion as untimely "we would be faced with a very different situation."

IV. How Much Flexibility?

A. Require a Rule 50(a) Trial Motion For Judgment As a Matter of Law

Collectively, the voice of experience speaks through these and other decisions. The requirement that an earlier motion for judgment as a matter of law be reinforced by a new motion at the close of all the evidence is repeatedly ignored by lawyers who should know better. Sixty-five years have not proved sufficient to condition the requirement in all lawyers' reflexes. One reason the requirement is ignored is that it seems to serve no purpose when the very same point has been made by an earlier motion. And the semblance seems to be the truth. An explicit motion that challenges the sufficiency of the evidence, made at a time that satisfies the Rule 50(a) requirement that the opposing party have been fully heard on the issue, is all the notice that should be required. The opposing party cannot fairly rely on the moving party to provide the missing evidence. If the party opposing the motion has more evidence to be introduced, a motion made during trial gives sufficient opportunity to introduce the evidence or to request procedural accommodation for later presentation. Satisfying this functional concern should satisfy the Seventh Amendment as well; the formal ritual of a separate motion at the close of all the evidence adds too little to count.

The rule can be changed easily in a format that carries forward the fiction that the "legal question" of the sufficiency of the evidence is reserved, no matter what the trial court says about the motion. This approach accepts any motion made, as permitted by Rule 50(a)(2), "at any time before submission of the case to the jury." Because the Rule 50(b) motion continues to be a renewal of the Rule 50(a) motion, it may be supported only by arguments made in support of the Rule 50(a) motion.

> **(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment * * *.
>
> **Committee Note**
>
> Rule 50(b) is amended to mollify the limit that permits renewal of a motion for judgment as a matter of law after submission to the jury only if the motion was made at the close of all the evidence. As amended, the rule permits renewal of any Rule 50(a) motion for judgment as a matter of law. Because the Rule 50(b) motion is only

a renewal of the earlier motion, it can be supported only by arguments properly made in support of the earlier motion. The earlier motion thus suffices to inform the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide any additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by disposing of some issues, or even all issues, without submission to the jury. This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment. Since 1938 Rule 50(b) has responded to the ruling in *Baltimore & Carolina Line v. Redman*, 1935, 297 U.S. 654, 55 S.Ct. 890, by adopting the convenient fiction that no matter what action the court takes on a motion made for judgment as a matter of law before submission to the jury, the sufficiency of the evidence is automatically reserved for later decision as a matter of law. Expansion of the times for motions that are automatically reserved does not intrude further on Seventh Amendment protections.

This change responds to many decisions that have begun to drift away from the requirement that there be a motion for judgment as a matter of law at the close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The most common occasion for omitting a motion at the close of all the evidence is that a motion is made at the close of the plaintiff's case, advancing all the arguments that the defendant wants to renew after a verdict for the plaintiff or a new trial. In many of the cases the trial court either takes the motion under advisement or gives some more positive indication that the question will be decided after submission to the jury. The niceties of the close-of-the-evidence requirement are overlooked by both court and parties. The present rule continues to trap litigants who, properly understanding that there is no functional value served by repeating an earlier motion at the close of the evidence, overlook the formal requirement. The courts are slowly working away from the formal requirement, but amendment carries the process further and faster.

Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.

Evidence introduced at trial after the pre-verdict motion may bear on the post-verdict motion. Evidence favorable to the party opposing the motion must be considered. The court also may consider

> evidence unfavorable to the party opposing the motion if it is evidence that the jury must believe unless there is reason to believe the opposing party had no fair opportunity to meet that evidence.

B. Require Sufficiency Issue To Be Raised

The conservative amendment just proposed is not the only approach that might be taken. The central need is to have a pre-verdict foundation for a post-submission motion to ensure that the opposing party have clear notice of an asserted deficiency in the evidence. That need can be served by means other than a motion for judgment as a matter of law. As noted above, the purpose is clearly served by a request for jury instructions that challenges the sufficiency of the evidence to support any instruction on an issue, at least if the request is made during trial. A motion for summary judgment that accurately anticipates the trial record serves the same function. Explicit discussions of the parties' contentions during a pretrial conference also may do the job. There is some attraction to a rule that would allow a post-submission motion to be based on any argument that was clearly made on the record. But implementation of such a rule would require difficult case-specific inquiries that probably are not worth the effort. An explicit Rule 50(a) motion requirement provides a clear guide. And it does not seem too much to ask that trial lawyers remember the need to make some explicit motion during trial.

Another possibility suggested and rejected by the Committee on Federal Procedure would rely on a case-specific determination whether the opposing party was prejudiced by the failure to make a pre-submission motion. Rejection seems wise. The inquiry inevitably would turn into arguments whether there was other evidence to be had, whether it would have been obtained and introduced, and whether it would have raised the case above the sufficient-evidence threshold. Again, it does not seem too much to ask that lawyers avoid these problems by making a Rule 50(a) motion during trial.

V. Other Rule 50(b) Issues

At least two other Rule 50(b) issues might be considered. Should the court be able to grant a motion made during trial after submission to the jury even if the motion is not renewed — and should appellate review be available if the trial court does not act in the absence of a renewed motion? Should there be a time limit for making a renewed motion after a mistrial? These issues are described here, with a draft rule that addresses them. But no recommendation is made. There are persuasive arguments that a motion made during trial need not be repeated to preserve trial-court power to act on the trial motion after trial, and that appellate review should be available. But there is not as much apparent distress over this requirement as arises from the requirement that a trial motion be repeated at the close of the evidence. Perhaps there is little need to take on this question. A time limit to renew after a mistrial may add a small bit of order, but does not seem important.

A. Renewed Motion Requirement

Rule 50(b) should continue to permit renewal after trial of a motion made during trial. But the express provision that the action is submitted to the jury subject to later deciding the motion suggests that the court should be able to grant the motion even without renewal. The court may have submitted the action to the jury only to avoid the need for a new trial if a judgment as a matter of law is reversed on appeal, and be prepared to act promptly after the jury has decided or failed to agree. A formal renewal of the motion can advance only grounds that were urged in support of the motion made during trial. Although it seems wise to require notice to the parties that the court plans to make the automatically reserved ruling, little is gained by requiring formal renewal of the motion.

Rule 50(b) does not say in so many words that the pre-submission motion must be renewed. It says only that the movant may renew its request by filing a motion no later than 10 days after entry of judgment. The somewhat muddled opinion in *Johnson v. New York, N.H. & H.R.R.*, 1952, 344 U.S. 48, 73 S.Ct. 125, however, seems to prohibit entry of judgment as a matter of law unless the motion is renewed. This decision has been severely criticized. See, e.g., 9A Wright & Miller, Federal Practice & Procedure: Civil 2d, § 2537, pp. 355-356. [The authors, having condemned the rule, nonetheless find wrong decisions recognizing the trial court's authority to act on the reserved motion without a renewed motion.]

The alternative Rule 50(b) draft set out below expressly recognizes the authority to act on a trial motion for judgment as a matter of law without renewal after trial. The trial court can act on the trial motion, and even if the trial court does not act an appellate court can review the failure to grant the Rule 50(a) motion.

B. Time For Motion After Mistrial

Judge Stotler, while chair of the Standing Committee, urged that Rule 50(b) should be amended to impose a time limit for renewing a trial motion after a mistrial. The rule now allows a motion to be renewed by filing a motion no later than 10 days after entry of judgment. Earlier versions set the

limit at 10 days after the jury is discharged. A series of amendments, culminating in 1995, established uniform time limits for post-trial motions under Rules 50, 52, and 59. It is easy enough to restore a special pre-judgment time limit for a Rule 50(b) motion after a mistrial.

It is not clear that a special time limit is needed. If there is to be a new trial, the court can readily set a case-specific time for pretrial motions. Expiration of the time for making a Rule 50(b) motion, moreover, might lead a party to recast the motion as one for summary judgment based on the trial record. The alternative Rule 50(b) draft, however, illustrates a 10-day limit for moving after a mistrial.

C. Other Possible Rule 50 Questions

Rule 50 may deserve more thorough reconsideration. It goes to great lengths to maximize the prospect that discretionary second-chance arguments will be made to the trial court before the first appeal. Two related arguments may be advanced for relaxation. The first is that a discretionary second chance is not likely to be given — and indeed is less and less likely as courts become less inclined to grant new trials on weight-of-the-evidence grounds, and as the Supreme Court has become willing to allow final disposition on appeal. The second is that the procedure is more intricate than warranted by the slight prospect that one party or the other will persuade the trial court to grant a second chance. The intricacy question becomes more poignant when it is recognized that Rule 50 does not address all the questions that might arise. For example, what happens if both parties move at the close of all the evidence and judgment as a matter of law is entered for one. Is the loser required to renew the unsuccessful motion under Rule 50(b) to be entitled to judgment as a matter of law on appeal if indeed it is the one who should prevail? Why not allow the verdict winner who has lost by judgment as a matter of law to invoke Rule 50(c)(2) by asking for a conditional second chance — I want to appeal to get judgment reinstated on my verdict, but I want the trial judge to tell the court of appeals that if the judgment as a matter of law is affirmed I should have a second chance to make out a sufficient case?

The response to these conceptual questions may be simple. They do not arise with any frequency — at least the cases do not show frequent struggles with them. For the most part we are living well enough with the oddities of Rule 50 procedure. Until real problems arise — as with the close-of-the-evidence requirement — we should let well enough be.

Rule 50(b): Alternative Draft

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

(1) ***Reserved Decision.*** If, for any reason, the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.

(2) ***Time To Move or Act.*** The time to move or act on the legal questions reserved by a Rule 50(a) motion is as follows:

(A) ***Renewed Motion.*** The movant may renew the Rule 50(a) motion by filing a motion no later than 10 days after entry of judgment, or if a complete verdict was not returned by filing a motion no later than 10 days after the jury was discharged. The movant also may move for a new trial under Rule 59 as joint or alternative relief. Failure to renew the Rule 50(a) motion does not waive review of the court's failure to grant the motion.

(B) ***Action by Court.*** The court, after giving notice to the parties no later than 10 days after the jury was discharged, may act on the Rule 50(a) motion without a renewed motion.

(3) ***Relief.*** In ruling on a reserved Rule 50(a) motion the court may:

(A) enter judgment on the verdict;

(B) order a new trial; or

(C) direct entry of judgment as a matter of law.

Committee Note

[The material above: a trial motion no longer need be repeated at the close of all the evidence.]

In addition, the requirement that a Rule 50(a) motion properly made during trial be renewed after trial is deleted. A motion made during trial supports a post-trial ruling by the trial court under the longstanding provision that the case is submitted to the jury subject to a later decision. So too, there is no need to repeat the motion to support appellate review: the court of appeals may review any issue raised by the trial motion. Both trial and appellate courts, however, should consider the motion in light of all the evidence in the record. The fact that the motion should have been granted on the record as it stood at the time of the motion does not justify judgment as a matter of law if consideration of the full record shows sufficient evidence to defeat the motion.

Finally, an explicit time limit is added for making a post-trial motion when the trial ends without a complete jury verdict disposing of all issues suitable for resolution by verdict. The motion must be made no later than 10 days after the jury was discharged.

C. Rules for Later Publication (1): Style Rules 38-63, Minus 45

A possibility discussed at the January Standing Committee meeting has come to fruit. The project to style all of the Civil Rules is progressing more smoothly than could have been expected at the beginning. This splendid progress is due to the herculean efforts of the many people involved — the Style Subcommittee and its consultants; the Advisory Committee's Style Subcommittees, reporters and consultants; Administrative Office staff; and the Standing Committee itself. It now seems possible to recommend that the complete set of styled Civil Rules be published in a single package in February 2005 if the Standing Committee approves the submission to be made at its January 2005 meeting. Publication in a single package will provide many advantages. The public comment period can be longer than the usual six months without impeding progress toward ultimate adoption. The longer comment period will enable the many Civil Rules constituencies to study the package once, in concentrated fashion and with the necessary opportunity to organize group review projects. It also will facilitate comprehensive review of the proposals that will be recommended for publication on a separate "Style-Substance" track to be described in part I C (2) below.

The package of Style Rules 38 to 63 does not include Rule 45, which was approved for deferred publication by the Standing Committee in January 2004 as part of the package that included the discovery rules. As usual, hundreds of questions were addressed in the first drafting stages. These questions were threshed out by the consultants and reporter, then by the Style Subcommittee, then by the Advisory Committee Style Subcommittees A and B, and finally at an Advisory Committee meeting attended by all members of the Style Subcommittee. Although all aspects of these rules are open for discussion, the initial Advisory Committee presentation will focus only on a few of the changes that have seemed to bear comment in the Committee Notes.

VI. TRIALS Rule 38. Jury Trial of Right	TITLE VI. TRIALS Rule 38. Right to Jury Trial; Demand
(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.	**(a) Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution — or as provided by a federal statute — is preserved to the parties inviolate.
(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.	**(b) Demand.** On any issue triable of right by a jury, a party may demand a jury trial by: **(1)** serving the other parties with a written demand — which may be made in a pleading — no later than 10 days after the last pleading directed to the issue is served; and **(2)** filing the demand as required by Rule 5(d).
(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.	**(c) Specifying Issues.** In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is deemed to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within 10 days of being served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.
(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.	**(d) Waiver; Withdrawal.** A party waives a jury trial unless its demand is properly served and filed. A demand that complies with this rule may be withdrawn only if the parties consent.
(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).	**(e) Admiralty and Maritime Claims.** These rules do not create a right to a jury trial on issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Committee Note

The language of Rule 38 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 39. Trial by Jury or by the Court	Rule 39. Trial by Jury or by the Court
(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or of all those issues does not exist under the Constitution or statutes of the United States.	**(a) After a Demand.** When trial by jury has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless: **(1)** the parties or their attorneys file a written stipulation to a nonjury trial or so stipulate on the record; or **(2)** the court, on motion or on its own, finds that on some or all of those issues there is no right to a jury trial under the Constitution or federal statutes.
(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.	**(b) When No Demand Is Made**. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.
(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.	**(c) Advisory Jury; Jury Trial by Consent.** In an action not triable of right by a jury, the court, on motion or on its own: **(1)** may try any issue with an advisory jury; or **(2)** may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

Committee Note

The language of Rule 39 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 40. Assignment of Cases for Trial	**Rule 40. Scheduling Cases for Trial**
The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.	Each court must provide by rule for scheduling trials without request — or on a party's request with notice to the other parties. The court must give priority to actions entitled to priority by federal statute.

Committee Note

The language of Rule 40 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 41. Dismissal of Actions	**Rule 41. Dismissal of Actions**
(a) Voluntary Dismissal: Effect Thereof. **(1) By Plaintiff; By Stipulation.** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.	**(a) Voluntary Dismissal.** **(1)** ***By the Plaintiff.*** **(A)** *Without a Court Order*. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing: **(i)** a notice of dismissal before the adverse party serves either an answer or a motion for summary judgment; or **(ii)** a stipulation of dismissal signed by all parties who have appeared. **(B)** *Effect*. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any action in federal or state court based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.
(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.	**(2)** ***By Court Order; Effect.*** Except as provided in (1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.	**(b) Involuntary Dismissal; Effect.** If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order specifies otherwise, a dismissal under this subdivision (b) and any dismissal not provided for in this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.
(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.	**(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim.** This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under (a)(1)(A)(i) must be made before a responsive pleading is served or, if there is none, before evidence is introduced at the trial or hearing.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.	**(d) Costs of a Previously Dismissed Action.** If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court: **(1)** may order the plaintiff to pay all or part of the costs of that previous action; and **(2)** may stay the proceedings until the plaintiff has complied.

Committee Note

The language of Rule 41 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

When Rule 23 was amended in 1966, Rules 23.1 and 23.2 were separated from Rule 23. Rule 41(a)(1) was not then amended to reflect the Rule 23 changes. In 1968 Rule 41(a)(1) was amended to correct the cross-reference to what had become Rule 23(e), but Rules 23.1 and 23.2 were inadvertently overlooked. Rules 23.1 and 23.2 are now added to the list of exceptions in Rule 41(a)(1)(A). This change does not affect established meaning. Rule 23.2 explicitly incorporates Rule 23(e), and thus was already absorbed directly into the exceptions in Rule 41(a)(1). Rule 23.1 requires court approval of a compromise or dismissal in language parallel to Rule 23(e) and thus supersedes the apparent right to dismiss by notice or dismissal.

Rule 42. Consolidation; Separate Trials	Rule 42. Consolidation; Separate Trials
(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.	**(a)** If actions before the court involve a common question of law or fact, the court may: **(1)** join for hearing or trial any or all matters at issue in the actions; **(2)** consolidate the actions; and **(3)** make any other orders to avoid unnecessary cost or delay.
(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.	**(b) Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more claims, crossclaims, counterclaims, third-party claims, or separate issues. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Committee Note

The language of Rule 42 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 43. Taking of Testimony	Rule 43. Taking Testimony
(a) Form. In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.	**(a) In Open Court.** At trial, the witnesses' testimony must be taken in open court unless a federal law, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. In compelling circumstances and with appropriate safeguards, the court may allow testimony in open court by contemporaneous transmission from a different location.
(b) [Abrogated.]	
(c) [Abrogated.]	
(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.	**(b) Affirmation Instead of Oath.** When these rules require an oath, a solemn affirmation suffices.
(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.	**(c) Evidence on a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may order that it be heard wholly or partly on oral testimony or on depositions.
(f) Interpreters. The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.	**(d) Interpreter.** The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

Committee Note

The language of Rule 43 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 44. Proof of Official Record	Rule 44. Proving an Official Record
(a) Authentication. **(1) Domestic.** An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.	**(a) Means of Proving.** **(1)** ***Domestic Record*****.** The following evidences an official record — or an entry in it — that is otherwise admissible and is kept within the United States, any state, district or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States: **(A)** an official publication of the record; or **(B)** a copy attested by the officer with legal custody of the record — or by the officer's deputy — and accompanied by a certificate that the officer has custody. The certificate must be made under seal: **(i)** by a judge of a court of record of the district or political subdivision where the record is kept; or **(ii)** by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation.	**(2)** ***Foreign Record.*** **(A)** *In General.* The following evidences a foreign official record — or an entry in it — that is otherwise admissible: **(i)** an official publication of the record; **(ii)** a copy attested by an authorized person and accompanied by a final certification of genuineness; **(iii)** a record and attestation certified as provided in a treaty or convention to which the United States and a country where the record is located are parties; or **(iv)** other means ordered by the court under (C).
A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.	**(B)** *Final Certification of Genuineness.* A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. **(C)** *Other Means of Proof.* If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either: **(i)** admit an attested copy without final certification; or **(ii)** allow the record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.	**(b) Lack of a Record.** A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under (a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).
(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.	**(c) Other Proof.** A party may prove an official record — or an entry or lack of an entry in it — by any other method authorized by law.

Committee Note

The language of Rule 44 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 44.1. Determination of Foreign Law	Rule 44.1. Determining Foreign Law
A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.	A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Committee Note

The language of Rule 44.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 46. Exceptions Unnecessary	Rule 46. Objecting to a Ruling or Order
Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.	A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

Committee Note

The language of Rule 46 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 47. Selection of Jurors	Rule 47. Selecting Jurors
(a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.	**(a) Examining Jurors.** The court must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.
(b) Peremptory Challenges. The court shall allow the number of peremptory challenges provided by 28 U.S.C. § 1870.	**(b) Peremptory Challenges.** The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.
(c) Excuse. The court may for good cause excuse a juror from service during trial or deliberation.	**(c) Excusing a Juror.** During trial or deliberation, the court may excuse a juror for good cause.

Committee Note

The language of Rule 47 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 48. Number of Jurors— Participation in Verdict	**Rule 48. Number of Jurors; Participating in the Verdict**
The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.	A jury must have no fewer than 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c). Unless the parties stipulate otherwise, the verdict must be unanimous and be returned by a jury of at least 6 members.

Committee Note

The language of Rule 48 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 49. Special Verdicts and Interrogatories	**Rule 49. Special Verdict; General Verdict and Interrogatories**
(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.	**(a) Special Verdict.** **(1)** ***In General***. The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by: **(A)** submitting written questions susceptible of a categorical or other brief answer; **(B)** submitting written forms of the special findings that might properly be made under the pleadings and evidence; or **(C)** using any other method that the court considers appropriate.
The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.	**(2)** ***Instructions***. The court must instruct the jury to enable it to make its findings on each submitted issue . **(3)** ***Issues Not Submitted***. A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. The court may make a finding on any issue omitted without a demand; if the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.	**(b) General Verdict with Answers to Interrogatories.** **(1)** ***In General***. The court may submit to the jury forms for a general verdict, together with written interrogatories on one or more issues of fact that must be decided. The court must instruct the jury to enable it to render a general verdict and answer the interrogatories in writing, and must direct the jury to do both. **(2)** ***Verdict and Answers Consistent.*** When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers. **(3)** ***Answers Inconsistent With the Verdict.*** When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may: **(A)** approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict; **(B)** direct the jury to further consider its answers and verdict; or **(C)** order a new trial. **(4)** ***Answers Inconsistent With Each Other and the Verdict***. When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

Committee Note

The language of Rule 49 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings	**Rule 50. Judgment as a Matter of Law in a Jury Trial; Alternative Motion for a New Trial; Conditional Ruling**
(a) Judgment as a Matter of Law. **(1)** If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. **(2)** Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.	**(a) Judgment as a Matter of Law.** **(1)** ***In General***. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: **(A)** determine the issue against the party; and **(B)** grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. **(2)** ***Motion***. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may: **(1)** if a verdict was returned: **(A)** allow the judgment to stand, **(B)** order a new trial, or **(C)** direct entry of judgment as a matter of law; or **(2)** if no verdict was returned: **(A)** order a new trial, or **(B)** direct entry of judgment as a matter of law.	**(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is deemed to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may: **(1)** allow judgment on the verdict, if the jury returned a verdict; **(2)** order a new trial; or **(3)** direct the entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion. **(1)** If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. **(2)** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.	**(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.** **(1)** ***In General***. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial. **(2)** ***Effect of a Conditional Ruling***. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; and if the judgment is reversed, the case must proceed in accordance with the appellate court's order. **(3)** ***Timing of the Motion for a New Trial.*** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.	**(d) Denying the Motion for Judgment as a Matter of Law.** If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Committee Note

The language of Rule 50 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 50(b) stated that the court reserves ruling on a motion for judgment as a matter of law made at the close of all the evidence "[i]f, for any reason, the court does not grant" the motion. The words "for any reason" reflected the proposition that the reservation is automatic and inescapable. The ruling is reserved even if the court explicitly denies the motion. The same result follows under the amended rule. If the motion is not granted, the ruling is reserved.

Amended Rule 50(d) identifies the appellate court's authority to direct the entry of judgment. This authority was not described in former Rule 50(d), but was recognized in *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), and in *Neely v. Martin K. Eby Construction Company*, 386 U.S. 317 (1967). When Rule 50(d) was drafted in 1963, the Committee Note stated that "[s]ubdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied * * *." Express recognition of the authority to direct entry of judgment does not otherwise supersede this caution.

Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error	**Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error**
(a) Requests. (1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests. **(2)** After the close of the evidence, a party may: **(A)** file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and **(B)** with the court's permission file untimely requests for instructions on any issue.	**(a) Requests.** **(1)** ***Before or at the Close of the Evidence.*** At the close of the evidence or at any earlier reasonable time that the court directs, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give. **(2)** ***After the Close of the Evidence.*** After the close of the evidence, a party may: **(A)** file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and **(B)** with the court's permission, file untimely requests for instructions on any issue.
(b) Instructions. The court: **(1)** must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments; **(2)** must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and **(3)** may instruct the jury at any time after trial begins and before the jury is discharged.	**(b) Instructions.** The court: **(1)** must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments; **(2)** must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and **(3)** may instruct the jury at any time before the jury is discharged.

(c) Objections. **(1)** A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection. **(2)** An objection is timely if: **(A)** a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or **(B)** a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.	**(c) Objections.** **(1)** ***How to Make.*** A party who objects to a proposed instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection. **(2)** ***When to Make***. An objection is timely if: **(A)** a party objects at the opportunity provided under (b)(2); or **(B)** a party was not informed of an instruction or action on a request before the time to object under (b)(2), and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.
(d) Assigning Error; Plain Error. **(1)** A party may assign as error: **(A)** an error in an instruction actually given if that party made a proper objection under Rule 51(c), or **(B)** a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made a definitive ruling on the record rejecting the request — also made a proper objection under Rule 51(c). **(2)** A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).	**(d) Assigning Error; Plain Error.** **(1)** ***Assigning Error***. A party may assign as error: **(A)** an error in an instruction actually given, if that party made a proper objection; or **(B)** a failure to give an instruction, if that party made a proper request under (a) and — unless the court rejected the request in a definitive ruling on the record — also made a proper objection under (c). **(2)** ***Plain Error***. A court may consider a plain error in the instructions that has not been preserved as required by (d)(1) if the error affects substantial rights.

Committee Note

The language of Rule 51 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 52. Findings by the Court; Judgment on Partial Findings	**Rule 52. Findings and Conclusions in Nonjury Proceedings; Judgment on Partial Findings**
(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.	**(a) Findings and Conclusions by the Court.** **(1)** ***In General***. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence, or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58. **(2)** ***For Interlocutory Injunctions***. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action. **(3)** ***For Motions***. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or Rule 56 or, unless these rules provide otherwise, on any other motion. **(4)** ***Effect of a Master's Findings***. A master's findings, to the extent adopted by the court, must be considered the court's findings. **(5)** ***Questioning the Evidentiary Support***. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings. **(6)** ***Setting Aside the Findings.*** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amendment. On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.	**(b) Amended or Additional Findings.** On a party's motion filed no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.
(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.	**(c) Judgment on Partial Findings.** If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by (a).

Committee Note

The language of Rule 52 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 52(a) said that findings are unnecessary on decisions of motions "except as provided in subdivision (c) of this rule." Amended Rule 52(a)(3) says that findings are unnecessary "unless these rules provide otherwise." This change reflects provisions in other rules that require Rule 52 findings on deciding motions. Rules 23(e), 23(h), and 54(d)(2)(C) are examples.

Amended Rule 52(a)(5) includes provisions that appeared in former Rule 52(a) and 52(b). Rule 52(a) provided that requests for findings are not necessary for purposes of review. It applied both in an action tried on the facts without a jury and also in granting or refusing an interlocutory injunction. Rule 52(b), applicable to findings "made in actions tried without a jury," provided that the sufficiency of the evidence might be "later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings." Former Rule 52(b) did not explicitly apply to decisions granting or refusing an interlocutory injunction. Amended Rule 52(a)(5) makes explicit the application of this part of former Rule 52(b) to interlocutory injunction decisions.

Former Rule 52(c) provided for judgment on partial findings, and referred to it as "judgment as a matter of law." Amended Rule 52(c) refers only to "judgment," to avoid any confusion with a Rule 50 judgment as a matter of law in a jury case. The standards that govern judgment as a matter of law in a jury case have no bearing on decision under Rule 52(c).

Rule 53. Masters	Rule 53. Masters
(a) Appointment. **(1)** Unless a statute provides otherwise, a court may appoint a master only to: **(A)** perform duties consented to by the parties; **(B)** hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by **(i)** some exceptional condition, or **(ii)** the need to perform an accounting or resolve a difficult computation of damages; or **(C)** address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.	**(a) Appointment.** **(1)** ***Scope***. Unless a statute provides otherwise, a court may appoint a master only to: **(A)** perform duties agreed to by the parties; **(B)** hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by: **(i)** some exceptional condition; or **(ii)** the need to perform an accounting or resolve a difficult computation of damages; or **(C)** address pretrial and posttrial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.
(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification. **(3)** In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.	**(2)** ***Disqualification***. A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, agree to the appointment after the master discloses any potential grounds for disqualification. **(3)** ***Possible Expense or Delay***. In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing Master. **(1) Notice.** The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment. **(2) Contents.** The order appointing a master must direct the master to proceed with all reasonable diligence and must state: **(A)** the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c); **(B)** the circumstances — if any — in which the master may communicate ex parte with the court or a party; **(C)** the nature of the materials to be preserved and filed as the record of the master's activities; **(D)** the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and **(E)** the basis, terms, and procedure for fixing the master's compensation under Rule 53(h). **(3) Entry of Order.** The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification. **(4) Amendment.** The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.	**(b) Order Appointing a Master.** **(1)** ***Notice*****.** Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment. **(2)** ***Contents.*** The order appointing a master must direct the master to proceed with all reasonable diligence and must state: **(A)** the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under (c); **(B)** the circumstances, if any, in which the master may communicate ex parte with the court or a party; **(C)** the nature of the materials to be preserved and filed as the record of the master's activities; **(D)** the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and **(E)** the basis, terms, and procedure for fixing the master's compensation under (h). **(3)** ***Entry*****.** The court may enter the order only after: **(A)** the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and **(B)** if a ground is disclosed, the parties, with the court's approval, agree to waive the disqualification. **(4)** ***Amendment*****.** The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) Master's Authority. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.	**(c) Master's General Authority.** Unless the appointing order directs otherwise, a master may regulate all proceedings and take all appropriate measures to perform the assigned duties fairly and efficiently. The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.
(d) Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.	**(d) Evidentiary Hearings.** Unless the appointing order directs otherwise, a master who conducts an evidentiary hearing may exercise the appointing court's power to compel, take, and record evidence.
(e) Master's Orders. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.	**(e) Master's Orders.** A master who makes an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.
(f) Master's Reports. A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.	**(f) Master's Reports.** A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party unless the court directs otherwise.

(g) Action on Master's Order, Report, or Recommendations. **(1) Action.** In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions. **(2) Time To Object or Move.** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time. **(3) Fact Findings.** The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that: **(A)** the master's findings will be reviewed for clear error, or **(B)** the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final. **(4) Legal Conclusions.** The court must decide de novo all objections to conclusions of law made or recommended by a master. **(5) Procedural Matters.** Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.	**(g) Action on the Master's Order, Report, or Recommendations.** **(1)** ***Action.*** In acting on a master's order, report, or recommendations, the court must give the parties an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions. **(2)** ***Time to Object or Move to Adopt or Modify.*** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days after a copy is served, unless the court sets a different time. **(3)** ***Reviewing Factual Findings.*** The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, agree that: **(A)** the findings will be reviewed for clear error; or **(B)** the findings of a master appointed under (a)(1)(A) or (C) will be final. **(4)** ***Reviewing Legal Conclusions.*** The court must decide de novo all objections to conclusions of law made or recommended by a master. **(5)** ***Reviewing Procedural Matters.*** Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(h) Compensation. **(1) Fixing Compensation.** The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard. **(2) Payment.** The compensation fixed under Rule 53(h)(1) must be paid either: **(A)** by a party or parties; or **(B)** from a fund or subject matter of the action within the court's control. **(3) Allocation.** The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.	**(h) Compensation.** **(1)** ***Fixing Compensation.*** Before or after judgment**,** the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after notice and an opportunity to be heard. **(2)** ***Payment.*** The compensation must be paid either: **(A)** by a party or parties; or **(B)** from a fund or subject matter of the action within the court's control. **(3)** ***Allocating Payment.*** The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.
(i) Appointment of Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.	**(i) Appointing a Magistrate Judge.** A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

Committee Note

The language of Rule 53 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

VII. JUDGMENT Rule 54. Judgments; Costs	TITLE VII. JUDGMENT Rule 54. Judgment; Costs
(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.	**(a) Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment must not include recitals of pleadings, a master's report, or a record of prior proceedings.
(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.	**(b) Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may enter a final judgment on one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the court enters judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.	**(c) Demand for Judgment.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.
(d) Costs; Attorneys' Fees. **(1) Costs Other than Attorneys' Fees.** Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court. **(2) Attorneys' Fees.** **(A)** Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial. **(B)** Unless otherwise provided by statute or order of the court, the motion must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.	**(d) Costs; Attorney's Fees.** **(1)** ***Costs Other Than Attorney's Fees*****.** Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent permitted by law. The clerk may tax costs on one day's notice. On motion served within the next 5 days, the court may review the clerk's action. **(2)** ***Attorney's Fees.*** **(A)** *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. **(B)** *Timing and Contents of the Motion*. Unless a statute or a court order provides otherwise, the motion must: **(i)** be filed no later than 14 days after the entry of judgment; **(ii)** specify the judgment and the statute, rule, or other grounds entitling the movant to the award; **(iii)** state the amount sought or provide a fair estimate of it; and **(iv)** disclose, if the court directs, the terms of any agreement about fees for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a).	**(C) Proceedings**. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(e) or Rule 78. The court may decide issues of liability for fees before receiving submissions relating to the evaluation of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).
(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of Rule 53(a)(1) and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.	**(D) Special Procedures by Local Rule; Reference to a Master**. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.
(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.	**(E) Exceptions.** Paragraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or under 28 U.S.C. § 1927.

Committee Note

The language of Rule 54 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 54(b) required two steps to enter final judgment as to fewer than all claims among all parties. The court must make an express determination that there is no just reason for delay and also make an express direction for the entry of judgment. Amended Rule 54(b) eliminates the express direction for the entry of judgment. There is no need for an "express direction" when the court expressly determines that there is no just reason for delay and enters a final judgment.

The words "or class member" have been removed from Rule 54(d)(2)(C) because Rule 23(h)(2) now addresses objections by class members to attorney-fee motions. Rule 54(d)(2)(C) is amended to recognize that Rule 23(h) now controls those aspects of attorney fee motions in class actions to which it is addressed.

Rule 55. Default	**Rule 55. Default; Default Judgment**
(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.	**(a) Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.
(b) Judgment. Judgment by default may be entered as follows: **(1) By the Clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person. **(2) By the Court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.	**(b) Entering a Default Judgment.** **(1)** ***By the Clerk.*** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk — on the plaintiff's request, with an affidavit showing the amount due — must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and is neither a minor nor an incompetent person. **(2)** ***By the Court.*** In all other cases, the party must apply for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to: **(A)** conduct an accounting; **(B)** determine the amount of damages; **(C)** establish the truth of any averment by evidence; or **(D)** investigate any other matter.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).	**(c) Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).
(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).	
(e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.	**(d) Judgment Against the United States.** A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

Committee Note

The language of Rule 55 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 55(a) directed the clerk to enter a default when a party failed to plead or otherwise defend "as provided by these rules." The implication from the reference to defending "as provided by these rules" seemed to be that the clerk should enter a default even if a party did something showing an intent to defend, but that act was not specifically described by the rules. Courts in fact have rejected that implication. Acts that show an intent to defend have frequently prevented a default even though not connected to any particular rule. "[A]s provided by these rules" is deleted to reflect Rule 55(a)'s actual meaning.

Amended Rule 55 omits former Rule 55(d), which included two provisions. The first recognized that Rule 55 applies to described claimants. The list was incomplete and unnecessary. Rule 55(a) applies Rule 55 to any party against whom a judgment for affirmative relief is requested. The second provision was a redundant reminder that Rule 54(c) limits the relief available by default judgment.

Rule 56. Summary Judgment	**Rule 56. Summary Judgment**
(a) For Claimant. 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.	**(a) By a Claiming Party.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after 20 days from commencement of the action or after the adverse party serves a motion for summary judgment.
(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) By a Defending Party.** A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.
(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.	**(c) Serving the Motion; Proceedings.** The motion must be served at least 10 days before the day set for the hearing. An adverse party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.	**(d) Case Not Fully Adjudicated on the Motion.** **(1)** ***Establishing Facts.*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then enter an order specifying what facts are not genuinely at issue, including the amount of damages or other relief. The facts so specified must be treated as established in the action. **(2)** ***Establishing Liability***. An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.
(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.	**(e) Affidavits; Further Testimony.** **(1)** ***In General.*** Supporting and opposing affidavits must be made on personal knowledge, set forth facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits. **(2)** ***Adverse Party's Obligation to Respond.*** When a motion for summary judgment is properly made and supported, an adverse party may not rely merely on allegations or denials in its own pleading; rather, the adverse party's response must — by affidavits or as otherwise provided in this rule — set forth specific facts showing a genuine issue for trial. If the adverse party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment 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.	**(f) When Affidavits Are Unavailable.** If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: **(1)** deny the motion; **(2)** order a continuance to permit affidavits to be obtained, depositions to be taken, or discovery to be undertaken; or **(3)** make any other appropriate order.
(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.	**(g) Affidavit Submitted in Bad Faith.** If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses it incurred as a result, including reasonable attorney's fees. An offending party or attorney may also be held in contempt.

Committee Note

The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them ore easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 56(a) and (b) referred to summary-judgment motions on or against a claim, counterclaim, or cross-claim or to obtain a declaratory judgment. The list was incomplete. Rule 56 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended Rule 56(a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). [Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728.] "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

Former Rule 56(d) used a variety of different phrases to express the Rule 56(c) standard for summary judgment — that there is no genuine issue as to any material fact. Amended Rule 56(d) adopts terms directly parallel to Rule 56(c).

Rule 57. Declaratory Judgments	Rule 57. Declaratory Judgment
The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.	These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. A party may demand a jury trial under Rules 38 and 39. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action and may advance it on the calendar.

Committee Note

The language of Rule 57 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 58. Entry of Judgment	Rule 58. Entering Judgment
(a) Separate Document. **(1)** Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion: **(A)** for judgment under Rule 50(b); **(B)** to amend or make additional findings of fact under Rule 52(b); **(C)** for attorney fees under Rule 54; **(D)** for a new trial, or to alter or amend the judgment, under Rule 59; or **(E)** for relief under Rule 60.	**(a) Separate Document.** Every judgment and amended judgment must be set forth in a separate document, but a separate document is not required for an order disposing of a motion: **(1)** for judgment under Rule 50(b); **(2)** to amend or make additional findings of fact under Rule 52(b); **(3)** for attorney's fees under Rule 54; **(4)** for a new trial, or to alter or amend the judgment, under Rule 59; or **(5)** for relief under Rule 60.
(2) Subject to Rule 54(b): **(A)** unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when: **(i)** the jury returns a general verdict, **(ii)** the court awards only costs or a sum certain, or **(iii)** the court denies all relief; **(B)** the court must promptly approve the form of the judgment, which the clerk must promptly enter, when: **(i)** the jury returns a special verdict or a general verdict accompanied by interrogatories, or **(ii)** the court grants other relief not described in Rule 58(a)(2).	**(b) Entering Judgment.** **(1)** ***Without the Court's Direction.*** Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when: **(A)** the jury returns a general verdict; **(B)** the court awards only costs or a sum certain; or **(C)** the court denies all relief. **(2)** ***Court's Approval Required.*** Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when: **(A)** the jury returns a special verdict or a general verdict with answers to interrogatories; or **(B)** the court grants other relief not described in this subdivision (b).

(b) Time of Entry. Judgment is entered for purposes of these rules: **(1)** if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and **(2)** if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs: **(A)** when it is set forth in a separate document, or **(B)** when 150 days have run from entry in the civil docket under Rule 79(a).	**(c) Time of Entry.** Judgment is entered for purposes of these rules as follows: **(1)** if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or **(2)** if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs: **(A)** it is set forth in a separate document; or **(B)** 150 days have run from the entry in the civil docket.
(c) Cost or Fee Awards. **(1)** Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2). **(2)** When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.	**(d) Cost or Fee Awards.** Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.
(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).	**(e) Request for Entry.** A party may request that judgment be set forth in a separate document as required by (a).

Committee Note

The language of Rule 58 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 59. New Trials; Amendment of Judgments	**Rule 59. New Trial; Amending a Judgment**
(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.	**(a) In General** **(1)** ***New Trial.*** The court may, on motion, grant a new trial on all or some of the issues: **(A)** after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; and **(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court. **(2)** ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct entry of a new judgment.
(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.	**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 10 days after the entry of the judgment.
(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.	**(c) Time to Serve Affidavits.** When a motion for new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after service to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may allow reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.	**(d) New Trial on the Court's Initiative or for Reasons Not in the Motion**. No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own or for a reason not stated in the motion, the court must specify the grounds in its order.
(e) Motion to Alter or Amend a Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.	**(e) Motion to Alter or Amend Judgment.** A motion to alter or amend a judgment must be filed no later than 10 days after entry of the judgment.

Committee Note

The language of Rule 59 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 60. Relief From Judgment or Order	Rule 60. Relief from a Judgment or Order
(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.	**(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission, whenever found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.
(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.	**(b) Grounds for Relief From Judgment.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: **(1)** mistake, inadvertence, surprise, or excusable neglect; **(2)** newly discovered evidence that, with due diligence, could not have been discovered in time to move for a new trial under Rule 59(b); **(3)** fraud (whether intrinsic or extrinsic), misrepresentation, or misconduct by an adverse party; **(4)** the judgment is void; **(5)** the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or **(6)** any other reason that justifies relief.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.	**(c) Timing and Effect of the Motion.** **(1)** ***Timing*****.** A motion under (b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding. **(2)** ***Effect on Finality*****.** The motion does not affect the finality of a judgment or suspend its operation.
This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.	**(d) Independent Action.** This rule does not limit a court's power to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief under 28 U.S.C. § 1655 to a defendant who is not personally notified of the action; or to set aside a judgment for fraud on the court.
Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.	**(e) Writs Abolished.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela,

Committee Note

The language of Rule 60 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 60(b) also said that the procedure for obtaining any relief from a judgment was by motion as prescribed in the Civil Rules or by an independent action. That provision is deleted as unnecessary. Relief continues to be available only as provided in the Civil Rules or by independent action.

Rule 61. Harmless Error	**Rule 61. Harmless Error**
No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.	Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or defect in a party's acts or omissions — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors or defects that do not affect any party's substantial right.

COMMITTEE NOTE

The language of Rule 61 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 62. Stay of Proceedings To Enforce a Judgment	Rule 62. Stay of Proceedings to Enforce a Judgment
(a) Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.	**(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings.** Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken for its enforcement, until 10 days have passed after its entry. But unless the court orders otherwise, the following are not automatically stayed after being entered, even if an appeal is taken: **(1)** an interlocutory or final judgment in an action for an injunction or a receivership; or **(2)** a judgment or order that directs an accounting in an action for patent infringement.
(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).	**(b) Stay Pending the Disposition of a Motion.** On appropriate conditions for the adverse party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions: **(1)** under Rule 50, for judgment as a matter of law; **(2)** under Rule 52(b), to amend the findings or for additional findings; **(3)** under Rule 59, for a new trial or to alter or amend a judgment; or **(4)** under Rule 60, for relief from a judgment or order.
(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.	**(c) Injunction Pending an Appeal.** After an appeal is taken from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the adverse party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either: **(1)** by that court sitting in open session; or **(2)** by the assent of all its judges, as evidenced by their signatures.
(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.	**(d) Stay on Appeal.** If an appeal is taken, the appellant may, by supersedeas bond, obtain a stay, subject to the exceptions in (a). The bond may be given upon or after filing the notice of appeal or upon obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.	**(e) Stay in Favor of the United States, Its Officers, or Its Agencies.** The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.
(f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.	**(f) Stay in Favor of a Judgment Debtor Under State Law.** If a judgment is a lien on the judgment debtor's property under state law where the court sits, the court must, on motion, grant the same stay of execution that the judgment debtor would be entitled to receive under that state's law.
(g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.	**(g) Appellate Court's Power Not Limited.** While an appeal is pending, this rule does not limit the power of the appellate court or one of its judges or justices to: **(1)** stay proceedings; **(2)** suspend, modify, restore, or grant an injunction; or **(3)** make an order to preserve the status quo or the effectiveness of the judgment to be entered.
(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.	**(h) Multiple Claims or Parties.** A court may stay the enforcement of a final judgment directed under Rule 54(b) until it enters a later judgment or judgments, and may prescribe conditions necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

Committee Note

The language of Rule 62 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 63. Inability of a Judge To Proceed	**Rule 63. Judge's Inability to Proceed**
If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.	If the judge who commenced a hearing or trial is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The successor judge may also recall any other witness.

Committee Note

The language of Rule 63 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

C. Rules for Later Publication (2): "Style-Substance Track"

The Style Project has required intimate and repeated review of every word and punctuation mark of each rule. Such close reading reveals many opportunities for improvement. Improvement, however, lies outside the Project confines. The sole permissible object is to express present meaning as clearly as can be but without change. The Project will fail if these limits are not honored.

To the extent that time and Advisory Committee resources permit, it might be possible to publish significant rules changes for comment in tandem with the Style Rules. The attempt could easily divert attention from the Style Rules, however, and might generate concern that other substantive changes might lurk in the Style Rules. Many interesting and potentially valuable suggestions for improvement have been deferred to a "Reform Agenda" to be addressed at stages over the indefinite future.

Continuing debates over the Style Rules have nonetheless revealed a small number of reforms that seem beyond reasonable controversy. These are reforms that in some sense change the apparent meaning of the present rule and that cannot be readily defended on the ground that because they make such good sense they must reflect what everyone is doing. The Advisory Committee has concluded that it will be useful to publish these few recommendations for noncontroversial substantive revision in tandem with the Style Rules. Tentatively identified as the "Style-Substance Track," the hallmark of these proposals is that they must be obviously right. Any proposal that encounters significant doubt should be rejected from this track. The advantage of this approach is that it will enable simultaneous adoption of the Style Rules and a set of simple improvements, leaving the stage clear for ongoing development of more difficult rules changes.

The following proposals include all of the Style-Substance Track proposals contemplated for Rules 1 through 63. No more than brief discussion, if any, is offered to supplement the designation of the amendment and the accompanying Committee Note. Any proposal that requires greater discussion is likely to be unfit for the Style-Substance Track.

Rule 4(k)(1)(C)

This provision is unfortunate in several ways. It is redundant because 4(k)(1)(D) addresses service "authorized by a United States statute." It does not directly address interpleader service for two reasons: 4(k) begins by speaking of jurisdiction over a "defendant," while the interpleader service provisions provide for service on "all claimants"; and the interpleader service provisions actually appear in 28 U.S.C. § 2361.

Rule 4. Summons[*]

* * * * *

(k) Territorial Limits of Effective Service.

[*] Proposed revisions based on rules as amended by the Style Project.

(1) ***In General.*** Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

*** * * * ***

~~**(C)** who is subject to federal interpleader jurisdiction under 28 U.S.C. § 1335; or~~

(~~D~~C) when authorized by a federal statute.

*** * * * ***

Committee Note

The former provision describing service on interpleader claimants is deleted as redundant in light of the general provision in (k)(1)(C) recognizing personal jurisdiction authorized by a federal statute.

Rule 8(a)(3)

The Style draft carries forward the present rule's reference to "relief in the alternative." The style consultants wanted to change to "alternative forms * * * of relief." The change "felt substantive." But the motive for putting it on the Style-Substance track would be to improve style, not to change meaning. The rule would read:

Rule 8. General Rules of Pleadings.

(a) Claims for Relief. A pleading that states a claim for relief — whether an original claim, a counterclaim, a crossclaim, or a third-party claim — must contain:

*** * * * ***

(3) a demand for the relief sought, which may include ~~relief in the~~ alternative forms or different types of relief.

*** * * * ***

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) In General. Each averment must be simple, concise, and direct. ~~No technical form is required.~~

*** * * * ***

Committee Note

Subdivision (a) — "alternative forms * * * of relief" is a style improvement of the present rule's "relief in the alternative." No changed meaning is intended.

Subdivision (d) — Former Rule 8(e)(1) stated that "No technical forms of pleadings or motions are required." That proposition is now embedded in practice and no longer needs express statement.

Rule 9(h)(2)

It would be easy enough to delete this seemingly redundant reference to Rule 15. But the reference may be useful to avoid arguments about sliding into and out of the Supplemental Rules and whether that utility outweighs the presumption against redundant references.

Rule 9. Pleading Special Matters

(h) Admiralty or Maritime Claim.

*** * * * ***

~~**(2)** Amending a Designation. Amending a pleading to add or withdraw a designation is governed by Rule 15.~~

(~~3~~2) *Designation for Appeal.* A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

Committee Note

Rule 15 governs pleading amendments of its own force. The former redundant statement that Rule 15 governs an amendment that adds or withdraws a Rule 9(h) designation as an admiralty or maritime claim is deleted. The elimination of paragraph (2) means that "(3)" will be redesignated as "(2)" in Style Rule 9(h).

Rule 11(a)

It is easy to add e-mail addresses, at least if we know how to describe them properly (shades of defining computer-based discovery). We also could delete the phrase "if any" and avoid deciding whether it modifies only telephone number or also address: do we want to recognize in the rule that a party (or attorney) may not have a physical address?

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

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is not represented by an attorney. The paper must state the signer's address, electronic-mail address, and telephone number ~~if any~~. [address, e-mail address if any, and telephone number if any] Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission

is promptly corrected after being called to the attorney's or party's attention.

* * * * *

Committee Note

Providing an e-mail address is useful, but does not of itself signify consent to filing or service by e-mail.

Rule 14(b)

Rule 14(b) now, and in the Style version, says only that a plaintiff may bring in a third party when a counterclaim is made. That is incomplete. Subject to the quirks of diversity jurisdiction, one plaintiff may crossclaim against another — most obviously when a counterclaim is made against them. Third-party practice should be available to a plaintiff just as it is to a defendant.

Rule 14. Third-Party Practice

* * * * *

(b) When a Plaintiff May Bring in a Third Party. When a ~~counterclaim~~ claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

* * * * *

Committee Note

A plaintiff should be on equal footing with the defendant in making third-party claims, whether the claim against the plaintiff is asserted as a counterclaim or as another form of claim. The limit imposed by the former reference to "counterclaim" is deleted.

Rule 16(c)(1)

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(c) Attendance and Matters for Consideration at Pretrial Conferences.

(1) ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by ~~telephone~~ other means to consider possible settlement.

* * * * *

Committee Note

When a party or its representative is not present, it is enough to be reasonably available by any suitable means, whether telephone or other communication device.

Rule 26(g)(1) and 26(g)(1)(B)(ii)

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

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

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address, telephone number, and electronic-mail address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

* * * * *

(B) with respect to a discovery request, response, or objection, it is:

* * * * *

(ii) consistent with these rules and warranted by existing law or a good-faith argument for

extending, modifying, or reversing existing law, or establishing new law; and

* * * * *

Committee Note

As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

Rule 30(b)(3)(A) and 30(b)(6)

Rule 30. Depositions by Oral Examination

* * * * *

(b) Notice of the Deposition; Other Formal Requirements.

* * * * *

(3) ***Method of Recording***.

(A) *Method Stated in the Notice.* The party noticing the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The party noticing the deposition bears the recording costs.

Any party may arrange to transcribe a deposition ~~that was taken nonstenographically~~.

* * * * *

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, ~~or~~ a governmental agency, or other entity, and describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf; and it may set forth the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The designees must testify about information known or reasonably available to the organization. This paragraph does not preclude depositions by any other procedure authorized in these rules.

* * * * *

Committee Note

The right to arrange a deposition transcription should be open to any party, regardless of the means of recording and regardless of who noticed the deposition.

"[O]ther entity" is added to the list of organizations that may be named as deponent. The purpose is to ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what abstract fictive concept is used to describe the organization. Nothing is gained by wrangling over the place to fit into current rule language such entities as limited liability companies, limited liability partnerships, business trusts, more exotic common-law creations, or forms developed in other countries.

Rule 31(c)

Rule 31. Depositions by Written Questions

* * * * *

(c) Notice of <u>Completion or</u> Filing.

<u>(1) *Notice of Completion*.</u> <u>The party who noticed the deposition must notify all other parties when it is completed.</u>

<u>(2) Notice of Filing.</u> A party who files the deposition must promptly notify all other parties of the filing.

Committee Note

The party who noticed a deposition on written questions must notify all other parties when the deposition is completed, so that they may make use of the deposition.

Rule 36(b)

Rule 36. Requests for Admission

* * * * *

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. ~~Subject to Rule 16(d) and (e), t~~The court may permit withdrawal or amendment of an admission that has not been incorporated in a pretrial order if ~~it~~ doing so would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is for purposes of the pending action only, is not an admission for any other purpose, and cannot be used against the party in any other proceeding.

Committee Note

An admission that has been incorporated in a pretrial order can be withdrawn or amended only under Rule 16(d) or (e). The standard of Rule 36(b) applies to other Rule 36 admissions.

(Comment: This change is no more than a clearer explanation of the present rule's "Subject to the provision of Rule 16 governing amendment of the pre-trial order." Relying on the Committee Note to accomplish the explicit cross-reference seems better than adding to the rule text a parallel statement that an admission incorporated in a pretrial order may be amended only under Rule 16(d) or (e).)

Rule 40

Rule 40. Scheduling Cases for Trial

Each court must provide by rule for scheduling trials ~~without request — or on a party's request — after notice to the other parties~~. The court must give priority to actions entitled to priority by federal statute.

Committee Note

The best methods for scheduling trials depend on local conditions. It is useful to ensure that each district adopts an explicit rule for scheduling trials. It is not useful to limit or dictate the provisions of local rules.

(Question: Why carry forward the reminder that courts must honor statutory priorities? Is there a risk that deletion of the second sentence would implicitly delegate § 2072 supersession authority to district courts, even though § 2071(a) and Rule 83(a)(1) both demand that local rules be consistent with Acts of Congress?)

D. Consideration of Noncontroversial "Global" Style Issues

One of the style project's goals is to use words consistently and uniformly to prevent confusion. The Standing Committee's Style Subcommittee has identified and maintained a list of recurring words and phrases in the Civil Rules that seem to have the same meaning but are worded differently. In many cases, the sole issue is apparent and requires only a decision to select one word over another that will be used uniformly throughout the rules, e.g., minor or infant. In other cases, the resolution is more complicated.

The Civil Rules Committee reviewed the list of recurring "global" issues and has recommended resolving 18 global issues that were determined to be noncontroversial. The chart on the next page lists each of the 18 global issues, including its precise location in the rules, and briefly describes the recommended resolution. Copies of the entire set of restyled rules showing the resolution of the global issues in highlighted text will be available at the meeting.

The Civil Rules Committee intends to address the other more difficult global issues identified by the Standing Style Subcommittee, and present a comprehensive set of proposals regarding all global issues to the Standing Committee at its January 2005 meeting with a recommendation that they be incorporated in the stylized rules approved by the Standing Committee to be published for comment. The Civil Rules Committee asks for no action to be taken on these global issues at this meeting and presents them only for informational purposes. The Committee will continue to address these global issues and welcomes any suggestion regarding them.

II. Information Items

A. Proposed Rule 5.1 Tabled

The proposals published for comment in August 2003 included a new Rule 5.1. Rule 5.1 is designed to implement 28 U.S.C. § 2403, which requires a court to certify to the United States Attorney General or a state attorney general the fact that the constitutionality of an Act of Congress or a state statute has been drawn in question. Provisions implementing § 2403 are now included in Rule 24(c). Rule 24(c) is not an illogical place for these provisions, since the purpose of notification is to enable the Attorney General to intervene. Perhaps because Rule 24(c) is not an obvious place to look for these provisions, however, experience shows that certification often is not made. Moving the provisions to Rule 5.1 may give them a new prominence that will encourage compliance. As published, Rule 5.1 added a new requirement. Present Rule 24(c) says that a party should call the court's attention to its duty to certify. Rule 5.1 requires that the party not only file a notice of the constitutional challenge but also serve the Attorney General by mail. This party-notice requirement was thought to impose no more than a slight burden in return for improving the prospect that the Attorney General would learn of the litigation in its early stages, perhaps well ahead of the district court's certification.

There were few public comments. In large part they supported the published rule. Renewed Advisory Committee discussion, however, revealed deep divisions. The discussion accepted the requirement that a notice be filed by a party who draws into question the constitutionality of an Act of Congress or a state statute. But the further requirement that a copy of the notice be mailed to the Attorney General generated anguished debate. Many Committee members thought it unnecessary to require a party to give notice to anticipate the court's certification. The discussion is reflected in the Draft Committee Minutes. In the end, the Advisory Committee concluded that the press of other agenda business required that further discussion of Rule 5.1 be tabled.

B. E-Government Act Rule "5.2"

The April agenda materials included materials explaining a draft Civil Rule "5.2" to implement § 205(c)(3) of the E-Government Act. The materials are set out below. They address the two central issues referred to the several advisory committees. The first section sets out a draft rule that includes several variations on the template draft prepared for the E-Government Subcommittee. The second section identifies a number of Civil Rules that may deserve further consideration for possible amendments to reflect the E-Government Act.

The draft Minutes reflect the shortness of the time available for discussion. It was agreed that it will be useful to move forward as quickly as possible. At the same time, several of the issues seemed complex. The Department of Justice, for example, reported that the draft rule would make no sense at all in civil forfeiture actions where the government is required to publish information that under the rule must be redacted from court filings. This example of an area in which the Civil Rule would need to be adjusted may not be the only such problem. More generally, the provisions that

address filing under seal seem to invite routine filing under seal. The result could be enormous burdens for clerks' offices and substantial dilution of open-access traditions. Response to the sealed filing provisions is aggravated not only by the prospect that improving legislation may be enacted but also — at least pending new legislation — by the unclear meaning of § 205(c)(3)(A)(iv). It also was noted that particular problems may emerge from the present rule that discovery materials are to be filed only when used in the action or ordered by the court. The prospect of reviewing and redacting voluminous discovery materials is unattractive. Lawyers already are beginning to adjust in framing discovery questions and answers, but only the most punctilious care could avoid the need for review at the time for filing.

These questions, and others that are likely to emerge, left the Advisory Committee uncertain whether it will be able to finish work on an E-Government Act rule at its fall meeting. The schedule remains to be worked out with the other advisory committees through the E-Government Act Subcommittee.

The Direction to Prescribe A Civil Rule

Section 205 (a) of the E-Government Act of 2002, Pub.L. 107-347, 116 Stat. 2899, 2913, 44 U.S.C. 101 note, requires each district court to establish a website. Section 205(c)(1) provides that the court "shall make any document that is filed electronically publicly available online." The court "may convert any document that is filed in paper form to electronic form"; if converted to electronic form, the document must be made available online. Section 205(c)(2) provides an exception — a document "shall not be made available online" if it is "not otherwise available to the public, such as documents filed under seal."

Section 205(c)(3) directs adoption of implementing rules:

(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28 * * * to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition[,sic] to, a redacted copy in the public file.

Other Civil Rules

Consideration of the E-Government Act rule may entail consideration of changes in other rules. Possible Civil Rules candidates are described below after presentation of a suggested Civil Rule "5.2" derived from the Template and the Appellate Rule variation. (Designation as Rule 5.2 is a first approximation. This rule is closely related to Rule 5, which includes filing in subdivisions (d) and (e). We have proposed a new Rule 5.1 to address notice of constitutional challenges to federal and state statutes; we might want to redesignate that as Rule 5.2 to bring this filing rule closer to Rule 5. There may be too much here to simply tack privacy onto Rule 5 as a new subdivision (f).)

Rule 5.2. Privacy in Court Filings

(a) Limits on Disclosing Personal Identifiers. A party[3] that files an electronic or tangible paper that includes any of the following personal identifiers may disclose only these elements:

(1) the last four digits of a person's social-security number;[4]

(2) the initials of a minor child's[5] name;[6]

(3) the year of a person's date of birth;

(4) the last four digits of a financial-account number; and

(5) the city and state of a home address.

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[3] Both Template and Appellate Rule are directed only to a party. Apparently that includes a party who files something in response to a court order to file. It is not clear whether all things filed with a court are filed by a party: what of an amicus? Who files the trial transcript? The court's opinion?

[4] "person" commonly includes artificial entities, such as corporations. Should taxpayer identification numbers be included?

[5] Style: is this redundant? Why not just "minor's name"?

[6] Will this prove awkward when suit is on behalf of a minor?

(b) Exception for a Filing Under Seal. A party may include complete personal identifiers [listed in subdivision (a)] in a filing made under seal. But the court may require the party to file a redacted copy for the public file.[7]

(c) Social Security Appeals; Access to Electronic Files.[8] In an action for benefits under the Social Security Act[9], access to an electronic file is permitted only[10] as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the [an?] administrative record; and

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[7] With the addition of the bracketed words, this tracks the Appellate Rule. It may leave open the question whether there is a right to file under seal. The Template clearly says that a party who wishes to file complete personal identifiers may file an unredacted document under seal; it goes on to provide that the court may require a redacted copy for the public file. The result seems unintentional — it establishes a right file under seal by simply including a complete personal identifier, and then leaves it up to the court to direct filing a public copy. More thought is needed.

[8] The Template does not include this subdivision. The Appellate Rule does. Failure to include a parallel provision in the Civil Rule would essentially moot the Appellate Rule.

[9] The Appellate Rule formulation is: "In an appeal involving the right to benefits under the Social Security Act * * *." This language may fit the Civil Rules if the only actions we wish to reach are appeals from benefit denials. Actions by the government to recover overpayments may not involve the same level of private information. It would help to have advice from someone familiar with the various forms of social-security benefit actions that may come to the district courts.

[10] The Appellate Rule is "authorized as follows." That seems to mean the same as "permitted only." If so, there is no gap: the rule does not mean to distinguish between "access" in the introduction and "remote electronic access" in paragraphs (1) and (2). The distinction, however, may be important: do we mean to close off electronic access from a public terminal in the clerk's office?

(2) [a person who is not a party or a party's attorney]{other persons} may have remote electronic access to:

(A) the docket maintained under Rule 79(a); and

(B) an opinion, order, judgment, or other written disposition, but not any other part of the case file or the administrative record.

~~**(d) Judicial Conference Standards.** A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.~~[11]

Committee Note

(A Committee Note can be adapted from the Template, Appellate Rules, and any other model.)

Parallel Civil Rules Changes

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[11] This provision in the Template raises a familiar concern. A recent illustration in the Civil Rules is shown by Rule 7.1. Rule 7.1 requires much less corporate disclosure than had been required by many local rules. Some drafts included a provision that would require additional disclosures as required by the Judicial Conference. Doubts were expressed about this attempt to delegate Enabling Act authority, despite the Rule 5(e) precedent that authorizes Judicial Conference standards for electronic filing. Doubts also were expressed about the practical availability of Judicial Conference standards; those doubts may dwindle as reliance on the Judiciary website becomes universal. There is a separate difficulty with requiring reliance on "interim rules"; initial interim rules will be superseded by adoption of Enabling Act rules. Section 205(c)(3)(B)(i) seems to contemplate interim rules only for the period before adoption of the first set of Enabling Act rules. Unless the Judicial Conference can adopt "interim rules" to bridge gaps between adoption and amendment of Enabling Act rules, the reference to interim rules should be dropped. The Appellate Rule draft omits this subdivision entirely.

The reference to interim rules raises a separate point. Section 205(c)(3)(A)(i) contemplates rules that protect not only privacy but also "security." Nothing in any of the drafts addresses "security" concerns.

Each Advisory Committee is to determine whether existing rules should be changed to reflect the new circumstances created by electronic access to materials filed with the court. Several Civil Rules may be candidates for future amendment; some of the more obvious possibilities are described briefly below. It may be premature, however, to consider amendments before gaining any experience with electronic access. Anticipated problems may not arise, and unanticipated difficulties are almost inevitable.

Rule 5(d). The statute requires that any document filed electronically be made available online. Paper documents converted to electronic form also must be made available online. Rule 5(d) now requires filing of "[a]ll papers after the complaint required to be served upon a party." Rule 5(d) was recently amended to forbid filing of discovery papers until they are used in the proceeding or the court orders filing. Rule 5(d) might be amended further to except other papers from filing.

Rule 5, whether in subdivision (d) or otherwise, also might be the place to add provisions on sealing filed papers. Rule 26(c)(6) already authorizes a protective order sealing a deposition. Section 205(c)(2) of the E-Government Act provides that a filed document shall not be made available online if it is "not otherwise available to the public, such as documents filed under seal."

Rule 5(d) also may be used to anticipate a pervasive problem. Filing discovery materials, when that happens, invokes all the limits of the proposed E-Government Act rule. Apparently depositions, responses to interrogatories, documents (including computer-generated information), requests for admission, and perhaps even reports of Rule 35 examinations, must be redacted. Rule 5(d) might be amended to provide a reminder of the duties imposed by Rule "5.2."

Amendments designed to limit filing requirements or to expand sealing practices must be approached with great care. It does not seem likely that these topics should be made part of the initial E-Government Act rules process, unless it seems appropriate to amend Rule 5(d) to refer to the Rule 5.2 duty to redact discovery materials when filed.

Rule 10. Rule 10(a) provides that "the title of the action shall include the names of all the parties." This provision is at odds with subdivision (a)(2) of the proposed rule, which permits only the initials of a "minor child." It might be desirable to add a cross-reference to Rule "5.2." (The E-Government Act might provide an occasion for reconsidering the question of pseudonymous pleading. There has not been any enthusiasm in recent years for considering an amendment that would attempt to guide this practice. But electronic access may suggest further consideration, particularly if it is easily possible to search court filings along with all other online materials that refer to a named person.)

Special problems arise from Rule 10(c), which indirectly reflects the practice of attaching exhibits to a complaint. The exhibit must be redacted to conform to Rule "5.2." It is difficult to guess whether this requirement will impose significant burdens in effecting the redaction, or whether there may be practical difficulties. If Rule "5.2(b)" survives, permitting filing of the complete complaint and exhibits under seal, these difficulties may be substantially reduced.

Again, it is difficult to frame amendments beyond a possible reference to Rule 5.2 in Rule 10(a).

Rule 11. The Minutes of the E-Government Subcommittee meeting reflect discussion of the question whether Rule 11 should be "amended to contemplate violations of the privacy/access rules. Judge [Jerry A. Davis] noted that CACM had reviewed this issue and determined that Rule 11 already covers any arguable violation of these policies and that it is better to leave it to the discretion of the courts as to how to deal with violations or abuse of any new rule regarding electronic filing. The Subcommittee agreed with this assessment."

Rule 11(b)(1) states that an attorney or party presenting a paper to the court certifies that it is not presented for any improper purpose. If it is desirable to use Rule 11 or any other rule of procedure to reach liability for such acts as purposefully filing a defamatory pleading, the present language seems adequate. The determination whether to bend Rule 11 to this purpose at all will be difficult — it at least approaches substantive questions of defamation liability, the right to petition courts, and privilege. It would not be wise to take on these issues by amending Rule 11, unless it be to disclaim any attempt to answer them.

Rule 12(f). The agenda includes a pending question addressed to the effect of a Rule 12(f) order to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Is the stricken material physically or electronically expunged? Or is it preserved to maintain a complete record, for purposes of appeal or otherwise, but sealed? Electronic access to court files may make this question more urgent, but there is no apparent change in the principles that will guide the answer.

Rule 12(f) could be amended to refer directly to an order to strike information that violates Rule "5.2." Authority to strike seems sufficiently supported, however, both by present Rule 12(f) and by the implications of Rule "5.2."

Rule 16. Rule 16(b) or (c) might be amended to include scheduling-order directions or pretrial-conference discussion of electronic-filing issues. The most apparent subjects would be limiting filing requirements or permitting filing under seal. Care would need to be taken to avoid interference with the purposes of the E-Government Act. But there may be an advantage, particularly in early years, from assuring that parties and court think of the privacy and security issues that may arise from electronic access.

Rule 26 or Other Discovery. Rule 5(d) limits on filing discovery materials are noted above. It is conceivable that a reminder of E-Government Act access — and the need to redact filed documents to comply with Rule "5.2" — should be added somewhere in the discovery rules as well.

The protective-order provisions of Rule 26(c) do not seem to need amendment. They provide ample authority to respond on a case-specific basis "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense * * *."

Rule 56. Summary-judgment affidavits are among the papers covered by Rule "5.2." It would be possible to add a cross-reference to Rule 56.

Rule 80(c). Rule 80(c) — inevitably part of the future project to reconcile the Civil Rules with the Evidence Rules — states that whenever stenographically reported testimony is admissible in evidence at a later trial, it may be proved by the transcript. Although the proof might include filing, and a corresponding need to redact under Rule "5.2," there is no apparent need to amend Rule 80(c) to refer back to Rule "5.2."

C. Rule 15

Proposals to revise Rule 15 have lingered long on the agenda. Some of the proposals seem simple, but on closer examination have proved complex. A subcommittee appointed to review the proposals has concluded that they deserve to be carried on the agenda for future consideration, but that they require deeper study than can be provided now in competition with more pressing projects.

D. Federal Judicial Center Studies

The Federal Judicial Center has completed two lengthy studies undertaken at the Advisory Committee's request. The summaries of these two studies are set out below.

The first study examined the impact of recent Supreme Court decisions on attorney choices between state and federal courts. The Advisory Committee's Class-Action Subcommittee maintains a watching brief on these questions, and will rely on the FJC study.

The second study examined the practice of filing sealed settlement agreements. The central empirical part of the study was a survey of 288,846 civil actions. Sealed settlement agreements were filed in 1,272 of those actions. The complaints were left unsealed in 97% of those 1,272 actions, ensuring public access to any information that might be important to public health or safety. The Advisory Committee's Subcommittee on Sealed Settlement Agreements will study the report as a vital source of information in determining whether the Civil Rules should be amended to address the practice of filing sealed settlement agreements.